

Collective Panic

Court decision terrifies unions

by JOSHUA DUNN and MARTHA DERTHICK



Teachers unions have had a rough few years. Charter schools, which are rarely unionized, have grown in popularity; several states, including Alabama, North Carolina, Michigan, and Kansas, have passed laws forbidding school districts from collecting union dues through payroll deductions; other

states, such as Wisconsin, have limited the unions' bargaining rights to wages only; and tenure protections have been attacked through pathbreaking litigation in California (see "Script Doctors," *legal beat*, Fall 2014). Membership in the National Education Association (NEA) has fallen by 9 percent since 2011, with the union losing nearly 200,000 active members. In what could be the most ominous development of all, the Supreme Court indicated this past summer that the freedom to collect fees from nonmembers, a prerequisite for union strength and to some union advocates even their survival, could be at risk.

In *Harris v. Quinn*, the Court addressed the power of public-sector unions to force home-health-care workers in Illinois who refused to join a union to pay agency fees. Under state law, these employees still had to pay the Service Employees International Union their "fair share" for the privilege of being represented. The union argued that these nonunion workers otherwise would be "free riders" who would benefit from the higher wages negotiated by the unions without having paid for the cost of bargaining.

The eight workers who challenged the Illinois statute argued that compelling them to pay agency fees violates their First Amendment free-speech rights. By a narrow majority, 5–4, the Court agreed. The Court's ruling was explicitly confined to workers who are not "full-fledged public employees." The plaintiffs, according to Justice Alito's majority opinion, were not "full-fledged" because they were supervised by private individuals, in this case the patients receiving care, and merely received compensation from the state.

Public-employee unions avoided a catastrophic blow because the ruling was limited to this narrow class. Crucially, the Court declined the plaintiffs' request to overturn a 1977 ruling in *Abood v. Detroit Board of Education* that allowed teachers unions to collect agency fees from nonmembers for costs related to "collective bargaining, contract administration, and grievance adjustment purposes" but forbid them to use such funds for political or ideological purposes. But lurking in Alito's opinion was language that teachers unions must find alarming. *Abood*, he said, should not apply to partial government employees because of its "questionable foundations."

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The problem with *Abood* was that it "failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." All collective bargaining in the public sector is "directed at the government" and is thus inherently political. As a result, *Abood* created a host of problems in trying to distinguish what unions could and could not force nonmembers to pay for. Thus, while

the Court did not overturn *Abood*, it sent a loud message that its days may be numbered.

The implications of the majority's decision were not lost on the dissenters. Justice Kagan, in an impassioned dissent, argued that it was "impossible to distinguish this case [*Quinn*] from *Abood*." And if the cases are indistinguishable, then *Abood* itself is in danger.

The result of the Court's decision will inevitably be increased political and legal attacks on the power of public-employee unions to bargain collectively. More state legislatures will be inclined to follow the Court's reasoning that compelling nonmembers to pay for collective bargaining violates their free-speech rights.

Even prior to the Court's ruling, litigation that challenges the power of teachers unions to collect agency fees was waiting in the wings. The case is *Friedrichs v. California Teachers Association*, brought by a group of 10 teachers. A federal trial-court judge dismissed the case in December 2013, but the teachers have appealed to the Ninth Circuit for expedited review. The compulsory fees allowed under *Abood*, they claim, violate their First Amendment rights to freedom of speech and association by forcing them to support collective-bargaining activities that they oppose.

Thus, while *Quinn* might have been a glancing blow to their interests, teachers unions are facing imminent direct attacks. Unions, it appears, are defending an increasingly precarious position.

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