Bargaining With the Government vs. Lobbying the Government — A Distinction without a Difference

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In March 2016, the U.S. Supreme Court handed down an anticlimactic decision in *Friedrichs v. California Teachers Association*, No. 13-57095 (9th Cir.), *cert. granted*, 135 S. Ct. 2933 (2015). This case was heralded as the last opportunity for the Court to decide whether public sector employees' First Amendment rights should trump unions' ability to fund political speech. However, the Court's 4-4 decision preserved the status quo and provided no real resolution to this question. While it is always difficult to predict how Supreme Court Justices will vote, it was widely believed that Justice Scalia would have come down against the union, leading to a 5-4 decision. The 4-4 decision means that the Ninth Circuit's decision stands, allowing unions to continue to charge non-union public sector employees for activities that constitute political speech. In addition, non-union public sector employees will continue to subsidize political speech, unless they affirmatively opt out annually from paying these subsidies.

How does a public sector union engage in political speech? During negotiations, public sector unions seek to influence the government on bargaining topics like wages, pensions, grievance processes, and tenure. Because these topics affect government spending, they are more than bargaining topics, becoming politicized issues and matters of public concern. When a public employee is forced to pay union fees for the union's bargaining efforts, that employee is, in essence, being compelled to support the union's *political* stance on a bargaining topic.

In *Friedrichs,* ten California public school teachers (the Petitioners) asked the Court to determine whether compelling financial support of a union violates the First Amendment, and to revisit *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The *Abood* decision compelled non-union public employees to pay for union expenses that are germane to collective bargaining. The Court's March decision upheld *Abood* in its entirety and forced non-union employees to continue to subsidize these expenses. Recognizing the significance of the *Friedrichs* decision, the Petitioners have asked the Court to rehear this case next term before, hopefully, a full nine-member Court.

Meanwhile, employers, unions, and employees should continue to examine the Court's March ruling. Was the *Friedrichs* decision necessary to ensure unions' continued success? Were any alternatives available to the Court? If the Court had ruled against the unions, how would major stakeholders, including employers, have been affected? In this article, we answer these questions by examining the two critical issues posed by the teachers in their petition.

Does Requiring Non-Union Public Sector Employees to Pay Agency Fees Violate the First Amendment?

The Petitioners asked the Court to first overrule *Abood*, and thus eliminate public sector "agency shop" arrangements under the First Amendment. An agency shop agreement permits an employer to hire non-union employees, who then have the opportunity to choose whether they want to be in the union. However, as a condition of employment, a non-union employee must still pay an "agency fee" to contribute to the costs of the union's collective bargaining efforts. Unions determine the amount of agency fees that non-members must pay, which—

perhaps unsurprisingly—are usually equal to the amount of union dues paid by union members.

When determining the amount for the agency fee, unions must look at "chargeable" and "non-chargeable" union expenses. In *Abood*, the Supreme Court explained the difference between these two types of expenses. Chargeable expenses include monies spent for union negotiations, contract administration, and other activities that are germane to the union's functions as the exclusive bargaining representative of all employees. Non-chargeable expenses include monies spent for the union's ideological or political activities such as lobbying, political advertising, and candidate endorsements. *Abood* recognized that where a public sector, non-union employee objects to being associated with certain political or ideological views, forcing that employee to pay for such activities violates the First Amendment. This means that nonmembers who properly object to paying for non-chargeable activities cannot be compelled to do so.

The Petitioners in *Friedrichs* asked the Supreme Court to go one step further than the decision in *Abood*. They argued that *Abood* should be overturned and non-union members should not be compelled to pay either non-chargeable *or* chargeable expenses. Petitioners contend that *Abood* contradicts the Court's more recent First Amendment cases such as *Harris v. Quinn*, 537 U.S. __, 134 S. Ct. 2618 (2014). In *Harris*, the state of Illinois enacted laws mandating that public employees pay agency fees to unions. Under Illinois law, personal health care assistants were classified as public employees, but only for the purpose of union collective bargaining. Thus, these workers were compelled to pay agency fees for union negotiations under the *Abood* decision.

The majority in *Harris* criticized *Abood* for failing to recognize the difference between collective bargaining in the public sector and collective bargaining in the private sector. In the public sector, core collective bargaining topics such as wages, pensions, and benefits are important political topics. Public sector negotiations about these topics have become increasingly more politicized because these topics impact stretched state budgets, long-term planning, and public policy. In the private sector, wages, pensions, and benefits are not political topics because funding for these matters does not deplete the public purse. *Harris* concluded that *Abood* failed to realize that public sector collective bargaining and union political and ideological speech, such as lobbying, are indistinguishable. The Court further held that health care employees, who were only classified as public employees for collective bargaining, should not be compelled to pay for political speech they did not wish to support.

Petitioners in *Friedrichs* further argued that *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012), undermined *Abood's* justification for compelling non-union public sector employees to pay agency fees. The *Abood* Court, like the unions in *Friedrichs*, argued that agency fees were necessary to preserve labor peace. The Court in *Abood* agreed with the position that agency shop agreements promoted labor peace because they made the elected union financially secure and reduced the likelihood that rival unions would oppose a stable, elected union. In turn, the Court also reasoned that an unopposed union ensured that the employer would avoid having to negotiate with multiple employee groups.

The Supreme Court in *Abood* also determined that agency fees were necessary to limit free-riders. "Free-riders" are non-union employees who enjoy the rewards of union membership without paying for the "struggle" to secure those benefits, as they do not pay union dues. Free-riders are problematic because, by law, a union is prohibited from negotiating solely for the

benefit of its members. Thus, any salary increase, employee grievance process, or training that is negotiated for union members must also be made available to non-union employees. Without agency fees, unions argue that they would struggle to carry the costs associated with collective bargaining and could not properly advocate for all employees.

However, when the Justices later decided *Knox v. Service Employees International Union*, *Local 1000*, they held that the desire to preserve labor peace and limit free-riders was insufficient to justify any infringement on employees' First Amendment rights. The Court compared unions to other advocacy groups, such as medical associations that lobby for benefits that are available to both members and nonmembers. These advocacy groups thrive even though nonmembers make no contributions to the advocacy groups' efforts. Thus, the Court determined that fears of free-riders, in particular, could no longer justify First Amendment violations imposed by agency fees. As a result of subsequent Supreme Court decisions, major principles supporting *Abood*'s decision have been undermined.

Is the Opt-Out Rule for Non-Chargeable Expenses Unreasonable?

Even if the Court decided not to overturn *Abood,* Petitioners in *Friedrichs* argued that the Court should minimize any infringement on non-union members' First Amendment Rights. After *Abood*, at least twenty states—including California—enacted laws permitting agency shop provisions in the public sector. Petitioners directly challenged California's law in the *Friedrichs* appeal.

California law requires that all public school teachers either join a union or pay agency fees for chargeable union expenses. The process that public sector unions use to comply with the law involves public school teachers initially paying agency fees that cover both chargeable and non-chargeable expenses. The teachers later have the option of being reimbursed for the non-chargeable expenses if they properly object and opt out of paying those costs. Unions send an annual *Hudson* notice to each employee that allows the employee to object and opt out of paying the non-chargeable expenses. The *Hudson* notice sets out the agency fees and includes a breakdown of chargeable and non-chargeable portions of that fee. This breakdown determines how much an objecting non-union employee may be reimbursed. Even though California law mandates that unions attach audit reports to *Hudson* notices, auditors do not have to verify that expenses are properly classified as chargeable or non-chargeable. Once the *Hudson* notice is received, a non-union employee must affirmatively opt-out from paying for non-chargeable expenses—year after year—to avoid paying for any lobbying or political advertising activity the employee does not wish to support.

Not all public sector unions handle the opt-out process the same way. Under California law, a non-union employee has at least thirty days to voice his or her objections and opt out. In reality, the opt-out period lasts anywhere between thirty days and six weeks, depending on the process used by the union. Some unions simplify the process by asking employees to check a box on the objection form, indicating their dissent and their desire to opt out from non-chargeable fees. However, unions often require more than simply checking a box. An objecting employee may be required to describe his or her objections in great detail, or may be asked to send the objection form via certified mail. Unions, however, universally place the burden on the non-union employee to opt out on an annual basis, regardless of whether that employee has opted out before.

Because the agency fee provision challenged in *Friedrich*s mandates that non-union employees must affirmatively opt out each year to avoid paying for non-chargeable activities, the burden of protecting First Amendment Rights is placed on the objecting employee. By default, any teacher who fails to opt out automatically pays for non-chargeable political speech. This default position incentivizes unions to capitalize on employee ignorance. Non-union members may be unaware that the opt-out process exists or of what steps they must take to avoid paying for non-chargeable activities. The lack of standardization in the opt-out process increases the likelihood that an objecting employee might default into paying for political speech he or she does not support. Thus, the Petitioners in *Friedrichs* argued that to reduce infringement on employees' First Amendment Rights, employees should only be required to opt in rather than opt out.

Despite strong arguments posed by both sides on these issues, the Supreme Court left unions, employees, and employers in limbo. The divided Court's decision provided an unsatisfactory resolution to questions that affect union funding and employees' First Amendment Rights. Thus, employees will continue to subsidize both chargeable and non-chargeable expenses, unless they opt out annually.

Did the Court Have an Alternative?

Even if the Court did not rule in favor of the Petitioners, the Court had other options besides upholding *Abood* in its current form. Members of the Court may have been hesitant to undo forty years of First Amendment jurisprudence, but they could have considered shifting the line between non-chargeable and chargeable expenses. Rather than overturning *Abood* and eliminating agency fees altogether, the Court could have simply provided new guidelines for determining which union activities are chargeable and which are not.

The Supreme Court could also have declared California's mandatory opt-out procedures as unconstitutional. The Court could have agreed with the Petitioners and ruled that a non-union employee should not be required to opt out annually when there is already some record that the employee previously objected to paying for non-chargeable expenses. If this had been the ruling, one opt-out objection could have covered future objections. Alternatively, the Court might have indicated that the First Amendment only allows non-union employees to opt in rather than opt out to minimize the burden placed on employees' constitutional rights.

If the Court Had Ruled Against the Union, How Would *Friedrichs* Have Affected Major Stakeholders?

Many expected the Supreme Court's decision in *Friedrichs* to dramatically change the way unions operate and ultimately to limit their success. Unions argued that overturning *Abood* and eliminating agency fees would have weakened unions' bargaining power and affected employees' access to good working conditions. Public sector unions are often credited with creating innovative changes in employee benefits, working conditions, and training programs that are later adopted throughout the private sector. Decreasing a union's resources, labor proponents have argued, might have affected a union's ability to lobby for progressive workplace conditions that could subsequently have had a national impact. Additionally, unions were concerned that once agency fees were eliminated or limited, employees would choose not to join unions to avoid additional costs.

There is evidence to suggest that there is not always a direct correlation between collection of agency fees and union membership. Union membership is a key indicator of a union's success. In 2015, the Bureau of Labor Statistics reported that union membership among federal employees was at 27.3% versus 6.7% in the private sector. Bureau of Labor Statistics U.S. Department of Labor, News Release: Union Members—2015, (2016), http://www.bls.gov/news.release/pdf/union2.pdf. When dealing with federal employees (as opposed to the state or municipal employees at issue in *Friedrichs*), unions are prohibited from collecting agency fees from non-union employees. Despite this, union membership was significantly higher among federal employees than in the private sector where agency fees are often permitted. Thus, the likelihood of free-riders was less significant in the federal employee context.

Additionally, a union's ability to obtain agency fees from non-members does not necessarily deter labor unrest. Some have suggested that when employees share in the sacrifice of securing a collective bargaining agreement, they are more likely to peacefully buy into the process. However, at oral argument, Justice Antonin Scalia noted that labor unrest occurs when an employer refuses to accede to a union's demands. Whether agency fees are permitted has no bearing on an employer's willingness to negotiate or acquiesce to a union's terms. Moreover, the National Labor Relations Act (NLRA) limits a rival union's ability to challenge an elected union's position as the exclusive bargaining representative for a specific period of time. The NLRA ensures that a single union representative can peacefully negotiate on behalf of all employees without worrying about unnecessary competition. Thus, it is unlikely that overturning *Abood* would disrupt the public sector workforce to a significant degree.

Employers also had an interest in understanding how *Friedrichs* could have affected their ability to negotiate with and manage their workforce. Both private and public employers have a long history of negotiating collective bargaining agreements that include agency fee provisions. Even if *Friedrichs* overturned *Abood*, it was unlikely that *Friedrichs* would have been applied retroactively. Moreover, *Friedrichs* would have had little impact on private sector employers. The facts in *Friedrichs* were limited to the public sector context. The California statute that compelled agency shop provisions in *Friedrichs* applies only to state and local government employers. In addition, the California public school teachers in *Friedrichs* argued against *Abood* and mandatory opt-out provisions based on the First Amendment. The First Amendment does not implicate private employers. Thus, private sector employers would have remained relatively unaffected regardless of the decision in the *Friedrichs* case.

If the Court chose to overturn *Abood* and invalidate agency fees, employees would have won a long-fought battle to protect First Amendment rights in the public sector workplace. The debate may have already encouraged some unions to re-evaluate union funding strategies and the allocation of agency fees to political campaigns and lobbying activities. Ultimately, the Court's current 4-4 decision compels non-union employees to continue to subsidize chargeable, and sometimes non-chargeable expenses, unless they affirmatively opt out, year after year, from subsidizing non-chargeable expenses. Major stakeholders will have to wait to see whether the Court decides to rehear this case next term and finally resolve these questions.

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