PUBLIC EMPLOYERS AND UNIONS HOLD BREATH AS HIGH COURT PONDERS WHETHER PUBLIC EMPLOYEES CAN BE COMPELLED TO PAY DUES

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The U.S. Supreme Court will recess for the summer at the end of June. But before doing so, it must decide the remaining cases on its docket from the October 2013 term, including *Harris v. Quinn*. Strangely, this case has received relatively little attention in the press, even though its potential significance is enormous. Its outcome could dramatically curtail the influence of public unions.

One reason why *Harris v. Quinn* has not drawn so much attention perhaps is that the underlying issue may appear obscure at first blush. The eight plaintiffs are home care assistants. Seven provide care to family members under a Medicaid program, which is administered by the State of Illinois. In order to participate in the program, the plaintiffs must contribute dues to a union that represents state home care workers, even though the plaintiffs themselves have declined union membership. The plaintiffs, however, object that they should be permitted to keep the money that they must now hand over to the union.

Before the lower courts, the plaintiffs argued primarily that they were not state employees at all. Rather, they worked for their disabled family members, who after all had selected them as caregivers. Before the Supreme Court, though, the focus of the case shifted. A secondary question — whether Illinois' requirement that they contribute to the union violated their free speech and freedom of association rights under the First Amendment — took center stage.

To be sure, Illinois has never forced the plaintiffs to contribute money toward the union's political activities, as this requirement would be unconstitutional under established precedent. Rather, the state mandates only that they pay the union's "agency" costs, or, in other words, their share of the union's costs in negotiating and administering the collective bargaining agreement governing their compensation, benefits, and working conditions. This requirement is consistent with the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, which held that public employees could be compelled to contribute to a union's agency costs, provided that they were not required to join the union or contribute towards its political speech and non-agency related activities. The plaintiffs, however, insist that negotiations

also constitute protected political speech, so they should not be compelled to pay even the agency costs permitted under *Abood*.

Quinn's potential significance can hardly be understated. If the plaintiffs succeed in overturning *Abood*, then any public employer — whether on the local, state, or federal level — would effectively become a "right to work" shop. In other words, unions could still organize their employees but they would have no ability to compel non-members to contribute to them. Public unions would then face what is sometimes characterized as the "free-rider" problem. Workers would lack a strong incentive to contribute to unions as they would be able to capture the benefit of union activities without anteing up any dues. Certainly, experience in "right to work" states — where union "security clauses" requiring non-member employees to contribute to union expenses are already outlawed — teaches that unions rarely thrive under such conditions. As a result, the political and economic landscape of states like Illinois and New, York where public unions have long exerted significant influence, would be greatly transformed.

Of course, it very much still remains to be seen how the court will rule. At oral argument, at least two conservative justices, including the court's usual swing vote, Justice Kennedy, appeared fully receptive to the plaintiffs' First Amendment arguments. By the same token, the court's four liberal justices were openly hostile to any suggestion that *Abood* should be revisited. But the court may well not breakdown along its accustomed ideological lines on this one. Justice Scalia, in particular, appeared disinclined toward abolishing *Abood*'s distinction between political speech and non-political union activities, whose logic he endorsed in a separate opinion he penned in *Lehnert v. Ferris Faculty Association*, a decision that was handed down in 1991. And the court could certainly find ways to rule in favor of either side while skirting the most explosive First Amendment issues. Still, public employers and unions have reason to hold their breath until *Harris v. Quinn* is decided given the potentially game changing consequences.