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Labor Watch

Turning Points in the Fight Against Forced Unionism?

Two cases offer the U.S. Supreme Court opportunities to stop abuses

By Stan Greer

Summary: *The National Labor Relations Act declares that "encouraging the practice and procedure of [monopolistic] collective bargaining" is "the policy of the United States." Federal courts have often treated that declaration as if it authorized union officials to do whatever they deem necessary to bring employees into unions. Fortunately, in one case heard in November and another set to be heard this month, the U.S. Supreme Court may identify some important limits on union officers' special legal privileges.*

Bill Messenger (*right*) of the National Right to Work Foundation represented parties in the Supreme Court cases *Mulhall* and *Harris*.

The National Right to Work Legal Defense Foundation provides legal representation to Americans who are fighting compulsory membership in labor unions, or compulsory payments by workers to those unions. Currently, the Foundation has two cases before the United States Supreme Court, the *Mulhall* case and the *Harris* case. Depending on the outcomes, these cases could have significant impacts on people's right to choose whether to join labor unions.

First, let's look at the case of *UNITE HERE Local 355 v. Mulhall*, which was heard recently by the U.S. Supreme Court. The case stems from a so-called "neutrality" deal forged in 2004 between hotel workers' union bosses in UNITE HERE and an employer, Mardi Gras Gaming. Mardi Gras is the operator of a dog racetrack and a casino located in Hollywood, Florida. UNITE HERE is a union that represents mostly hotel workers and those in related fields such as food and laundry services. [For the history of UNITE HERE, see *Labor Watch*, June 2013.]

Under the terms of the neutrality deal, Mardi Gras agreed to help officials of Local 355 of UNITE HERE secure monopoly-bargaining power over the company's front-line employees. In exchange, the union brass agreed to divert a substantial sum of money from their treasuries, laden with workers' dues, to back a casino gambling ballot initiative that the company wanted passed. Union bosses also promised not to picket or strike Mardi Gras as they sought to unionize its employees.

After the deal was reached, without employees' input, it became clear that many of them did not want to be unionized by UNITE HERE. One employee, groundskeeper Martin Mulhall, was especially determined to prevent UNITE HERE from being imposed on him and his fellow workers. Mulhall was confident that, provided that employees had the opportunity to make their choice in the privacy of a voting booth, Mardi Gras' front-line employees would never vote to make UNITE HERE Local 355 their monopoly-bargaining agent. He was chagrined to learn that, under the terms of the "neutrality"

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deal, UNITE HERE could unionize the workplace without having to face a secret-ballot election first.

Mardi Gras had acquiesced to "card check" recognition of Local 355. That is the sort of thing many businesses have done in recent years in order to avoid Big Labor harassment and negative public relations, or to get something in return from the union. The "card check" process essentially eliminates the secret ballot. Under the longstanding federal court interpretation of NLRA Section 9(a), union organizers may acquire monopoly-bargaining power by collecting signed "union authorization cards," if the employer acquiesces. Consequently, under the peering eyes of union organizers individual workers may be intimidated into unionizing—signing not just themselves, but all of their nonunion fellow employees, over to union officials' control.

Mulhall believed that UNITE HERE organizers would never be able to win over a majority of employees without coercion, but that absent the protection of a secret ballot, the union could prevail if given a "card check" process and the opportunities for intimidation it would provide.

That's especially true because there's little chance that union professionals would share a critical fact with hesitant employees: that the cards, if signed by a majority, bring the union in automatically, with no secret-ballot vote ever required. Under pressure from union organizers, employees often sign such cards because they incorrectly assume—or are dishonestly told by the union—that by signing they are just calling for an election in which they will later have a chance to vote against the union.

Mulhall was determined to stop the "card check" scheme, but he didn't know how. He reached out to the National Right to Work Legal Defense Foundation, and in 2008 foundation attorney Bill Messenger filed, on Mulhall's behalf, a federal suit alleging that key provisions of the "neutrality" deal between Mardi Gras and Local 355 violate the law. The deal has not (as yet) led to unionization of Mardi Gras employees; the company eventually concluded the deal was illegal and repudiated it. I say "as yet" because Local 355 has attempted to enforce the "neutrality" deal in court. Thus, the *Mulhall* case remains active and in need of resolution. **[See the update on page 3.]**

The case was heard by the U.S. Supreme Court on November 13. Lawyers for Martin Mulhall do not contend that "card check" deals *per se* are illegal. However, as a practical matter, Mulhall represents a grave threat to "card check" organizing. That makes the case critically important because, according to the best available evidence, "card check" has become private-sector unions' most important method of organizing.

No wonder Benjamin Sachs of Harvard Law School has referred to *Mulhall* as, potentially, "the most significant labor case in a generation." Sachs' assessment has been quoted in dozens of mainstream and specialized legal media reports on the case.

Gag clause a 'thing of value'

The major issue in the *Mulhall* case relates to whether key elements of the agreement between UNITE HERE and Mardi Gras constitute a "thing of value." The NLRA law's Section 302(a)(2) makes it

> unlawful for any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, *any money or other thing of value* . . . to any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees, of such employer [emphasis added].

And Section 302(b)(1) makes it unlawful for any union or union officer "to request, receive, or accept, or agree to accept" any such "thing of value."

As Bill Messenger, attorney for the National Right to Work Legal Defense Foundation, explained in a brief to the Supreme Court, Congress adopted Section 302 largely in recognition of the fact that union monopoly bargaining as authorized and encouraged by the statute "creates a fiduciary relationship." A fiduciary relationship is one of trust, such as between a trustee and a beneficiary; a trustee must act in the interests of the beneficiary. For example, an attorney must operate in the interests of his or her client. The NLRA-promoted fiduciary relationship between union officers and unionized employees is another example.

Messenger argued that Congress had adopted Section 302 largely to forestall "conflicts of interest in labor relations." In support of this view, he quoted a U.S. Senate report on the 1959 NLRA amendments that extended the section to cover any union seeking to organize an employer's employees:

> For centuries, the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve.

Agreements to "pay, lend, or deliver" things of value to employees themselves, rather than to union officials,

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Update: U.S. Supreme Court punts on *Mulhall*

As this issue went to press, the Supreme Court surprised observers by reversing itself in the *Mulhall* case—deciding (for now) not to decide.

That leaves the earlier ruling by the 11th Circuit Court of Appeals in effect, but only in the 11th Circuit, the region made up of Alabama, Georgia, and Florida. That earlier ruling favored the plaintiff, the worker Mulhall, and was a defeat for labor unions, as well as for businesses that pressure their workers into joining unions, in return for special union favors.

But two other circuit courts have ruled differently. The Supreme Court refuses to resolve the inconsistency, and so, for now, the law will be interpreted differently in different parts of the country.

Earlier, the Court accepted the case for review. (In lawyers' terminology, the justices "granted *certiorari*," "cert." for short.) Lawyers for the two sides argued the case before the Court, and the case appeared headed for a resolution. Then, however, the Court reconsidered its grant of *certiorari*. The one-sentence decision declared that the earlier decision to hear the case was "improvidently granted."

Because the Court didn't explain its rationale, observers seeking to make sense of it all were forced to turn to the dissenting opinion by three left-wing justices, Stephen Breyer, Elena Kagan, and Sonia Sotomayor. It's rare for the Court to reverse itself at this stage, and rarer still for anyone to dissent from such a reversal.

Why did they do it? One guess: The Court's radicals believed that they could throw the case out on a technicality, that Mulhall didn't have standing to sue. (The law puts strict limits on who is legally allowed—has "standing"—to file such a lawsuit.) At the same time, members of the Court's moderate-to-conservative wing believed that, if the case were decided on its merits, Mulhall would win. So, rather than have the case decided on a technicality that would have (in layman's terms) let the bad guys win, the more mainstream members of the Court chose to freeze everything for now.

After the Court issued the dismissal, Prof. Jack Goldsmith of Harvard Law School explained that "as long as [the 11th Circuit's] decision stands, the specter of expensive and difficult litigation will hover over neutrality/bargaining agreements in many circuits, and will indeed chill the making of those agreements." With the federal courts still split on the issue, employees and employers can point to the Mulhall case as a reason to resist union officials' demands for card-check organizing agreements. (Even in the vast majority of the country, where the 11th Circuit's decision isn't the law of the land, business people and union officials will be mindful of the possibility, however slight, that so-called "top-down" unionization/bribery schemes might be prosecuted as criminal acts.)

The socialist publication *In These Times* described the case in a headline: "Supreme Court Dismisses Mulhall v. Unite Here, Giving Labor a Lucky Break" and noted that "Unions dodged a bullet" when the Court dismissed "the strange and potentially disastrous case. . . . Making neutrality agreements a crime would have struck at the heart of organizing as it is practiced today. The neutrality approach—in which the employer agrees not to oppose an organizing campaign—has been the mode of choice in most union drives since the '90s. The employer usually further promises to "card check," which means that it will recognize the union if a majority of the employees sign cards stating their desire for union representation."

Among the dangers to unions if the case had continued, as noted by *In These Times*: "scaring some potentially cooperative employers into demanding [unionization] elections" and "posing a possible danger [for criminal prosecution] in the hands of a future, zealous Republican U.S. Attorney." In addition, if the case had continued to fruition, an unfavorable-to-unions decision would have stripped away some of the jurisdiction in such cases of the National Labor Relations Board, currently controlled by Obama appointees.

The pro-Obama blog *Think Progress* reported: "The [dismissal] means the Roberts Court will not have the opportunity to weaken a key tool in modern labor organizing. . . But it also means a federal appeals court decision invalidating the tactic will stand."

Mark Mix of the National Right to Work Committee touted the dismissal as a success, because it will have the effect of "limiting the potential for backroom deals between union organizers and company officials. Management shouldn't be allowed to turn over employees' personal information to aggressive Big Labor organizers as a negotiating tactic."

The *Wall Street Journal* editorialized: "The Supreme Court doesn't usually make news when it fails to decide a case, but this week it did on a major labor relations question. Rarely has the lack of a ruling been so intriguing. . . . Let's hope the Justices find another case soon to make clear that such sweetheart deals [as in the Mulhall case] are illegal." —SJA

At war with itself: Forced unionism and the National Labor Relations Act

The original version of the National Labor Relations Act of 1935 (NLRA), popularly known as the Wagner Act, was upheld by the U.S. Supreme Court three-quarters of a century ago. Since then, federal labor policy has been at odds with itself. In its various iterations over the years, federal labor law has always included provisions that amount to Congress putting its thumb on the scale in favor of the collectivization of employees. Yet the Wagner Act and subsequent statutes also include provisions suggesting that federal policy must be neutral—that employees' freedom *not* to join a union is also protected by law.

Here are illustrations of the contradiction between being pro-union and being neutral:

► On the one hand, the NLRA's Section 1 ("Findings and Policies"), as currently amended, states:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . *by encouraging the practice and procedure of collective bargaining* [emphasis added]. . . .

The "declaration of purpose and policy" in Title II of the 1947 Taft-Hartley Act, which amended the NLRA law, even more resoundingly favors "exclusive" union bargaining over individual negotiations between employees and employers:

> sound and stable industrial peace . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the [union] representatives of their employees.

► On the other hand, several NLRA clauses seem to say employees should be free to reject unionization. Even if federal labor law regards contracts—that is, contracts agreed upon by employers and union officials acting as employees' "exclusive" bargaining agents—as the "most satisfactory" means of achieving industrial peace and other desirable ends, employees can still opt against them. NLRA Section 1 declares it is U.S. policy to

> protect[] the exercise by workers of *full freedom of association*, self-organization, and designation of representatives *of their own choosing* [emphases added].

And the first 57 words of Section 7 give the impression that employees are free to reject association with unions:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

However, the following 29 words strip Section 7 of much of its meaning.

> . . . except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Sec. 8(a)(3) . . . .

In other words, Section 7 at first appears to recognize that any worker should have freedom of choice–

• to join or bankroll a union, even if most of his fellow employees don't want one, or

• *not* to join or bankroll a union, even if most of his fellow employees want one.

But then it "clarifies" that the freedom of the worker who doesn't want a union is contingent on what his fellow employees and employer think.

Section 7 first acknowledges, then tramples a worker's personal right to withhold support from a union. This nonchalance prompted former National Right to Work Committee President Reed Larson to call it "one of the most cynical exercises in legislative deception on record."

The NLRA does at least specify that it's only under certain conditions that union organizers can acquire monopoly power in a workplace, that is, the power to bargain over the pay, benefits, and other working conditions of all the employees in a group. Only if a union has been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" may it become the "exclusive representative."

Receiving 'information opposing unionization' is a right

The NLRA also tacitly recognizes that, before employees collectively decide whether or not they will be unionized, they have a right to information that runs counter to the union's point of view. As then-Justice John Paul Stevens put it in a 2008 majority opinion for the U.S. Supreme Court, there is an "underlying right to receive information opposing unionization."

Arguably, the protection of employees' right to hear both sides of the story is the primary purpose of NLRA's Section 8(c). That section states that, with regard to the actions of employers, union officials, or their respective agents, "expressing of any view, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . "

Speech opposing unionization is protected as long as it "contains no threat of reprisal or force or promise of benefit." Section 8(c) invalidates any bureaucratic regulations or court decisions that would hand union organizers undue power to prevent employees from receiving "information opposing unionization."

Of course, under the First Amendment, the NLRA cannot *compel* any employer to explain to employees why unionization may be against their best interests.

Likewise, the NLRA cannot prevent employers from ordering their managers to keep their mouths shut on the topic, to refrain from saying anything "anti-union." But federal policy can and should seek to encourage "free debate on issues dividing [organized] labor and management," as Justice Stevens put it, because such debates help protect employee rights.

Don't get me wrong. Neither the original NLRA nor the current version (the NLRA as amended) provides adequate protection for the employee's personal right to refrain from union affiliation. Still, any reasonable reading of the current NLRA bars employers from colluding with unions to push their employees into unionizing.

Again, employers may choose unilaterally to remain silent and keep their managers silent in the face of a union organizing drive, but they may not cut a deal with organized labor to undermine employees' right not to unionize.

'Excess profits' the justification for the NLRA

The NLRA is a radical law, period. Under the NLRA, a private-sector employer, willing or not, is forced to negotiate with a union deemed to have the support of a majority of the employees in a federally delineated "bargaining unit." All "unit" employees, willing or not, are forced to accept that union as their monopoly-bargaining agent.

In the mid-1930s, Congress had a very specific economic rationale for favoring a new federal policy that, as one early proponent admitted, "makes the intent of any or all of the individual employees immaterial."

That rationale was the "excess profits" theory. Senator Robert Wagner (D-N.Y.), the lead Senate sponsor of the NLRA ("Wagner Act"), spent several years laying the groundwork for the act's passage by blaming the Great Depression on "excess profits." On May 15, 1935, when the NLRA was being considered on the Senate floor, Wagner opened the proceedings with a lengthy address hammering home the point that "excess profits" for business were harming America and prolonging the Depression.

Less than two months later, the Wagner Act was signed into law, but few of the directly affected parties expected it to withstand a court challenge. In April 1937, the Supreme Court astonished practically every observer by upholding the NLRA by 5-4. The law quickly accomplished what Wagner had intended: Unionization flourished, profits plummeted, and wage rates rose.

Otherwise, however, things did not turn out quite as planned. Until 1937, private-sector employment had increased every year since 1932, for a total gain of nearly 6.9 million jobs. At the beginning of 1937, private-sector employment was on track to equal and surpass its pre-Depression 1929 high of 28.3 million within a year.

Then things changed. Just a few months after the Supreme Court upheld the Wagner Act, the bottom fell out of the economy. Some 1.9 million jobs disappeared in 1937. Private-sector employment didn't reach its pre-Depression level until 1941, as the nation mobilized for World War II.

The monopolistic unionism promoted by the Wagner Act compromised efficiency and profitability by forcing employers to equally reward their most productive and least productive employees. Therefore, wage increases for some workers resulted in widespread job losses. Apologists for the NLRA typically gloss over this disaster, and instead try to give the law credit for the prosperity of the 1950s and 1960s. The facts belie this: Private-sector unionism peaked in the early 1950s.

From 1953 to 1973, the share of private-sector workers who were union members dropped from 35.7% to 26.6%. To the extent the 1950s and 1960s really were a time of strong economic growth, the data indicate *de-unionization* may plausibly be credited as a cause.—SG

Turning Point

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are indisputably permissible. The only "things of value" prohibited are those rendered by employers to union *officials* (except for some explicit exceptions in the law).

In the case now before the Supreme Court, Mulhall contends that three types of organizing assistance promised by Mardi Gras to Local 355 as part of their "neutrality" deal constitute "things of value" prohibited by Section 302:

> (1) lists of confidential information about Mardi Gras' nonunion employees, including their "job classifications, departments, and addresses"; (2) use of Mardi Gras' private property for organizing; and (3) control over Mardi Gras' communications to nonunion employees regarding unionization . . . . The last provision [of the deal] stated that "[t]he Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer" to unionization or any particular union.

The Obama administration involved itself directly in the case, filing a "friend of the court" brief. While urging the Supreme Court to find that Local 355 had not violated Section 302, Solicitor General Donald Verrilli conceded that "courts generally construe" the term "thing of value" to include "both tangibles and intangibles." He noted:

> Courts have found a wide variety of goods, services, and benefits to be "things of value" within the meaning of the criminal laws.

Mulhall's brief added that to be a "thing of value" under Section 302, a service or benefit need only be of value to the union officials receiving it. Moreover, each of the neutrality pact provisions at issue has a market value, albeit one

it is difficult to assess with any precision, and can be "delivered" to union representatives.

For example, the gag rule provision is legally comparable to one business agreeing with another (assuming the agreement is permissible under antitrust law) not to fight for customers in a particular market, in exchange for some other consideration:

> . . . Coca-Cola certainly delivers something of great value to Pepsi if it enters into a noncompetition agreement that bars it from advertising or competing against Pepsi in a particular market.

No 'successful union organizing' without employer collusion?

Questioned during November's Supreme Court hearing on the *Mulhall* case, UNITE HERE lawyer Richard McCracken had a tough time defending his claim that gag rules, lists of employee names and addresses, and use at no cost of an employer's facilities are not "things of value" under Section 302. Even Deputy Solicitor General Michael Dreeben, who also appeared before the Court to argue that UNITE HERE bosses had not violated the law, undercut McCracken on this key point when he admitted:

> Certainly, read in isolation, the words "thing of value" are very broad. In other statutes, they cover intangibles. We would have no problem treating the things here as things of value under . . . 302 if that's the only thing that existed.

But Dreeben contended all this shouldn't matter, because union organizers have a right to seek recognition from an employer as employees' monopoly-bargaining agent based on signed cards alone, without a secret-ballot election. That's under NLRA Section 9(a), as interpreted by the Supreme Court in *National Labor Relations Board v. Gissel Packing* (1969). If the employer acquiesces, union bosses have a right to unionize employees through such "card checks" without a vote.

"Card check" recognition is obviously a thing of value to organized labor, Dreeben noted. Because it is permissible for employers to deliver such recognition to union officials, he claimed, it should also be permissible for employers to deliver to union officials virtually any other kind of organizing assistance, regardless of what Section 302 says.

The administration's Dreeben and UNITE HERE's McCracken evidently did not think it prudent to baldly claim, as Sachs of Harvard Law School had in a blog post the day before, that "effective union organizing" in the private-sector today relies on employer collusion in the form of gag rules, lists of information, and use of property. Yet Dreeben made the same point more circumspectly. He suggested the Justices should rule against Mulhall because employers' "voluntary" recognition of unions through "card checks" is not merely a "permissible" element but a "favored" element of national labor policy.

But that's wrong. In reality, the Supreme Court in the 1969 Gissel case acknowledged that "secret elections," not "card checks," are the "preferred" method "of ascertaining whether a union has majority support." Therefore, there is no plausible reason to ignore the literal meaning of Section 302 in order to avoid hindering Big Labor from securing monopoly-bargaining privileges through "card checks," even though "card checks," with organizing assistance from employers, have become unions' favored *modus operandi*.

As the attorney Bill Messenger observed in response to a question from Justice Sonia Sotomayor, "nothing gives [UNITE HERE] any right to the three things it demands from Mardi Gras. So enforcing 302 in this case cannot conflict with the NLRA."

Case #2: Forcing caregivers to join unions

If it comes out wrong, the Supreme Court case of *Harris v. Quinn*, set to be argued this month, could take the country much further down the road of Big Labor coercion. Or it could go in the other direction, revoking forced-dues privileges that government unions have exercised in many jurisdictions for more than four decades.

The lead plaintiff in *Harris* lives in a Chicago suburb and is the mother of a young adult son with severe developmental disabilities. In fall 2009, Pam Harris received a form letter from agents of Gov. Pat Quinn (D-Ill.). It informed her that, as a care-provider for her son in the state Disabilities Program, she now could cast a mail-ballot vote on which of two unions would be installed as her monopoly-bargaining agent in her dealings with the state. The letter Harris and several thousand other Disabilities Program providers received did not clearly state that they could opt for no union representation at all.

How did top bosses of the Service Employees International Union (SEIU) and the American Federation of State, County and Municipal Employees (AFSCME) get the opportunity to compete for control of Disabilities Program providers? They owed it all to Executive Order 2009-15, issued by Quinn on June 29, 2009.

Participants in the Illinois Home Based Support Services Program for Mentally Disabled Adults receive taxpayer-funded subsidies from the state to help cover the cost of care. Adults, or their legal guardians, may use their subsidies to compensate care-providers. Executive Order 2009-15 was crafted to enable one union to secure recognition from the state as these providers' exclusive representative in their dealings with the state, and then to extract forced dues or fees from the providers.

For many years before, Big Labor had wanted to corral taxpayer-subsidized home care providers across Illinois into government unions, but had not been legally able to do so. The courts had held the providers were not public employees, because they are not supervised, hired, or fired by the state.

Quinn's edict did nothing to change the underlying facts, of course. It simply declared that, even though citizens like Pam Harris aren't supervised, hired, or fired by the state of Illinois or any of its subdivisions, the fact that they are paid and regulated by the state suffices to justify classifying them as public employees solely for purposes of unionization.

If the schemes concocted by Pat Quinn and other opportunistic Big Labor politicians in multiple states over the past few years—schemes to expand the reach of public-sector monopoly unionism—are constitutionally permissible, the implications are enormous. Doctors who accept patients under Medicare and/or Medicaid could be forced by gubernatorial executive order or state legislation to accept a particular private organization as their lobbying agent. Moreover, doctors could be forced to pay mandatory dues and fees to such an organization. Similarly, impoverished parents who participate in the "food stamp" program could be forced to join or pay fees to a government-designated lobbying agent. (For more on schemes to unionize private citizens who receive government assistance, see *Labor Watch*, Nov. 2012.)

Harris, other care-providers cry halt

Over the course of the rigged Disabilities Program provider "election" in fall 2009, Harris and other parents pooled their money to print and distribute a flyer countering the Quinn team's propaganda. The independent-minded providers' shoestring effort succeeded. Providers ultimately voted two to one for "no union." Nevertheless, SEIU and AFSCME union officers continued to press ahead with their efforts to gain forced-dues privileges over caregivers.

In *Harris v. Quinn*, Pam Harris and other Disabilities Program providers are seeking relief from these unionization efforts (continued under a program established by Quinn's predecessor, the now-jailed Gov. Rod Blagojevich). They have been joined by several at-home caregivers who are being forced to pay union dues as a condition of receiving state assistance. Like Martin Mulhall in his case, the plaintiffs in the Harris case are represented before the Supreme Court by Bill Messenger of the Right to Work Foundation.

During oral arguments on January 21, Messenger will ask the Supreme Court to protect his clients from compulsory payments to unions by overturning *Abood v. Detroit Board of Education*, a 36-year-old case that invoked the "free rider" excuse to force workers into unions. Under this theory, workers who don't pay forced union dues would get a "free ride" with regard to the benefits of the union's bargaining and contract administration (benefits unsolicited by the workers, of course). Messenger will respond by citing a recent Foundation-won Supreme Court case, *Knox v. SEIU Local 1000*, in which Justice Samuel Alito observed in his majority opinion that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." Alito added that perhaps *Abood* had crossed "the limit of what the First Amendment can tolerate." (For more on *Knox v. SEIU*, see *Labor Watch*, Oct. 2012.)

Messenger will also argue that, even should the Court balk at reversing Abood, his clients must not be forced to pay union dues or face the imminent threat of forced-dues payments, because they are not employed in any government workplace. Therefore, there exists not even a theoretical possibility of "labor peace" in the workplace being disrupted by so-called "free riding," as the *Abood* opinion had envisioned.

'First Amendment values are at serious risk'

A *Harris* ruling that neither revokes Abood's constitutional waiver for public-sector forced union dues nor finds the plaintiffs outside of Abood's reach would have very dark implications for personal liberty and the democratic process.

In a November 2011 petition asking the Supreme Court to accept the case, Messenger reminded the Court that, outside the realm of labor-management relations, it has up to now been very reluctant to uphold statutes or executive orders that impose "compulsory advocates" on individual citizens. He quoted the Court's 2001 ruling in *U.S. v. United Food*s:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.

In short, *Abood* blew a hole in the First Amendment, but a victory for the Quinn Administration and Big Labor in *Harris* would greatly expand that hole and jeopardize the free speech rights of millions of citizens who have been protected up to now.

That's why, as high as the stakes are in *Mulhall,* the stakes in *Harris* appear to be even higher.

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LaborNotes

The latest effect of labor reforms by **Gov. Scott Walker** (R-Wisc.) is the loss of certification by two public-sector unions, the **Wisconsin Association for Correctional Law Enforcement** and the education unit of **Council 24** of the **American Federation of State, County and Municipal Employees** (AFSCME). The reforms require that to be re-certified, unions must receive the votes of at least 51% of all eligible union members, not just a majority of those voting. Three other government-employee unions were successfully re-certified. Another effect of Walker's reforms: membership in AFSCME's **Council 40** has dropped more than 35% in two years, from 31,730 to 20,488.

The reinsurance tax in Obamacare is intended to guarantee profits for health insurance companies, which supported the law. This year, it will amount to $44 per beneficiary. It would have been $42, but was raised to cover the shortfall when unions' healthcare plans were granted a special-interest exemption by the Obama administration.

U.S. Bankruptcy Judge Steven Rhodes ruled that **Detroit** is eligible for Chapter 9 bankruptcy—which means that city government can restructure (i.e., cut) its workers' pensions. The **American Federation of Teachers** and the AFSCME asserted that the **Michigan** state constitution forbids such cuts; they claimed the city wasn't really insolvent and **Gov. Rick Snyder** (R) had improperly forced the city into bankruptcy, but Judge Rhodes rejected those arguments. The city has an estimated debt of $18 billion.

The Detroit case is critical because the unfunded pension liabilities of state and local governments threaten the nation's financial stability. A pension fund is considered sound if at least 80% of its obligations are funded; only 12 states meet that threshold.

On December 5, hundreds of protests occurred across the country in support of raising the so-called minimum wage for fast-food workers to $15 an hour. Most of the protesters weren't fast-food workers at all, and were paid to protest by unions, particularly the **Service Employees International Union** (SEIU). ***Bloomberg BusinessWeek*** notes that the protests represent a new union strategy: "The SEIU says workers aren't organizing the traditional way—restaurant by restaurant, vote by vote—and they don't yet know what their union would look like. 'It's not predetermined what form this will take,' says **Mary Kay Henry**, SEIU's president. 'We would be creating something new.'"

Because the cost of a worker actually includes taxes and mandated benefits, it's actually higher than the stated wage. For example, the **Heritage Foundation** calculates that, counting Obamacare, the current $7.25 will actually be $10.30 an hour in 2015, even if the minimum isn't raised. Under pressure from the **President**, **Congress** will probably raise the minimum to $10.10, which is really almost $13 an hour.

Washington, D.C. is one of the richest places on earth, and only about 4,000 of D.C.'s 745,000 workers currently receive the so-called minimum wage. In 2013, members of the **City Council** tried to push through a $12.50-an-hour minimum that would have applied to **WalMart** and almost no other employer. For most other businesses, the minimum would have been $8.25; those businesses would have benefitted at WalMart's expense. WalMart threatened not to open six stores planned for the city, and the mayor vetoed the measure.

Here's where the D,.C. situation gets weird. **Sean Higgins** in the ***Washington Examiner*** reported: "The D.C. Council began the year by trying to pass a minimum wage hike intended to bring to WalMart to heel. It is ending the year by pushing a minimum wage increase that would likely benefit WalMart. . . . [The change, probably to $11.50] would have the unintended effect of helping to insulate D.C.'s six new WalMarts from economic competition. The chain will be able to pay the new higher wage—in many cases, it already does—but local mom-and-pop stores may not. . . 'Small businesses are the least able to absorb . . . a dramatic increase in their labor costs,' notes the **National Federation of Independent Business**." The peculiar politics of the minimum wage—the council trying to use it to hurt WalMart, then trying to use it to help WalMart—proves a maxim of journalist **M. Stanton Evans**: "Liberals don't care what you do, as long as it's compulsory."