Selected U.S. Supreme Court Decisions

and

Pending Cases

On Topics of Employment Law

May 2017 - April 2018

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New Prime Inc. v. Oliveira

Issue: Does the language in the Federal Arbitration Act exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” apply to contracts between an employer and an independent contractor, so that a truck driver working as an independent contractor can avoid being bound by a binding arbitration clause in his contract with the employer?

Janus v AFSCME Council 31

Issue: Is the First Amendment violated by an agency-shop clause in a public-sector union’s collective bargaining agreement, which clause requires employees who are not members of the union to pay dues to the union to cover the costs of collective bargaining, contract administration and grievances? Should the Court overrule Abood v Detroit Board of Education (1977), which upheld such clauses as a way to prevent “free riders?”
CNH Industrial N.V. v Reese  
2018 WL 942419 (2/20/18)  
The Court Rejects A Presumption in Favor of Lifetime Healthcare Benefits for Retirees

Held: (per curiam) When a collective bargaining agreement is silent with respect to the duration of retiree benefits (in this case healthcare benefits for retirees), a court may not infer that the retiree healthcare benefits were intended to vest for the lifetime of the retirees.

Instead, the court must apply “ordinary principles of contract law.” And in doing so, when the only “durational” language in the collective bargaining agreement is its “general durational clause,” the employer’s obligation to provide those retiree healthcare benefits expires at the time that the agreement as a whole expires.

Background
In 1998, CNH and the UAW signed a collective bargaining agreement. Among other provisions, the CBA provided that CNH would provide health insurance for certain retiring employees and their surviving spouses. The CBA had no language indicating the duration of these healthcare benefits. By its terms, the CBA itself was to expire in May 2004.

In 2004, CNH gave notice that it would terminate the retiree healthcare benefits. A class of CNH retirees and surviving spouses filed a lawsuit seeking a declaration that the CBA had created lifetime vested healthcare, and an order that CNH maintain those benefits.

While that lawsuit was pending in federal district court, the Supreme Court reversed a Sixth Circuit Court of Appeals decision in an unrelated case. In that case, M&G Polymers USA LLC v Tackett, 135 S. Ct. 926 (2015), the Supreme Court rejected a Sixth Circuit’s ruling that, in the absence of evidence to the contrary, it should be presumed that retiree benefits in a collective bargaining agreement were intended to vest for the lifetime of the retirees. Instead, the Supreme Court ruled, “ordinary contract principles” should be applied. It remanded that earlier case for reconsideration in light of this directive.

In CNH, after complex proceedings in district court (including one ruling against the retirees followed by a later reversal by the same court, which then ruled in favor of the retirees), the Sixth Circuit ruled in favor of the retirees. In doing so, it distinguished CNH from M&G Polymers by finding that the CNH collective bargaining agreement was ambiguous as a matter of law, and ruling that under those circumstances, it was appropriate to infer that the provision for retiree health benefits was intended to vest for the life of the retirees.

Significance
In a brief per curiam opinion, the Supreme Court reversed the Sixth Circuit’s pro-employee approach to retiree healthcare benefits. Ruling that “ordinary principles of contract law” must be applied, the Court ruled that the Sixth Circuit had no basis for finding that the retiree healthcare provision of the CBA was ambiguous and should therefore be construed as guaranteeing lifetime vesting. Instead, the Court ruled, in the absence of express language addressing the duration of the retiree benefits, the only reasonable interpretation was that those benefits expired when the collective bargaining agreement as a whole expired.

While not surprising in light of the Court’s earlier decision in M&G Polymers, this case appears to continue a trend in both the Supreme Court and in lower federal courts of favoring employers in litigation challenging the termination of retiree healthcare benefits.
Encino Motor Cars LLC v Navarro: Round II
A Fair Labor Standards Act Case Revisited: One Narrow, and One Broad Ruling
2018 WL 1568025 (4/2/18)

Held: (5-4): Narrow ruling: Auto dealership “service advisors,” who advise customers about what repairs their vehicles need, are not entitled to time-and-a-half for overtime. They fall within the FLSA’s statutory exemption from overtime protection for “salesmen…primarily engaged in...servicing automobiles.”

Broader ruling: The 5-judge majority rejects the long-standing principle that exemptions from the FLSA’s overtime pay protections should be narrowly construed in order to fulfill the statute’s broad remedial purposes.

Statutory and Factual Background
The Fair Labor Standards Act (FLSA) mandates that employers pay their employees time-and-a-half for overtime work of over 40 hours per week. However, the FLSA contains a number of exemptions from this mandate, one of which is for “any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles, trucks or farm implements if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers” 29 USC §213(b)(10)(A).

The plaintiffs in this case were “service advisors” at a Mercedes-Benz dealership. Their job, when a customer sought repairs, was to schedule the requested repairs, and to encourage the customer to have additional repairs done. They were paid solely on a commission basis. They worked 7 a.m. to 6 p.m. five days per week (55 hours/week), and sometimes longer.

Procedural Background
In 1970, the Department of Labor (DOL) adopted a regulation stating that service advisors were entitled to overtime pay and did not fall within the exemption for “salesmen, partsmen and mechanics.” But between 1973 and 1976 several federal courts of appeal rejected this interpretation. In 1978, the DOL issued an opinion letter stating that service advisors, in most cases, were not entitled to overtime protection. In 2011, however, the DOL reversed itself, and issued a rule that once again stated that service advisors were entitled to overtime pay. The plaintiffs’ 2012 lawsuit sought overtime pay for their hours worked over 40 per week.

The 9th Circuit initially ruled in favor of the services advisors, finding that the statutory language was ambiguous, and that it should, therefore, defer to the expertise of the DOL. In 2016, the Supreme Court reversed this ruling, holding that the DOL’s position was not entitled to deference because the DOL had not given adequate reasons for its rule. The Supreme Court remanded the case to the 9th Circuit for reconsideration. On remand, the 9th Circuit, having reconsidered, again ruled that the service advisors were entitled to overtime pay, based on the fact that they neither sold cars not serviced them, and also based on the long-standing principle that, in light of the FLSA’s remedial purposes, the statutory exemptions from its overtime protections should be narrowly construed.

The Supreme Court’s Ruling, and its Significance
The Supreme Court held that service advisors are not entitled to overtime pay; they are exempt as “salesmen…primarily engaged in … servicing” cars. In addition, however, the majority explicitly repudiated the long-standing principle that exemptions from the FLSA’s overtime protections must be narrowly construed. As J. Thomas wrote, “We reject this principle as a useful guidepost for interpreting the FLSA. . . . [T]here is no reason to give [the exemptions] anything other than a fair (rather than a ‘narrow’) interpretation.” Adopting the position sought by the U.S. Chamber of Commerce in its amicus brief, the Court has thus reversed over 50 years of precedent requiring broad protection of the right to overtime pay.
Coventry Health Care of Missouri v Nevils
Federal Preemption of State Consumer Protection Laws as Applied to Federal Employees
137 S. Ct. 1190, 2017 WL 2962971 (4/18/17)

Held: (8-0) The Federal Employees Health Benefits Act preempts a Missouri consumer protection statute which prohibit an insurance company from claiming the proceeds of an insured person’s personal injury settlements. That state law cannot be applied to health insurance contracts for federal employees who live in Missouri.

Background
If a person is injured by the negligence or otherwise wrongful act of another person or entity, the injured person may be receive compensation as a result of a lawsuit or other settlement with the negligent person or entity. But the injured person may have a health insurance policy that includes a subrogation clause which gives the insurance company the right to be repaid, from the settlement, any money the company has paid for medical care related to the injury.

Missouri, like a number of other states, has a consumer protection statute that bans such subrogation clauses in insurance contracts. One policy reason behind such a ban is that in cases in which the personal injury settlement does not cover all of the injured person’s losses, a requirement that the injured person pay to the insurance company, from those settlement proceeds, the cost of all related medical bills, can result in the injured person ultimately receiving little or nothing in compensation for the injuries suffered. Indeed, in some cases, the subrogation rights of the insurance company can be even higher than the net settlement which the injured person receives. A more general policy concern is a belief that such subrogation amounts to an impermissible assignment of the injured person’s right to a cause of action for suffering a personal injury.

The Federal Employees Health Care Benefits Act (FEHCB) does not, itself, ban subrogation clauses in health insurance contracts of federal employees. This Act does, however, authorize the federal Office of Personnel Management (OPM) to set the terms of federal employees’ health care policies, and OPM has adopted a rule allowing the insurance companies covering federal employees to include such subrogation agreements in their contracts. The FEHCB also contains a clause specifically stating that the terms of the covered insurance policies “shall supersede and preempt any State or local law.”

Nevils, a federal employee who lived in Missouri and obtained a settlement from a personal injury, challenged the subrogation clause in her health insurance contract. The Missouri Supreme Court upheld the state’s ban on such clauses, ruling that the state law was not preempted by federal law, since the federal law itself contained no prohibition on state laws banning subrogation clauses.

The Supreme Court’s ruling.
The Supreme Court reversed the Missouri Supreme Court. It held that Missouri’s consumer protection law banning subrogation clauses in insurance contracts could not be applied to health insurance policies for federal employees who lived in Missouri. As applied to federal employees, the Court held, Missouri’s law was preempted by federal law, because (1) the FEHCB authorized the OPM to set the terms of federal employees’ health care policies, and (2) OPM had adopted a policy authorizing subrogation clauses in such policies, and (3) the federal statute, the FEHCB contained a clause specifically stating that the terms of such policies “shall supersede and preempt any State or local law.” Not a surprising decision, despite three separate rulings by the Missouri Supreme Court to the contrary during the course of this litigation.
Kindred Nursing Centers Ltd. Partnership v Clark
Federal Preemption of State Consumer Protection Laws:
The Federal Arbitration Act Bars a Wrongful Death Lawsuit against a Nursing Home
2017 WL 2039160 (5/15/17)

Held: (7-1) The Federal Arbitration Act preempts a Kentucky common law rule that had protected consumers by holding that binding arbitration agreements signed by a person holding a power of attorney for another are unenforceable unless the grantor of that power of attorney, in the written power of attorney document, specifically authorized the holder of the power to agree to binding arbitration.

Background.
The arbitration agreements at issue in this case were contained in the contracts which a nursing home required as a condition of admitting residents. They required a would-be resident to agree to forego lawsuits and to submit any disputes (including claims of gross negligence, medical malpractice or wrongful death) to binding arbitration. Many elderly people, of course, have given a general power of attorney to a relative. In such cases, the nursing home required the relative to sign the contract on behalf of the elderly person.

One nursing home resident in this case was an elderly man who, his relatives alleged, had suffered numerous injuries due to the nursing home’s negligence, including falls, dehydration, malnutrition, pressure sores, infections, improper wound care, severe pain and ultimately death. The other was an elderly woman alleged to have suffered similar injuries, plus dehydration, skin breakdown, infections, medical errors, and death. Both had executed general powers of attorney authorizing a relative to sign, on their behalf, any and all contracts.” Those relatives had signed the nursing home contracts at issue.

Relatives then sued the nursing home in state court for wrongful death, malpractice, and the suffering their elderly relations had endured before they died. The nursing home argued that the lawsuits should be dismissed, based on the binding arbitration clauses in the contracts. The Kentucky Supreme Court, however, ruled that under the state’s common law, access to courts and juries was such a sacred, fundamental constitutional right that a mere general power of attorney could not deprive someone of that right. Only if a power of attorney had a “clear statement” authorizing the holder to agree to binding arbitration would such a clause be enforceable. The nursing home sought review of this ruling by the U.S. Supreme Court.

The Supreme Court’s decision.
The Supreme Court ruled in favor of the nursing home, holding that the Federal Arbitration Act of 1925, in mandating enforcement of arbitration agreements, preempted Kentucky’s common law. The case is noteworthy for a number of reasons.

(1) Though not directly employment-related, the decision is yet another rejection of an effort to invalidate a binding arbitration clause because that clause deprives the more vulnerable party of fundamental rights. (2) And in this case, the Court held that the FAA preempts laws that “disfavor” arbitration agreements indirectly, by placing more demanding burdens on them than on other types of agreements. (3) The decision was authored by Justice Kagan, who, together with Ginsburg, Breyer and Sotomeyer, had forcefully dissented from previous decisions that had interpreted the FAA broadly to preempt lawsuits by consumers and employees. (4) In fact the only dissenting judge was Justice Thomas, who reaffirmed his belief that the FAA does not apply to lawsuits in state courts. (5) Justice Kagan, however, did write for the 7-judge majority that a court may invalidate an arbitration agreement based on such general contract defenses such as fraud and unconscionability.
Held: (9-0) State courts have jurisdiction to hear a class action lawsuit alleging violations of the 1933 Securities Act.

**Background and Supreme Court Decision.**
The plaintiffs in this case included three employee pension funds that had invested in a telecommunications company, Cyan, Inc., after Cyan went public in 2013. In 2014, Cyan’s stock fell in value. The pension funds eventually filed a class action lawsuit against Cyan in a California state court, alleging that it had violated the federal Securities Act of 1933 by issuing a registration statement and prospectus in connection with its initial public offering that contained material misstatements and omissions.

Cyan moved to dismiss the state court lawsuit, arguing that another federal law, the Securities Litigation Uniform Standards Act of 1998, deprived state courts of jurisdiction over any lawsuits alleging a violation of the Securities Act of 1933, and that only federal courts had such jurisdiction. The California courts rejected Cyan’s position.

On review, the U.S. Supreme Court unanimously held that (1) state courts do have jurisdiction (concurrent with federal courts) over class action lawsuits alleging violations of the Securities Act of 1933, and (2) once such a lawsuit has been filed in state court, the defendant(s) cannot remove it to federal court.

**Significance.**
This case will benefit organizations (including employee pension funds) seeking to sue a company for fraudulent actions that violate the federal Securities Act of 1933, since a state court lawsuit can avoid the more burdensome substantive and procedural requirements involved in filing such a lawsuit in federal court. Plaintiffs can also “forum shop” in order to bring their case to what may be a more plaintiff-friendly state court.

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Perry v Merit Systems Protection Board
137 S.Ct. 1975 (6/23/17)

Held: (7-2) When the Merit Systems Protection Board (MSPB) hears a “mixed case” [i.e. one alleging both a violation of the Civil Service Reform Act (CSRA) and a violation of the employee’s rights under a federal anti-discrimination law] and decides the case not on the merits but on jurisdictional grounds, that decision is reviewable by a federal district court, not a court of appeals.

**Significance**
The MSPB is an agency that hears cases in which federal employees challenge their dismissals or other adverse actions against them. As a result of this case and prior decisions:

1. If the employee asserts rights only under the CSRA, the MSPB decision is reviewable in the Federal Circuit, where the nature of that review is limited and deferential to the MSPB.

2. However, the MSBP’s decision is reviewable in federal district court (where the nature of review is broader) if (1) the employee asserts only federal anti-discrimination law violations, and no violations of the CSRA, or (2) the employee asserts violations of both the CSRA and anti-discrimination laws. This is true regardless of whether the MSBP’s was based on substantive, procedural or jurisdictional grounds.
Pending Supreme Court Cases

Mount Lemon Fire District v Guido
No date currently set for oral argument

Issue: Does the Age Discrimination in Employment Act’s 20-employee minimum requirement for coverage of private sector employers apply to states and political subdivisions, or is there no minimum employee requirement for a states or political subdivisions?

Background and Legal Issue
The Mount Lemon Fire District is a political subdivision of the State of Arizona. It has fewer than 20 employees. The plaintiffs, John Guido and Dennis Rankin, were terminated from their jobs with the Fire District at ages 46 and 54, respectively. They sued the Fire District, alleging age discrimination in violation of the Age Discrimination in Employment Act (the ADEA).

When the ADEA was originally enacted, it covered only private-sector employers with 25 or more employees. A 1974 amendment lowered the minimum employee requirement to 20, and extended coverage to states and political subdivisions of states, as reflected in the statutory language above.

The term “employer” means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . . The term also means (1) any agent of such a person and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. 630(b)

The Fire District argues that the 20-employee minimum applies not only to private employers, but also to “a State or political subdivision of a State.” The Plaintiffs argue that, based on the statutory language, the 20-employee minimum does not apply “a State or a political subdivision of a State.”

Lower court ruling
The Ninth Circuit Court of Appeals, disagreeing with four other circuit courts of appeals (the Sixth, Seventh, Eighth and Tenth), held that a state or a political subdivision of a State does not need 20 or more employees in order to qualify as an employer subject to the requirements of the ADEA.

Significance
The statutory could clearly be interpreted either way, and the Supreme Court will now decide whether the language in the statute requiring a minimum of 20 employees for ADEA coverage does, or does not, apply to states and political subdivisions of states.
New Prime Inc. v. Oliveira
Oral argument not yet scheduled

1. When there is a disagreement over whether the Federal Arbitration Act applies to a dispute, and the agreement in question provides that the arbitrator will decide all issues of arbitrability, is that provision enforceable, or does a federal court, in the first instance, have jurisdiction to decide arbitrability?

2. Does the language in the Federal Arbitration Act exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” apply to contracts between an employer and an independent contractor?

Background
New Prime Inc., an interstate trucking company, runs an apprenticeship program for new drivers, whom it recruits. Domenic Oliveira went through New Prime’s apprenticeship program, for most of which he was not paid at all, and then, encouraged by New Prime, signed a contract to become an independent contractor working for New Prime. Among other provisions, this contract stated that all disputes between Oliveira and New Prime would be submitted to binding arbitration.

Oliveira eventually brought a class actions lawsuit against New Prime, alleging that:
1. New Prime exercised so much control over his activities that he was, in fact, an employee rather than an independent contractor.
2. New Prime did not pay him as promised but instead short-changed him in numerous ways.
3. New Prime paid him, and others similarly situated, less than minimum wage, and that because they were really an employees, this low pay violated the Fair Labor Standards Act.

The Federal Arbitration Act’s Section 1 Exemption
The FAA which generally requires enforcement of binding arbitration agreements, contains an exemption, which states that the Act shall not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

Lower Court Proceedings
New Prime moved to dismiss Oliveira’s lawsuit on the ground that contract which Oliveira had signed required him to submit all disputes to binding arbitration.

Oliveira argued that this dispute was not arbitrable, and not subject to the FAA’s binding arbitration requirements, because it was covered by the exemption for “contracts of employment of...a class of workers engaged in . . . interstate commerce,” - - specifically, truck drivers.

New Prime argued that an arbitrator, and not the court, should decide the initial issue of arbitrability. It further argued that the FAA’s exemption did not apply in this case, because it applied only to employees engaged in interstate commerce, and not to independent contractors.

The First Circuit, in a decision by Judge Rogeriee Thompson, ruled that:

1. The federal court, and not an arbitrator, has the authority to make the threshold determination of whether the FAA’s binding arbitration provisions applied to the dispute.

2. The FAA provision that exempts contracts of employment of transportation workers from the Act's coverage, see id. § 1 (the § 1 exemption), applies to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship.

The validity of these rulings are now pending before the Supreme Court.
Janus v AFSCME Council 31
Oral Argument: Feb. 26, 2018

Issue: The constitutionality of public sector “fair share” fees.

Does the First Amendment prohibit an agency-shop clause in a public-sector union’s collective bargaining agreement — i.e. a clause that requires employees who are not members of the union to pay to the union a service charge equal to the percentage of union dues devoted to funding the union’s collective bargaining, contract administration and grievance adjustment activities?

Should the Court overrule Abood v Detroit Board of Education (1977), which upheld such clauses?”

Initial Comments

Janus v AFSCME is one of the most closely-watched and hotly contested cases on this term’s Supreme Court’s calendar. At issue is whether public employee collective bargaining agreements, in states that do not have so-called “right to work” laws, can continue to require non-union members, as a condition of continued employment, to pay to the union a service fee equal to the percent of union dues that are devoted to the unions’ collective bargaining, contract administration and grievance adjustment activities.

In addition to the briefs filed by the parties, no fewer than 76 amicus curiae briefs (“friend of the Court” briefs) have been filed in this matter, in which numerous concerned organizations and individuals offer legal arguments urging the Court to rule one way or another on this issue.

The Precedent at Issue: Abood v Detroit Board of Education

The named plaintiff, Mark Janus, is an employee of the State of Illinois, working in its child support division. He and the conservative legal foundations that are funding his lawsuit (the National Right to Work Legal Defense Foundation and the Liberty Justice Center) seek to overturn the Supreme Court’s 1977 decision in Abood v Detroit Board of Education, 421 U.S. 209, in which a unanimous Supreme Court upheld agency shop clauses in public employee collective bargaining agreements. In Abood, the Court held that:

A. Employees of state and local governments, while that may not be required to join the union that represents their bargaining unit, can be required to pay an “agency fee,” equal to the percentage of union dues that are devoted to collective bargaining, contract administration and grievance adjustment activities.

The Court held that such agency fees were constitutional because (a) a public employee union has a duty of fair representation, and must fairly represent all members of the bargaining unit, regardless of whether they have joined the union, (b) an agency fee requirement eliminates the incentive to become “free riders,” who received all the benefits of the union’s collective bargaining, contract administration and grievance activities, without contributing to the cost of those activities, and (c) even though payment of an agency fee might, to some extent, interfere with an employee’s freedom to associate only with ideas with which he agrees, that interference is constitutionally justified by the contribution that union shops makes to labor relations and labor peace.
B. Employees who choose not to join the union may not be required to pay to the union an amount greater than that agency fee. Thus, objecting employees cannot be required to pay to the union any amounts that will be devoted to ideological causes not germane to the union’s collective bargaining, contract administration and grievance adjustment activities - e.g. causes such as political lobbying and contributions to political candidates.

The Abood Court held that required contributions to support these more political activities as a condition of keeping one’s government job were the equivalent of requiring the objecting employee to support ideological causes that he or she opposed. Such a requirement, the Court held, violated such employees’ First Amendment rights of free speech and freedom of association.

Arguments of the Parties and the Amici Curiae

A. Arguments of those supporting the continued validity of public sector agency fees

Those submitting briefs to the Supreme Court supporting the continued validity of public sector agency fees include, among others: numerous labor unions, civil rights organizations, labor and constitutional law legal scholars and law school professors, the U.S. Conference of Catholic Bishops, past D.C. Bar Association Presidents, LGBT organizations, 20 states and the District of Columbia, the National Conference on Public Employee Retirement Systems, and a group of leading economists including three Nobel laureates.

Among their arguments supporting the continued validity of these agency fees are the following:

- The Court should not overrule over 40 years of precedent established by Abood.
- A group of economists including three Nobel Prize winners argued that under a “right to work” system where mandatory service fees are outlawed, unions will become weaker -- not because members of the bargaining unit withhold financial support out of dislike of the union and its activities, but rather because narrow individual self-interest, vs. the collective nature of union benefits, will create an incentive not to pay dues and to become a “free rider.” Unions, too, expressed concern about “free riders” benefiting from the union’s actions but contributing nothing toward support those actions.
- The mandatory agency fees should not be seen as “compelled speech” that violates the First Amendment. Instead they are more akin to “compelled-subsidies,” which the courts have upheld as constitutional in numerous contexts, such as mandatory bar association dues for attorneys.
- Even if the agency dues are a form of “compelled speech,” compelled subsidies of speech happen all the time. For example whenever the government, having collected taxes, gives grants or subsidies to private organizations that engage in speech, the taxes so paid are a form of compelled subsidies of speech. When college students are assessed “activity fees” that support a variety of student organizations, this is a compelled subsidy of the speech of others. Some businesses are required to pay fees for business organizations that may advertise to support the industry as a whole.
Financially viable public sector unions should be supported, because they benefit not only the covered employees, but the government’s ability to benefit from an employees’ input and opinions, and thus govern more effectively.

Twenty states and the District of Columbia argued that financially viable public sector unions contribute to labor peace, because they provide an organized, structured way of addressing employer-employee relations in the public sector, thereby contributing to reduced employee turnover and avoiding paralyzing public employee strikes. Without such structure, there is greater likelihood of disorganization and labor strife. (Witness the recent state-wide teacher strikes in West Virginia and Arizona, both of which are “right to work” states that do not allow agency fees.)

Eliminating fair-share fees is likely to result in union “death spirals” where dues and agency fees drop, forcing unions to raise dues for their remaining members in order to fulfill their responsibilities, with those increased dues causing further losses in membership.

Law enforcement, firefighter and other public safety employees argued that well-funded public sector unions promote government policies that provide adequate employee training, equipment, public outreach and coordination among public safety employees, and thereby advance public safety.

Eighty-seven civil rights organizations argued that overruling Abood would undermine public sector unions, which have been one of the most important vehicles for providing economic and professional opportunities for workers, and particularly for women and minorities, since the public sector employs higher rates of women and minorities and has been a source of opportunity and dignity for those groups. There is evidence that women and minorities represented by unions have greater pay equity, better benefits, and greater access to civil rights protections. Eliminating the fair share fees would undermine this entire system, which has been a road to the middle class for many women and minorities.

A group of workers at child-protection agencies argued that collective bargaining has allowed them to implement policies, provide training and fund projects that help them fulfill their responsibility of protecting children.

The U.S. Conference of Catholic Bishops noted its support of workers right to unionize, and its opposition to “right to work” legislation. It urged the Court not to lay the groundwork for a future case in which the Court might also rule that even in the private sector, agency fees are unconstitutional.

B. Arguments of those opposing the continued validity of public sector agency fees

Those submitting briefs to the Supreme Court supporting the continued validity of public sector agency fees include, among others: some individual public sector employees (including some school teachers, some court employees and others); 20 states; a variety of conservative legal centers including The 1851 Center for Constitutional Law, the libertarian Freedom Foundation, The Claremont Institute’s Center for Constitutional Jurisprudence, the Rutherford Institute, the Buckeye Institute and the Cato Institute.
Among their arguments for opposing the agency fees are the following:

- Numerous amicus briefs argued that collective bargaining with the government is the same as lobbying the government; it is a form of political activity, and based on their First Amendment rights, public sector employees who disagree with the union’s collective bargaining positions should not be required, at pain of losing their jobs, to support this political activity with which they disagree.

- Fair share fees are a form of compelled speech and association. Because they implicate fundamental First Amendment rights, that should be subjected to heightened constitutional scrutiny, and should not be allowed unless they will achieve some compelling governmental goal that cannot be achieved by means less intrusive on First Amendment rights. The goals of labor stability can be achieved without imposition of mandatory agency fees, and the goal of discouraging free riders is insufficient to justify the infringement on free speech.

- Four public school teachers, represented by the Fairness Center (an anti-union organization) stated that they opposed the pay increases sought by their union, because they were concerned about the financial cost of those pay raises, and that they did not want to be forced to contribute financial to the union’s advocacy of something which they opposed.

- Two economists, represented by the Freedom Foundation, argued that their research showed that “right-to-work” states had more labor peace and fewer strikes than states that allowed agency fees. Thus, they argued, agency fees did not contribute to labor peace, and could not be justified on that basis. (Their brief was, presumably, submitted before the statewide teacher strikes in the right-to-work states of West Virginia and Arizona, and the threatened statewide teacher strike in right-to-work Oklahoma.)

- Twenty states, citing Detroit as an example, argued that collective bargaining had led to municipal bankruptcies, and that agency fees that went to support collective bargaining were therefore not justified as benefiting the public.