BACKGROUNDER (JANUARY 2017)

Gregory J. Hartnett, et al. v. Pennsylvania State Education Association, et al.

THE EXECUTIVE SUMMARY

The Fairness Center and the National Right to Work Foundation jointly represent a group of Pennsylvania teachers challenging the Pennsylvania State Education Association's ("PSEA's") and its local affiliates' practice of forcing nonmember teachers to financially support a union. Teachers Greg Hartnett of the Homer Center School District, Elizabeth Galaska of the Twin Valley School District, and John Cress and Robert Brough, Jr. of the Ellwood City Area School District have chosen not to be union members. Yet current law allows unions, through collective bargaining with public employers, to require nonmembers to pay union fees regardless of whether they want the unions' representation. Collective bargaining is inherently political, and compelling nonmembers to pay fees to a union that they have chosen not to join violates core protections of the First Amendment.

THE PROBLEM

Pennsylvania is one of many states that allows unions to force public employees who are not union members to financially support the union. Mr. Hartnett and his fellow teachers have no desire to subsidize what they view as objectionable and politically controversial policy positions taken by the PSEA and its affiliates. They believe that certain positions taken by the unions in collective bargaining are not in their best interest or in the best interest of society at large. Yet, despite this, they are all required to pay the union part of their hard-earned salary. And the amount is significant. For instance, the PSEA's nonmember fees in 2016-2017 are only 26% less than full membership dues.

The PSEA can charge nonmember fees because of a First Amendment "compromise" struck 40 years ago by the Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court recognized that compelling public employees to financially support a union "has an impact on their First Amendment interests," *id.* at 222, however, the Court decided that, despite their First Amendment rights of freedom of speech and association, forcing nonmembers to support unions was necessary to promote "labor peace."

THE LAW

In *Abood*, the Supreme Court applied precedent from two cases involving compulsory dues for private-sector unions to public-sector workers. *See Machinists v. Street*, 367 U.S. 740 (1961); *Ry. Emps.' Dep't. v. Hanson*, 351 U.S. 225 (1956). The teachers in *Abood* argued that private-sector employment is fundamentally different from public-sector employment because of constitutional concerns inherent in the government forcing employees' speech—principally, that "public employment cannot be

conditioned upon the surrender of First Amendment rights," *Abood*, 431 U.S. at 226, and that collective bargaining is inherently political. *Id.* at 227.

The Court decided that restricting nonmembers' First Amendment rights was acceptable as long as the compelled fees would support only those activities related to the union's collective bargaining activities. Conversely, a "union cannot constitutionally spend [nonmember fee] funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 235. The Court did, however, recognize that this rule could cause "difficult problems in drawing lines between collective-bargaining activities…and ideological activities unrelated to collective bargaining," *Id.* at 236, but resolved that such constitutional questions would need to be decided on a case by case basis. *Id.*

In the 40 years since *Abood* was penned, countless judicial hours and resources have been expended trying to salvage *Abood*'s First Amendment compromise. The Supreme Court has had to address a myriad of issues including the acceptable notice for nonmembers, *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012); *Chicago Teachers' Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), appropriate chargeable expenses, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and limits to *Abood*'s intrusion on associational freedoms, *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

Moreover, *Abood*'s premise—that collective bargaining can be separated from politics—has been recognized as fundamentally flawed. Negotiations on agreements are often held directly with elected officials and concern the expenditure of taxpayer dollars. Money devoted to a collective bargaining agreement must come from somewhere, and every dollar devoted to government union contracts is a dollar that cannot go to infrastructure, public safety, fire protection, community maintenance, or tax relief. As Justice Alito stated in his *Knox* opinion:

> Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, these sorts of compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights.

132 S. Ct. at 2289 (internal quotations omitted).

In January of 2016, the Supreme Court heard oral argument in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083, *reh'g denied*, 136 S. Ct. 2545 (2016). Rebecca Friedrichs and ten of her fellow public schoolteachers asked the Court to overrule *Abood* due to the clear violation of their Constitutional rights. Yet, after the death of Justice Antonin Scalia, on March 29, 2016, the Court issued a one-line, 4-4 opinion that left in place *Abood*'s ruling. *Id.*

Mr. Hartnett and other teachers will be asking the federal courts to revisit *Abood*'s First Amendment compromise and hold that nonmembers cannot be forced to pay for union representation.

THE CONCLUSION

Compulsory union fees assessed to nonmembers violate nonmembers' Constitutional rights of free speech and free association. Teachers and other public employees should not have to pay for activity

and representation they do not support.

THE CASE LOGISTICS

Plaintiffs

- Gregory J. Hartnett
- Elizabeth M. Galaska
- Robert G. Brough, Jr.
- John M. Cress

Defendants

- Pennsylvania State Education Association
- Homer-Center Education Association
- Twin Valley Education Association
- Ellwood Area Education Association
- Homer Center School District
- Twin Valley School District
- Ellwood City Area School District
- Charles Koren, in his official capacity as Superintendent of the Homer-Center School District
- Robert Pleis, in his official capacity as Superintendent of the Twin Valley School District
- Joe Mancini, in his official capacity as Superintendent of the Ellwood City Area School District

Court

United States District Court for the Middle District of Pennsylvania

Judge

The Honorable Yvette Kane

Relief Sought

Plaintiffs are requesting that the Court declare compulsory union fees unconstitutional and an impermissible violation of public employees' First and Fourteenth Amendment rights of free association and free speech.

Date Filed

January 18, 2017

THE LEGAL TEAM

David R. Osborne is President and General Counsel at the Fairness Center, where he provides advice and counsel to clients, directs the Fairness Center's legal strategy, and oversees all litigation efforts. Before joining the Fairness Center, David litigated on behalf of healthcare providers and conducted organizational and lobbying efforts for a national trade association. He previously worked as a judicial clerk to a Florida Supreme Court justice and served as official staff to a member of Congress. David graduated from the Florida State University College of Law.

Nathan J. McGrath is Vice President and Litigation Counsel at the Fairness Center, where he litigates and develops legal strategy to advance its mission. Before joining the Fairness Center, Nathan was a staff attorney with the National Right to Work Legal Defense Foundation, Inc., where he practiced constitutional, labor, and administrative law. Nathan was also an associate attorney with Lawlor & Lawlor, P.C., a general practice firm in Pittsburgh, Pennsylvania. Nathan graduated from Regent University School of Law.

Karin M. Sweigart is Deputy General Counsel and Director of External Relations at the Fairness Center, where she focuses on client interaction and litigation activities. Before joining the Fairness Center, Karin served as legislative counsel for the Committee on House Administration in the United States Congress, and counsel to Congressman Dan Lungren. She also served as a Jesse M. Unruh Fellow in the California State Assembly. Karin graduated from the University of St. Thomas School of Law.