



Justice Deferred

Supreme Court lets agency fees stand

by JOSHUA DUNN

Predicting how the U.S. Supreme Court will rule based on oral arguments is a risky business, and that reality came into high relief after Justice Antonin Scalia’s unexpected passing in February. After the January 11 arguments in *Friedrichs v. California Teachers Association*, a majority of the justices were

clearly poised to overturn a 38-year-old mistake and eliminate one of the most cherished powers of teachers unions—the authority to confiscate money from nonmembers. But Scalia’s death led to a split decision, leaving the union’s power intact, at least for now, and raising the stakes in this year’s presidential election.

In 1977, the court held in *Abood v. Detroit Board of Education* that public employees could not be compelled to join a union but could be forced to pay “agency” fees, AKA “fair-share” fees, to help cover costs associated with collective bargaining. Unless all workers were required to pay, union leaders argued, many nonmembers would become “free riders” who didn’t contribute their fair share.

For teachers unions, *Abood* has been a financial windfall. In states that allow agency fees, more than 90 percent of teachers join a union, while only 68 percent join in states that don’t. Since agency fees cost a teacher nearly as much as union dues, many see little reason not to join the union and get full membership benefits. As well, unions impose opt-out policies requiring teachers to “affirmatively decline” every year to support the political activities of the union, which allows them to request a partial refund of their dues.

In 2013, California teacher Rebecca Friedrichs and eight others filed suit contending that the mandatory fees violated their rights to freedom of speech and association. To expedite the case, they asked the Ninth Circuit Court to rule in favor of the union in hopes of sending the case straight to the Supreme Court. Under existing precedents, the plaintiffs pointed out, the union’s case would probably hold, but new rulings had called those precedents into question, making the Supreme Court the only one that could adjudicate the teachers’ claims. The Ninth Circuit agreed, setting up a January showdown before the Supreme Court.

At oral argument, the plaintiffs seemed to carry the day. Roberts, Scalia, and Alito pointed out that the union’s position rests on a false assumption: that one can draw a clear line between the political and nonpolitical activities of public-sector unions. Scalia contended that one cannot, that

“everything that is collectively bargained with the government is within the political sphere.” The only way for unions to credibly claim they represent the interests of all teachers is to assume that all teachers have the same preferences. But the very existence of *Friedrichs* shows that to be false. Justice Kennedy said that the “union is basically making these teachers compelled riders for issues on which they strongly disagree.” In short, it’s not a free ride if you never wanted the ride. It’s more like being clubbed in the head, tied up, and thrown in the union trunk.

Notably, the best evidence for the weakness of the union’s position came from the court’s liberal bloc of Breyer, Sotomayor, Kagan, and Ginsburg, who made little effort to dispute the plaintiff’s First Amendment arguments. Instead, those justices mainly argued that *Abood* should be upheld because the case “was [decided] forty years ago” and overturning such a “deeply entrenched” precedent would be unsettling. Fundamental rights, however, do not normally yield to that kind of utilitarian calculus, and hiding behind *stare decisis* looked like weakness, not strength.

After oral argument, *Friedrichs* was set to become one of the most significant cases of this term, but Scalia’s death threw the outcome into doubt and gave the union hope. That hope was confirmed in March, when the court issued a *per curiam* decision, saying, “The judgment is affirmed by an equally divided Court.”

Despite this decision, the future of *Friedrichs* remains uncertain. The court’s judgment leaves the Ninth Circuit ruling in place, but it has no precedential value. Once the court has a full complement of members, the plaintiffs will ask the court to rehear the case. Since Scalia’s replacement is unlikely to be confirmed until after the election, it looks like the new president will be the one who determines the final fate of agency fees and teachers’ First Amendment rights.

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