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Legal Sidebar

UPDATE: Public Sector Union Dues: Grappling with Fixed Stars and Stare Decisis (Part I)

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UPDATE: On June 27, 2018, the Supreme Court issued its decision in Janus v. AFSCME, Council 31. *The Court held that public-sector agency fee arrangements violate the First Amendment, overruling its 1977 decision in* Abood v. Detroit Board of Education. *In a 5-4 opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch, Justice Alito wrote that by requiring public employees to contribute to a union, "even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities," agency fee arrangements "violate[] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." In so holding, the Court reasoned that* Abood *was wrongly decided, relying on much of the majority's reasoning in the* Harris v. Quinn *decision (discussed in the Legal Sidebar below). The* Janus *Court ultimately ruled that public employers and unions may not deduct agency fees or other payments to the union from a nonmember employee's wages, or otherwise attempt to collect such payments, unless the employee "clearly and affirmatively consent[s]" to the payment. Justice Kagan, writing for herself and Justices Ginsburg, Breyer, and Sotomayor in dissent, posits that the Court's decision "will have large-scale consequences" for public-sector labor relations and significant implications for First Amendment law. Additional CRS analyses of the opinion are forthcoming.*

The Supreme Court long ago described the First Amendment's protection against compelled speech as a "fixed star in our constitutional constellation." This Term, the Court may decide whether it has steered too far from that shining precept in the area of public employee union dues (or agency fees) in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. Specifically, the Court will consider whether to overrule its 1977 decision in *Abood v. Detroit Board of Education*, in which the Court announced the basic test for determining the validity of "agency shop" arrangements between a union and a government employer. Agency shop arrangements (sometimes called "fair share" provisions) require

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employees to pay a fee to the union designated to represent their bargaining unit even if the employees are not members of that union. The *Abood* Court held that these arrangements do not violate the First Amendment insofar as the union uses the fees for "collective bargaining activities" and not "ideological activities unrelated to collective bargaining." In its October 2015 Term, the full Court heard oral argument on whether to overrule *Abood*, but ultimately divided four-to-four on this question following the death of Justice Scalia. Now that Justice Gorsuch has joined the bench, it remains to be seen whether a majority of the Court will reaffirm *Abood* or chart a new course.

Part I of this two-part Sidebar provides general background on *Abood* and the case law leading up to *Janus*. Part II then discusses the perspectives Justice Gorsuch may bring to *Janus* and the potential implications of the decision for public sector collective bargaining and compulsory fees more broadly.

***First Amendment Principles and* Abood.** As background, the Supreme Court has interpreted the First Amendment's Free Speech Clause to bar the government not only from *prohibiting* speech, but also from *compelling* private speech that is contrary to an individual's personal beliefs. The Court has held moreover that money spent in support of speech can be a form of protected expression. In *Abood*, the Court considered the intersection of both of these First Amendment principles in a case about compelled *subsidization*.

Abood involved a First Amendment challenge to an agency shop arrangement brought by public school teachers who opposed certain union activities (or public sector collective bargaining in general). The Supreme Court held that compelling public employees to support their union representative does raise First Amendment concerns, and that the government may not condition an employee's job on subsidizing an ideological cause that the employee opposes. The Court held that nevertheless, "important government interests" justified the collection of agency fees for activities germane to collective bargaining. The Court reasoned that the government's ability to bargain with a single representative avoids conflicting demands from rival unions, thereby promoting "labor peace." To that end, agency fees minimize the incentive for non–dues-paying employees to "free ride" on the benefits that the union obtains for all employees in the bargaining unit (whom by law the union must represent fairly regardless of union membership). In a separate opinion, Justice Powell (joined by Chief Justice Burger and Justice Blackmun) criticized the line the Court drew between collective bargaining and ideological (or political) activities, finding no meaningful difference between the two in the public sector because "'bread and butter' issues" like "wages, hours, vacations, and pensions" directly impact matters of political importance, such as state and local budgets, tax rates, and public service offerings.

***Key Decisions After* Abood.** In the years since *Abood*, the Court has attempted to define the contours of what is "germane" to collective bargaining (also referred to as "chargeable" expenses), upholding, for example, expenditures on national conventions to elect union officers but not charges for political lobbying. The Court also has interpreted the First Amendment to require procedural safeguards to protect the rights of objecting employees, holding that unions may not use a basic rebate program to refund objecting employees for nonchargeable expenses and instead must (among other things) explain the basis for the agency fee and give employees a "reasonably prompt opportunity" to challenge the fee amount.

In recent years, however, the Court has expressed concern with certain applications of *Abood*, even questioning the constitutional analysis underpinning the 1977 decision. In the 2012 case of *Knox v. SEIU, Local 1000*, Justice Alito, on behalf of himself and four other members of the Court (Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas) criticized one of the key justifications for agency fees (i.e., the free rider concern), noting that such "free-rider arguments" generally are "insufficient to overcome First Amendment objections." The Court cited several examples of associations that engage in work that benefits a larger group without requiring nonmembers to contribute, including parent-teacher associations and lobbying groups. The *Knox* Court also questioned the procedural mechanisms that *Abood* and subsequent decisions appeared to endorse: "By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable

expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." Without overruling *Abood*, the Court held that public sector unions must obtain affirmative consent from their employees before levying a special fee or dues increase to finance political activities.

Two years later, in *Harris v. Quinn*, the Court (on behalf of the same Justices in the *Knox* majority) distinguished *Abood,* holding that the case was not controlling with respect to an agency shop arrangement that did not involve "full-fledged public employees." In so holding, the *Harris* Court described *Abood* as "questionable on several grounds," resulting in what the majority viewed as the repeated struggles to differentiate between chargeable and nonchargeable expenses. The Court echoed the concern Justice Powell expressed in *Abood* about the overlap between collective bargaining and political advocacy in the public sector. In contrast, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor in dissent, posited that *Abood* is consistent with the Court's decisions, which have "long afforded government entities broad latitude to manage their workforces, even when that affects speech they could not regulate in other contexts." The silver lining in the majority's opinion, according to the dissenting Justices, was that the Court declined an invitation to overrule *Abood*, which the dissent described as "deeply entrenched" and "the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation."

A year later, the Court granted certiorari in *Friedrichs v. California Teachers Association* to consider whether to overrule *Abood*. During the January 11, 2016 oral argument, several of the Justices expressed views on *Abood* that appeared to be consistent with the *Harris* Court's criticisms, including Justice Scalia, who remarked that "everything that is collectively bargained with the government is within the political sphere, almost by definition." However, Justice Scalia passed away the following month, and shortly thereafter, on March 29, 2016, the Court issued an unsigned, one-line decision affirming the judgment of the Court of Appeals "by an equally divided Court," thus upholding *Abood*. The decision in *Friedrichs* did not identify the positions of the Justices, but some commentators suspected that the Court divided in a similar fashion to the decisions in *Knox* and *Harris*.

For a discussion of how these arguments may play out in *Janus* and the possible implications for collective bargaining in the public sector, please see Part II of this Sidebar.