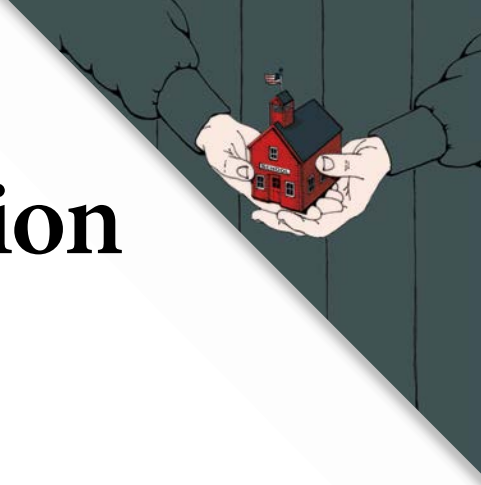

Paycheck Protection

Court upholds Michigan law

by JOSHUA DUNN and MARTHA DERTHICK

Does forbidding public schools from collecting union dues through payroll deductions violate unions' rights to freedom of speech under the First Amendment? Michigan's teachers unions believe that it does, but a federal appeals court in *Bailey v. Callaghan* has disagreed. If the decision stands, it could have significant effects, as other states have passed or are considering similar legislation in the face of terrified union opposition.

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Unions have long viewed attacks on payroll deduction as an existential threat. In 1978, Robert Chanin, the longtime general counsel for the National Education Association (NEA), said, "It is well-recognized that if you take away the mechanism of payroll deduction you won't collect a penny from these people." More recently, Dennis Van Roekel, current president of the NEA, estimated that the loss of payroll deduction would lead to a 30 percent decline in union membership.

In 2012, Michigan passed Public Act 53, which prohibited public schools from using their resources, i.e., payroll deductions, to assist unions in collecting membership dues. Unions would have to collect dues on their own. But because the law applied only to schools and not to other public employers, such as police and fire departments, teachers unions argued that it engaged in unconstitutional viewpoint discrimination.

Their argument required several steps. Payroll deduction makes it easier to collect union dues, and unions use those dues in part to engage in expressive activity. Collecting dues on their own is more costly and less productive for unions because it is easier for teachers to opt out. Citing *Citizens United*, the unions argued that the law would make it unconstitutionally burdensome for them to engage in speech and would diminish the amount of speech they could engage in. And by making it more difficult to collect dues for teachers unions but not for other public employees' unions, the law discriminates against their pro–teachers union viewpoint. Schools' payroll-deduction systems, they argued, are a "nonpublic forum" that they are entitled to use.

A district court judge agreed with the unions and issued an injunction barring the law's enforcement. But a divided Sixth Circuit panel overturned the injunction, ruling that the unions' claims were without merit, and remanded the case. The majority opinion, written by Judge Raymond Kethledge, said that the Supreme Court had held in 2009 that denying use of government "payroll mechanisms" did not violate free-speech rights of unions. But that case involved a total prohibition on union payroll deductions without singling out teachers or any other group of employees. The appellate court nonetheless denied the teachers' claim that Michigan's law unconstitutionally discriminated against them. Because it did not single out unions "based upon whether a union supports or opposes a particular policy position," it did not engage in viewpoint discrimination. The court argued that the law, rather than targeting teachers unions, focused on a particular employer, public schools. The court concluded that the law "does not restrict speech; it does not discriminate against or even mention viewpoint; and it has nothing to do with a forum of any kind."

The dissenter on the three-judge panel, Judge Jane Branstetter Stranch, argued that Michigan had invidious motives for targeting public schools and clearly wanted "to cripple the school unions' ability to raise funds for political speech." Forbidding all public employers from collecting union dues would have been satisfactory under the controlling Supreme Court precedent. But one could also use her reasoning to forbid comprehensive bans. The fundamental problem with Michigan's law, she said, was that it sought to limit a particular type of speech. An identical law that included all public employers could be accused of the very same impermissible animus, since it would have the effect of limiting pro–public-sector union speech.

The unions immediately asked for an *en banc* review. But in July the circuit court declined this request, leaving an appeal to the Supreme Court as the unions' last and not very promising option.

Kansas and North Carolina recently banned payroll deductions, and Indiana is considering a ban as well. Given the threat these restrictions pose to unions, litigation will almost certainly follow wherever they are passed. The Sixth Circuit's decision is a hopeful sign, however, that the federal courts will not find the strained free-speech arguments compelling.

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