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Supreme Court Brief

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Challenging a Decades-Old Decision

If you were forecasting the outcome of *Janus v. AFSCME*, the high court labor union case being argued on Feb. 26, "I think you would put the thumb on the scale of the challengers to *Abood*," said **Latham & Watkins partner Roman Martinez**.

That's *Abood v. Detroit Board of Education*, the nearly 41-year-old, unanimous decision upholding the constitutionality of so-called fair share fees paid by non-union public employees to unions representing all employees in collective bargaining.

Whether Abood survives—and unions with it, some argue—is at the heart of *Janus*, which attacks it on First Amendment grounds. **In 2016, the justices deadlocked** on that very question in F*riedrichs v. California Teachers Association*. **Justice Antonin Scalia**, until his death that year, was thought to have been the fifth vote to overrule.

More than six dozen amicus briefs have been filed—an indication of the high stakes. Here are a few that caught our attention.

➤➤ Whenever the justices are asked to overturn a longstanding precedent, stare decisis—respect for prior decisions—becomes a major issue. **The Cato Institute's Ilya Shapiro tells the court** that "labor peace," a major justification for the Abood decision, "**is simply not a sufficiently compelling governmental interest to justify the continued toleration of compelled speech and association."** And he notes: "Indeed, in the last 50 years, the Court has overturned no fewer than seven precedents in the free-speech context alone."

➤➤ **Mayer Brown's Andrew Pincus, representing a group of constitutional law scholars**, **counters**: "Concluding that a prior decision interpreting the Constitution may be wrong is not sufficient to justify overruling. Rather, the Court must find a special justification' to disregard the presumption and take that unusual step." That justification, he adds, is rarely present and **"all of the relevant factors weigh strongly against overruling Abood."**

➤➤ Attacking *Abood* on another front, **Baker & Hostetler's Andrew Grossman** on behalf of the Competitive Enterprise Institute, which brought the 2016 challenge to the high court, **accuses public sector unions** since Abood of showing "unbridled creativity in channeling the fees paid by non-members to fund a range of ideological activities as wide as any political party's."

➤➤ **But in a brief in support of neither party, Sidley Austin's Virginia Seitz**, representing **major public accounting firms** that audit labor unions, tells the court that **independent auditors provide assurance that "union-claimed expenditures were actually made for the specific claimed expenses,"** and that the allocation of those expenses to the chargeable or nonchargeable category is fairly presented."

➤➤ In a twist, **Harvard Law's Charles Fried** and **Yale Law's Robert Post,** represented by **Seth Waxman of Wilmer Cutler Pickering Hale and Dorr**, offer the justices **an entirely different path**: Adopt the "statutory-duties test" proposed by Justices Scalia, Sandra Day O'Connor, Anthony Kennedy and David Souter, in *Lehnert v. Ferris Faculty Assn*. That test looks to "whether the union engages the government as an employer within a statutory system of labor relations, or instead as a sovereign, outside of the strict context of employment."

➤➤ And the Trump administration, in a brief by **U.S. Solicitor General Noel Francisco supports overruling** *Abood*—a switch from the Obama administration position.