Independent® Women's Forum

The *Janus* Case: Public Union Dues

EXECUTIVE SUMMARY

Just over forty years ago, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that states may force public employees to pay public-union dues, subsidizing union speech with which the employee may disagree.

Abood is radically out of step with core First Amendment law. Indeed, the Supreme Court recently stated, in *Harris v. Quinn*, that it is a "bedrock principle" that, "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." Yet, nearly five million public employees are required, as a condition of employment, to subsidize the speech of a third-party union on matters of public policy.

The First Amendment secures to "the people" not only the right to share their views, but also the right *not* to speak and to decide when and whether to engage in public discussion. As the Supreme Court held in *West Virginia State Board of Education v. Barnette*, the First Amendment "guards the individual's right to speak his own mind," and does not allow state officials "to compel him to utter what is not in his mind."

Since the *Abood* decision, the Supreme Court has become increasingly uncomfortable with public-sector agency shop arrangements. In 2014, the Supreme Court recognized that, for public unions, collective bargaining is inherently political: "[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government," and bargaining subjects, "such as wages, pensions, and benefits are important political issues." Furthermore, the "free-rider" argument that had carried the day in *Abood*—that nonmembers benefited from collective bargaining and must pay their fair share, has also come under fire from the Supreme Court. In 2012, the Court, noted that *Abood*'s "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." These sorts of "free-rider arguments . . . are generally insufficient to overcome First Amendment objections," the Court continued.

Forty years of error is enough. Next month, the Supreme Court will take up the question whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment. The answer is clearly yes.

MORE INFORMATION

Case Background

Under Illinois law, a qualified public union becomes the *exclusive* representative for state employees for collective bargaining regarding pay, pensions, and working conditions. The public employer may not deal with other associations—or even with individual employees. Instead, the union speaks exclusively and finally for *all* employees, even those who are not union members and who oppose its agenda.

Illinois public employees must also fork over part of their salary to support union activities. Illinois law requires non-members to "pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment" to the public union.

Mark Janus is a child support specialist for the State of Illinois. He is not a union member, and disagrees with their collective bargaining efforts, but has compulsory union fees deducted from his paycheck each month. His agency fees are nearly 80 percent of full union dues.

In February 2015, newly-elected Governor Rauner began negotiating with the public union, *AFSCME*. In light of the Illinois budget crisis, the Governor sought changes that would provide for additional flexibility and efficiency, link pay increases to merit, and obtain significant savings from the healthcare program. After bargaining stalled, the Governor attempted to implement certain policies, including merit pay increases, overtime hours, bereavement leave, volunteer usage, and drug testing. The union sued to stop him—using funds acquired from members and *non*-members like Janus.

Abood v. Detroit Board of Education, *431 U.S. 209 (1977).*

In *Abood*, Michigan teachers sued to challenge an "agency shop" arrangement that required non-members, as a condition of employment, to pay a service charge to the public union. The Supreme Court held that the government may not compel employees to subsidize the political or ideological speech of a third party—to force employees to subsidize political advocacy would violate the First Amendment. Yet, the Court engaged in a series of missteps to allow precisely that outcome. The Court held that nonunion members *could* be compelled to pay for collective bargaining related to wages, hours, and working conditions because such topics were neither political nor ideological.

The error made by the *Abood* Court was immediately apparent. In his concurrence, Justice Powell wrote:

> Nor is there any basis here for distinguishing "collective bargaining activities" from "political activities" so far as the interests protected by the First Amendment are concerned. Collective bargaining in the public sector is "political" in any meaningful sense of the word. This is most obvious when public sector bargaining extends ... to such matters of public policy as the educational philosophy that will inform the high school curriculum. But it is also true when public sector bargaining focuses on such "bread and butter" issues as wages, hours, vacation, and pensions. Decisions on such issues will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates.... Under our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters.

As Justice Powell wrote, "collective bargaining in the public sector is 'political' in any meaningful sense of the word." Even bread and butter issues such as wages and pension benefits impact public expenditures, tax rates, and the level of public services. As the *Abood* majority recognized (but failed to credit) "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political."

In short, *Abood* is wrong because negotiating with the state is itself political speech. Public-sector collective bargaining almost always involves matters of public interest—it sets the level of government services, *and* the public foots the bill.

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The Writing on the Wall

In recent years, the Supreme Court has expressed increasing skepticism about the constitutionality of public-sector agency shop arrangements. One of the main arguments made by the unions in support of the *Abood* decision is stare decisis—the idea that it is better that the law be settled than it be right. And since *Abood* has been on the books for a long time, and states and public-sector unions have relied on it, they argue, the Court ought not upset the apple cart.

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Most pointedly, in 2014, in *Harris v. Quinn*, the Supreme Court refused to extend *Abood*'s agency shop arrangement to in-home assistants who were quasi-public employees. In doing so, the Court was clear that *Abood* was on thin ice. The *Harris* Court noted that the "primary purpose" of permitting unions to collect fees from nonmembers was to prevent free-riding on union efforts, but found that "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." The *Harris* Court went on to find the *Abood* Court's analysis "questionable on several grounds"—some of which had become more troubling since the decision was issued.

- First, the *Abood* Court had erred in relying on prior opinions to all but decide the First Amendment question. Those cases did not involve the same issue of public-sector unions.
- Second, *Abood* failed to appreciate the difference between public-sector and private-sector collective bargaining. In the public sector, "core issues such as wages, pensions, and benefits are important political issues."
- Third, *Abood* failed to appreciate the conceptual difficulty of distinguishing between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easy to see. But in the public sector, both collective-

bargaining and political advocacy and lobbying are directed at the government and concern governmental services and expenditures.

- Fourth, *Abood* did not anticipate the administrative problems that would result from attempting to classify public-sector union expenditures as chargeable v. non-chargeable (political or ideological expenditures).
- Fifth, *Abood* did not foresee the practical problems facing nonmembers. These nonmembers bear the burden and expense of mounting a legal challenge to an improper charge.
- Sixth, *Abood* rests on an unsupported empirical assumption: that the principle of exclusive representation in the public sector is dependent on a union or agency shop. But the two are not dependent. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee.

This extensive list makes clear that a majority of the Supreme Court was poised to overrule *Abood* in 2014—notwithstanding stare decisis principles. As the Court put it in 2012, in *Knox v. Service Employees International Union*, "[b]ecause a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'"

Indeed, the Supreme Court granted certiorari on the *Abood* question in 2015 in *Friedrichs v. California Teachers Association*. The oral argument in that case revealed a Supreme Court deeply skeptical of *Abood*. Justice Anthony Kennedy turned the union's "free rider" argument—that a nonmember benefits from the union's work on his behalf without having to pay for it—on its head. He told the union's lawyer that charging teachers a fee for political speech doesn't solve a "free rider" problem, but instead makes them a "compelled rider" on the agency's positions. The justices also had little patience with the idea that

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collective bargaining is non-political. Several noted that such a process for public-sector unions is inherently political. As Justice Scalia put it, "everything that is collectively bargained with the government is within the political sphere, almost by definition." Chief Justice Roberts agreed noting that the allocation of public moneys is "always a public policy issue."

After the case was argued, Justice Scalia passed away, and the Court split 4-4 on the question. We will learn more at the *Janus* oral argument next month, but every indication is that Justice Gorsuch will follow in the mold of Justice Scalia and subject First Amendment limitations to heightened scrutiny.

Once the precedent of *Abood* has been cleared—the Court can address the constitutionality of public-sector agency shop arrangements afresh, and under the proper standard of review. Remarkably, *Abood* did not subject the compulsory agency fee to ordinary First Amendment scrutiny. Instead, the majority found that an employee could be compelled to finance collective bargaining activity because such activity was "relevant or appropriate" to the asserted governmental interests. The Court deferred to the State on the question—declaring that its "province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment." This degree of deference where First Amendment interests are impaired is unusual in First Amendment law. Ordinarily, compelled speech may be required only when the State can prove that the required fees are necessary to serve a compelling government interest.

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In *Harris*, the Court wrote that, "an agency-fee provision imposes 'a significant impingement on First Amendment rights,' and is impermissible unless it passes 'exacting First Amendment scrutiny.'" This level of scrutiny requires that the agency fee "serve a 'compelling state interest[ ] . . . that cannot be achieved through means significantly less

restrictive of associational freedoms.'" The *Harris* Court found it "arguable" that even that "standard is too permissive" for agency fees.

Public-sector agency shop arrangements are unconstitutional unless agency fees are the least restrictive means to achieve a compelling state interest. Compulsory fees are not the least restrictive means of achieving a compelling state interest in managing public employment because exclusive representation in the public sector does not depend upon fees from nonmembers. Exclusive representation without compulsory fee arrangements is alive and well in the federal government and in the twenty-seven states that have right to work laws in effect. That fact alone should end the case. Further, the unions seek the right to exclusively represent public-sector employees and enjoy the privileges and advantages that come along with being their exclusive representative—including the ability to recruit and retain members. Any incidental benefit that might accrue to nonmembers is small—and in cases like Mr. Janus', nonexistent. Mr. Janus does not agree with the union's positions and is thus a "forced rider" rather than a free rider. This the First Amendment does not permit.

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Conclusion

Next month, the Supreme Court will hear oral argument on an important First Amendment issue: May public employees be forced to finance speech with which they disagree? The answer is obvious from the question: no. It is a bedrock principle of First Amendment law that the right of the people to speak freely comes with the right also not to speak. The government may not force employees to finance political speech with which they disagree. It is time for the Supreme Court to set the record straight.