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THE PUBLIC SECTOR

U.S. Supreme Court poised to decide whether public-sector 'agency shop' is constitutional

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In its 2015 term, the U.S. Supreme Court will decide what may prove to be one of the most important labor law cases in decades—whether an "agency shop" in the public sector is constitutional. In an agency shop, all employees represented by a union—supporters and detractors alike—can be compelled to either join the union or pay the virtual equivalent of dues, initiation fees, and assessments. The challengers—public school teachers and a nonprofit religious organization—contend that compelled payments to a union they oppose violate their rights under the First Amendment to the U.S. Constitution. A decision in their favor would reverse 38 years of court precedent allowing agency shops in the public sector.

Abood—longstanding precedent authorizing public-sector agency shops

In *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), the Supreme Court held that agency shop arrangements in the public sector are constitutional. The Court explained that to fulfill its duty as the exclusive bargaining representative, a union was entitled to receive financial support from all members of the bargaining unit. The Court said that the Constitution did not give employees a right to take a "free ride" by benefiting from union representation without paying the cost. The Court also determined that agency shops were supported by a strong governmental interest in "labor peace."

Qualifying its holding in *Abood,* the Court said that employees couldn't be required to pay for political expenditures unrelated to collective bargaining. Instead, unions had to rebate the portion of fees that funded those activities if nonmembers objected and "opted out" from funding them.

Harris v. Quinn—a step toward reversing Abood

In *Harris v. Quinn,* 134 S.Ct. 2618 (2014), a divided Court took a step toward potentially reversing *Abood.* The Court reviewed an Illinois statute allowing agency shops for personal care providers who worked for private individuals but were considered public employees for agency fee purposes. Because the workers served private individuals rather than the state as an employer, the union's representational obligations were very limited. The Court held that under these circumstances, the agency fee law didn't serve a compelling state interest and violated the First Amendment.

The majority opinion was highly critical of *Abood,* questioning the decision on several grounds. The majority emphasized that in public-sector collective bargaining, issues such as wages, pensions, and benefits are political. Compelling nonmembers to support objectionable union views and actions on such issues, in the majority's view, directly implicated nonmembers' First Amendment rights. However, the majority didn't overrule *Abood,* leaving that fight to a later day.

Friedrichs v. California Teachers Association

The case to be decided in 2015, *Friedrichs v. California Teachers Association,* is a direct attack on *Abood.* Friedrichs claims that California's agency shop law for public school employees should be stricken because it forces them to pay a union to advance bargaining positions that are contrary to the employees' on-the-job interests. For example, in public schools, unions typically reject merit pay principles—in opposition to the views of many teachers. Unions may advocate for tenure or seniority-based assignment policies that nonmembers may oppose on educational or public-policy grounds. In essence, according to the petition, the agency shop law compels public employees to subsidize political speech with which they disagree, violating their First Amendment rights of free expression.

'Opt out' or 'opt in'?

The claimants in *Friedrichs* also argue that unions must receive affirmative advance approval (opt ins) from nonmembers before collecting moneys going to political activities unrelated to collective bargaining. Questioning *Abood,* a 2012 decision (*Knox v. SEIU,* 132 S.Ct. 2277) found that a union was required to use an "opt-in" process for collecting a special assessment, but the Court didn't extend this requirement to other collection situations. The claimants argue that if *Abood* is not overturned entirely, "opt outs" should

be disallowed in accordance with the *Knox* decision. *Friedrichs, et al. v. California Teachers Association, et al.* (U.S. Supreme Court Petition No. 14-915).

Bottom line

More than 20 states allow for agency shops, which provide millions of dollars in support of the goals of public-sector unions. A win for the petitioners would substantially weaken the power of many unions.

The Court's general rule is that its prior precedents must be respected (*stare decisis*). It appears that

the four most conservative justices would happily overrule *Abood* anyway. The question is whether there's a fifth vote.

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