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GUEST COLUMN

Agency shop déjà vu, again

By Arthur Hartinger

The U.S. Supreme Court recently granted a writ of certiorari on behalf of two public employees working for the state of Illinois. The case is *Mark Janus and Brian Trygg v. American Federation of State, County and Municipal Employees, Council 31*. The issue: Whether *Abood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

"Agency shop" means that employees in a bargaining unit are required, as a condition of employment, to pay a fee to the union. For local California agencies covered by the Meyers-Milias-Brown Act, "agency shop" is defined as: "An arrangement that requires an employee, as a condition of employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments to the organization."

In *Abood*, a Supreme Court decision issued in 1977, the same issues now raised in Janus were in play. The underlying complaints in *Abood* alleged that the employees were unwilling or had refused to pay union dues; that they opposed collective bargaining in the public sector; that the union was engaged in various political and other ideological activities of which the employees did not approve; and that the agency shop clause should be declared invalid as a violation of their freedom of association protected by the First and 14th Amendments.

Abood approved agency shop arrangements requiring a "service fee" paid by non-union employees because those employees theoretically benefit from the union's work as the exclusive representative. After all, unions must negotiate and administer collective bargaining agreements, process grievances and work to settle disputes that arise under the labor contracts. This work benefits non-members as well as members. As recognized in *Abood*, "[a] union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."

The decision in *Abood* has been under fierce criticism from the moment it was announced. After all, it is argued, collective bargaining in the public sector is inherently political. Unions regularly support elected officials who are sympathetic to their cause, and attack those who are not. Agency shop arrangements effectively force employees to contribute to an organization of which it may want no part, and to support union activities to which the employees may strenuously object. These arguments are facially powerful. Imagine being forced to pay money to an organization that you dislike and which supports political causes and candidates that you oppose. In effect, this is the outcome of agency shop arrangements.

Is AB 119's passage merely coincidental, with no connection to the recent efforts to overturn *Abood*?

Abood was most recently challenged in *Friederichs v. California Teachers Association*, and it was widely predicted that *Abood* and agency shop provisions would be struck down. However, Justice Antonin Scalia, who Supreme Court watchers predicted would vote to overturn *Abood*, died suddenly in 2016. A divided Supreme Court issued a 4-4 decision which left *Abood* intact.

With the appointment of Justice Neil Gorsuch, the stage is now set for *Abood* to be successfully challenged, and for agency shop arrangements to be invalidated as unconstitutional.

California labor unions are already anticipating a reduction in the revenue generated through agency shop arrangements. Labor supported a bill — Assembly Bill 119 — that was recently signed by Gov. Jerry Brown. Among other things, AB 119 requires public agencies to:

1. Provide 10 days' advance notice of any new employee orientation;

2. Provide to the union the name, job title, department, work location, work, home, personal cellular telephone number, personal email address, and home address of any new employee within 30 days of hire; and

3. Provide to the union the information in number 2 every 120 days for all employees.

Under AB 119, labor unions must be given time to address new employees at the time they are given initial orientations. Is AB 119's passage merely coincidental, with no connection to the recent efforts to overturn *Abood*? Or, is labor working to protect its revenue stream by obtaining mandatory access to new employees (presumably to explain the many benefits of union membership, and to persuade new employees to join the union and pay dues)?

As with Friederichs, it is widely predicted that Justice Gorsuch will be the fifth vote to overturn *Abood*. We shall see.

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