Legal Sidebar

Free-Riders or Compelled Riders? Key Takeaways as Court Considers Major Union Dues Case

01/12/2016

According to the Bureau of Labor Statistics, as of 2015, 7.2 million employees in the public sector belong to a union, with more than 700,000 additional government employees being represented by a union without belonging to the union. At least a significant portion of the latter employees is mandated to pay dues to a union pursuant to laws in more than twenty states authorizing "fair-share provisions" or "agency-shop agreements." This arrangement entitles the union to levy a fee on employees who are not union members, but who are nevertheless represented by the union as a condition of employment. The primary rationale for such laws is to prevent nonmembers from "free-riding" on the union's efforts by obtaining the benefits of representation without any of the costs. Some experts suggest that state laws mandating dues payments have a profound effect on the membership and financial health of government unions because, without such laws, those unions would not only lose out on dues currently being received from nonmembers, but would also witness a reduction in current membership as some members chose instead to be free-riders. It is in this potentially high-stakes context that the Supreme Court heard oral arguments in *Friedrichs v. California Teachers Association* on whether to overturn the 1977 case of *Abood v. Detroit Board of Education*, which held that agency-shop arrangements generally do not violate the First Amendment.

The nearly forty-year-old decision at the heart of the *Friedrichs* case, *Abood*, centers on the issue of compelled subsidization, conduct that has long been viewed skeptically in the United States. Thomas Jefferson, in the Virginia Statute for Religious Freedom, famous wrote that "to compel a man to furnish contributions of money for the propagation of opinions, which he disbelieves is sinful and tyrannical." And the Court in *Abood* echoed Jefferson's sentiments, holding in the context of a Detroit school teacher challenging the propriety of an agency-shop agreement, that the First Amendment generally prohibits the government from requiring any objecting nonmember of a union from contributing to support an ideological cause he may oppose. Nonetheless, the *Abood* Court, in a compromise that recognized the value of having a union as the exclusive bargaining agent of public employees and the fear of the aforementioned free-rider concerns, held that the First Amendment bar on compelled subsidization is not absolute. Specifically, the government *can* authorize agency-shop agreements *if* the public employee union uses an objecting non-member's dues for purposes that are *germane* to core union activities, like collective bargaining, because of the government's interest in labor peace and a sound collective bargaining system. In this sense, the Court in *Abood* held that the State of Michigan's agency-shop law was unconstitutional insofar as it allowed objecting school teachers to contribute to the union's political activities, but constitutional to the extent objecting nonmembers' dues were used, for example, to pay for the salaries of union attorneys reviewing a collective bargaining agreement.

In recent years, the Supreme Court has openly criticized the *Abood* decision (without overturning the 1977 case) for two main reasons. First, a majority of the Court has argued that *Abood*'s distinction between expenditures made for collective bargaining and political purposes is difficult to administer because debates about how much a *public* employee should be paid or the conditions of employment for a government worker are, at bottom, all *political* issues. This view was embraced in oral argument in *Friedrichs,* with Justice Alito suggesting that the test created by *Abood* was not "workable." Second, in recent cases, the Court has openly questioned whether free-rider concerns are a sufficient reason to overcome any First Amendment problems with respect to agency-shop agreements. In this vein, Justice Kennedy pressed the Solicitor General of California in the *Friedrichs* oral argument for a "compelling interest" to justify requiring all public employee unions to participate in agency-shop arrangements.

The defense of *Abood* centers on two major arguments. First, those that support the 1977 decision have argued that the Supreme Court's case law on public employee speech—which has generally allowed the government greater leeway

when it is acting in the capacity of an employer (as opposed to a sovereign capacity)— lends credence to *Abood's* distinction between compelled subsidization for matters related to employment (as opposed to political issues). Justice Kagan, echoing her 2014 dissent in *Harris v. Quinn,* made this point at oral argument in *Friedrichs,* arguing that because the case law is clear that a *private* employee can be compelled to subsidize a *private* employee union, "the government, when it's acting as an employer with respect to its employee workforce, really ought to be able to do the same things that a private employer can." Second, *Abood* supporters have argued that the doctrine of *stare decisis*—the concept that the Supreme Court should adhere to its own precedent to promote "evenhanded, predictable, and consistent development of legal principles" and "foster[] reliance on judicial decisions" –counsels against overruling the forty-year old case. Justice Breyer, in oral argument in *Friedrichs*, embraced this view, contrasting *Abood*—which centered on, in Breyer's view, prosaic matters like how much money is spent for "bargaining about wages, hours, and working conditions"—with *Plessy v. Ferguson,* the infamous 1896 ruling upholding racial segregation, a ruling that denied "a right to treat people equally" to ""millions" until being overturned in 1954.

However, it remains to be seen whether either of these arguments will be persuasive to five members of the Court. Justice Scalia, based on language from a 1991 opinion that appears sympathetic to free-rider concerns with regard to agency-shop arrangements, was seen by many on both sides as a "swing" vote in the *Friedrichs* case. Nonetheless, the most senior Justice on the Court twice voiced the argument during the *Friedrichs* hearing that "everything that is collectively bargained with the government is within the political sphere," an argument, if accepted by the Court, would flatly contradict the underlying two-part test embraced by *Abood.* Moreover, Justice Kennedy, who is typically seen as the "swing" justice on the Court, having been in the majority of 88% of cases last term, appeared even less sympathetic to the respondent's arguments in *Friedrichs.* Specifically, Justice Kennedy raised the point that "many teachers . . . strongly, strongly disagree with the union position on" a host of issues those teachers are compelled to subsidize, including "teacher tenure," "merit promotion," and "classroom size." In what could be a critical moment in the *Friedrichs* oral argument, Justice Kennedy openly objected to *Abood*'s free-rider concerns, arguing that instead of being a "free-rider," a "union basically is making [objecting] teachers compelled riders for issues on which they strongly disagree." While predicting an outcome in a Supreme Court case based on an oral argument is often an exercise in futility, it does appear, after the *Friedrichs* oral argument, that *Abood's* future could be in peril.

Regardless of the ultimate outcome in *Friedrichs*, the case will likely be a major decision that revisits the Court's compelled subsidization cases, which, in practical terms, could impact over seven million public employees throughout the nation and could possibly affect the current debate over how to address fiscal pressures mounting in states facing billions of dollars in obligations to their respective public employees. More broadly, *Friedrichs* could raise new constraints on Congress when compelling individuals to subsidize the speech of a private party, including outside of the context of labor law. The Court should resolve the fate of *Abood* by June 2016. (For a more detailed discussion of *Abood* and *Friedrichs*, CRS has published a general congressional distribution memorandum that is available upon request to the author).

Posted at 01/12/2016 11:44 AM