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Trials &TRIBULATIONS

Compulsory public union dues under scrutiny once again

In 1977, the United States Supreme Court issued a landmark decision that has helped to shape the landscape of public unions ever since. Of course I am referring to *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) in which the Supreme Court permitted state laws coercing payment of public union dues by public employees who were not union members.

After nearly 30 years, this longstanding precedent came under significant attack in 2016 in the Friedrichs case. *Friedrichs v. California Teachers Ass'n*, 136 S.Ct. 1083 (2016) (decided before Justice Gorsuch was confirmed) resulted in a non-binding 4-4 split decision by the court, preserving the right to compel the payment of dues but leaving the door open for future assaults. Now, slightly more than one year later, *Abood* faces another challenge — this time with a full complement of justices who will decide whether compulsory association with a public union is a violation of the First and 14th Amendments.

Since 1977, public unions have enjoyed the benefits of the *Abood* decision, which determined that state laws requiring public employees to pay union dues were permissible, even if an employee did not elect to become a member, so long as the dues were used for non-political purposes. The *Abood* Court found that compelling employees to financially support political activity would amount to a violation of the First Amendment rights of free speech and free association. However, the court carved out compulsory dues in support of collective bargaining activity. The rationale behind this exception was that such compulsory dues were necessary to prevent free riding by non-members, who benefited from the union's collective bargaining activities.

By MICHAEL J. ADAMS
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Fast forward to 2016: A teacher from California, Rebecca Friedrichs, sought to upend the California state law that required her to pay union dues despite her status as a non-member. At oral argument, the four liberal leaning justices appeared most concerned with overcoming stare decisis, perhaps signaling that Friedrichs had a stronger argument on the merits. Indeed, Justice Anthony Kennedy, often the all-important swing vote, appeared concerned with the effect that overruling *Abood* might have on existing public labor agreements, but he appeared to sympathize with the petitioner. The court ultimately confirmed the lower court's ruling in a divided 4-4 vote, upholding the state law.

At the same time Friedrichs was winding its way through the legal system, a second challenger to Abood materialized in Illinois. There, the current governor of Illinois, Bruce Rauner, brought a suit against several large public unions seeking a declaration that the Illinois state law requiring compulsory payment of dues by non-members violated the First Amendment. Rauner, realizing early on that he would have difficulty establishing subject matter jurisdiction, potentially avoided dismissal when two public employees, Mark Janus and Brian Trygg, intervened on his behalf in the suit.

Janus and Trygg's primary argument echoes the one Friedrichs posed: that state laws requiring non-member public employees to contribute dues violate the right to free speech and free association. Challengers of forced association argue that all activities of a public union are essentially political, thus *Abood's* carve out for non-political bargaining activities is insufficient to protect non-members. This argument, also posited by Janus and Trygg, rests on the notion that activities of public unions are, invariably, a matter of public concern.

For example, the amount of salary each public school teacher receives can have political repercussions, as any increase may result in additional financial burdens on local taxpayers. The same can be said for classroom size, which can affect how many teachers the school district must employ. Basically, Janus and Trygg contend that the line between political activity and non-political activity is too blurred to distinguish. As a result, requiring non-members to pay for these activities is the equivalent of requiring endorsement of those activities, essentially silencing their right to an opposing point of view.

Proponents of laws requiring compulsory dues argue that reversing *Abood* will irreparably harm public unions. This harm would allegedly manifest in the form of fewer employees electing to join and contribute financially to the union, resulting in reduced bargaining power. Ultimately, this reduction in collective bargaining power would work against the interests of the employees, interests which proponents argue outweigh any First Amend-

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ment concerns.

In response, the opposition points to the numerous federal employee unions. Unlike their state counterparts, federal employees are not required to join or financially contribute to federal employee unions such as the Service Employees International Union (SEIU) or the American Federation of Government Employees (AFGE). As noted during the oral argument of the *Freidrichs* case, these federal employee unions have done well over the years without the protections of *Abood*. In fact, a report by the *Washington Post* in January 2013 found that membership in federal employee unions had increased by 98,000 since 2002, in spite of the decline in federal government employment numbers during that period (particularly the number of postal workers). During that same time period, Bureau of Labor statistics reflect that membership in non-federal employee unions continued to decline.

It is undeniable that collective bargaining has been an essential tool for many employees to successfully protect their interests. The First and 14th Amendments support both the freedom of association and expression necessary to engaged in concerted activity. These amendments also provide individuals with the freedom to dissent and stand apart from the majority, even if it is against the interests of the collective. While Janus has yet to be heard, based upon the oral arguments in *Friedrichs,* it appears as if the conservative leaning justices — and Justice Kennedy — will likely agree with the petitioners that in this context the right to not associate should be preserved, and *Abood* should be reversed.

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