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Will Supreme Court protect workers' rights against union-government collusion?

By Ilya Shapiro

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Those who support the power of unions and governments over the rights of workers are scared of the Supreme Court's imminent ruling in Harris v. Quinn, in which a group of home health aides challenge an Illinois law that compels them to join a union and pay dues.

For example, Prof. John Logan in The Hill's Contributors blog on May 29 began his analysis of Harris by attacking the workers' lawyers as "extremist" and warned that "a sweeping ruling against agency fee agreements in the public sector in Harris v. Quinn would be an extreme and blatantly political act."

What's going on here? Are these personal-care assistants, most of whom tend to their own disabled family members, possessed of a false consciousness, selling out their comrades on behalf of some corporate exploiter?

Not quite. All they want is to be free from having to subsidize the speech and activities of the Service Employees International Union. Indeed, there's no business or corporate interest here at all: The workers who brought the lawsuit are independent contractors whose "boss" is the person they're caring for. But don't take my word for it; under Illinois law, the disability program participant, or "customer," is "the employer of the PA [personal assistant]" and "is responsible for controlling all aspects of the employment relationship between the customer and the PA, including, without limitation, locating and hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action against the PA, and terminating the employment relationship between the customer and the PA."

Nonetheless, while expressly preserving customers' rights to hire and fire their aides, the Illinois legislature in 2003 labeled PAs as "public employees . . . . [s]olely for the purposes of coverage under the Illinois Public Labor Relations Act," which provides for collective bargaining. The state then designated SEIU as their exclusive representative and entered into a collective-bargaining agreement requiring all aides to remit union fees.

The Supreme Court did uphold, in the 1977 case of Abood v. Detroit Board of Education, the constitutionality of compulsory dues to finance a public-sector union, finding that the government interest in "labor peace"—preventing massive unrest caused by workers' differing

views—justified the infringement of dissenters' associational and expressive freedoms. But the Court's acceptance of "labor peace" as such a strong interest rests on compound legal fictions, akin to what the Court said in its most recent labor case, Knox v. SEIU (2012)—striking down another forced-union-support law—"appears to have come about more as a historical accident than through the careful application of First Amendment principles." Abood assumed that precedents had already recognized "labor peace" as a First Amendment "compelling interest." Those older cases saw "labor peace" as justifying only Congress's exercise of its Commerce Clause power to regulate labor relations—because strikes, riots, and other violence disrupt interstate commerce—not as a basis for overriding workers' First Amendment rights.

Moreover, the ruling under review in Harris carries Abood far beyond its holding, absolving Illinois of the burden of showing any justification for the abrogation of the rights of workers who aren't hired or supervised by the state, who don't work in state facilities, and whom the state doesn't consider to be its employees for any other purpose. All this when there's no risk that home healthcare aides are going to war with the state or otherwise create massive unrest. If affirmed, the lower court's decision would enable politicians and labor leaders to conspire in circumventing the First Amendment's limitations on compelled speech and association to bolster the ranks and finances of organized labor.

Indeed, as Abood recognized, the very purpose of forcing workers to associate with a union is to facilitate its speech on their behalf, while suppressing their individual views, and thereby to achieve that mythical "labor peace." But the First Amendment doesn't allow the government to "substitute its judgment as to how best to speak for that of speakers and listeners," the Court held in Riley v. National Federation of the Blind (1988). Illinois's scheme to compel aides to subsidize a union absent any legitimate state interest is the predictable result of Abood's casual disregard of public employees' rights.

And the Illinois law here is leading a national movement to organize homecare workers—including medical assistants and even family child-care providers—in a last-ditch attempt to revive declining union rolls. More than a dozen states have implemented similar schemes, with no limiting principle to prevent the misapplication of Abood's "labor peace" rationale to curtail the rights of any recipient of government subsidies or fees, including doctors and nurses participating in Medicaid programs, attorneys for the indigent, foster parents, and employees of businesses receiving tax credits.

Abood was thus wrong when it was decided and still can't be reconciled with cases recognizing, as the Court said in Knox, "the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." But even if the Court is unwilling to recognize that "labor peace" was never a persuasive justification for violating workers' rights, it should still reject the Illinois ploy because it's unsupported by any compelling state interest.

Prof. Logan called Harris "perhaps the most important labor case to come before [the Supreme Court] in several decades," one that "could inflict a major blow against unions that represent public employees." He's absolutely right: In light of states' growing collusion with unions to create sham employment relationships that circumvent First Amendment protections, the Court

should act now to protect workers' associational and expressive rights before this phenomenon takes greater root in labor law.

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