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POLITICS

Unions Come Into the Justices' Cross Hairs, Again

Sidebar

By ADAM LIPTAK JUNE 12, 2017

Last year, the Supreme Court seemed poised to deal a sharp blow to public sector unions. Then Justice Antonin Scalia died and the court deadlocked, granting the unions a reprieve.

It may not last long. Last week, a new case raising the same legal question arrived at the court, which is back at full strength with the appointment of Justice Neil M. Gorsuch.

Unions again have reason to be nervous. Having already determined that the issue in the case warrants the court's attention, the justices will probably agree to hear it.

And if Justice Gorsuch votes with the court's more conservative members, which seems likely, millions of government workers in more than 20 states could be

allowed to opt out of paying for collective bargaining, depriving unions of vast sums of money and making them less powerful and effective.

The case is the latest installment in a decades-long campaign by prominent conservative foundations to weaken unions that represent public employees. They contend that requiring government workers to pay fees for collective bargaining and related activities violates the First Amendment.

"For too long, millions of workers across the nation have been forced to pay dues and fees into union coffers as a condition of working for their own government," said Mark A. Mix, the president of the National Right to Work Legal Defense Foundation, which helped bring the new case. "Requiring public servants to subsidize union officials' speech is incompatible with the First Amendment."

The case concerns Mark Janus, who works for the state government in Illinois and is represented by the American Federation of State, County and Municipal Employees. He sued the union, saying he does not agree with its positions and should not be forced to pay so-called fair share fees to support its work.

The union's president, Lee Saunders, said the case was an assault on the labor movement.

"The corporate C.E.O.s behind this case want to take away the freedom of working people to join together in a strong union and negotiate a fair return on their work," Mr. Saunders said in a statement. "The rich and powerful interests behind this case are asking the Supreme Court to further rig the rules against working people and deny them the freedom to join together in a strong union to provide for their families, protect their communities and lift up the concerns of all working families."

If the Supreme Court agrees with the challengers, it will have to overrule a 40-year-old precedent, Abood v. Detroit Board of Education. That decision distinguished between two kinds of compelled payments by government workers who choose not to join unions.

Forcing nonmembers to pay for a union's political activities violates the First Amendment, the court said. But it is constitutional, the court added, to require nonmembers to help pay for the union's collective bargaining efforts in order to prevent freeloading and ensure "labor peace."

Unions say the distinction makes sense. Collective bargaining is different from spending on behalf of a political candidate, they say, adding that nonmembers should not reap the benefits of collective bargaining without paying their fair share of its cost.

The unions' main foe on the Supreme Court is Justice Samuel A. Alito Jr., who has been laying the groundwork for overruling the Abood decision.

In a 2012 decision that made minor adjustments to how public unions must issue notifications about their political spending, Justice Alito paused to raise questions about the constitutionality of requiring workers who are not members to pay fees to unions.

"Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights," he wrote.

Then he seemed to invite a legal challenge. "We do not revisit today whether the court's former cases have given adequate recognition to the critical First Amendment rights at stake," Justice Alito wrote.

The digression alarmed Justice Sonia Sotomayor.

"To cast serious doubt on longstanding precedent," she wrote in a concurrence, "is a step we historically take only with the greatest caution and reticence. To do so, as the majority does, on our own invitation and without adversarial presentation is both unfair and unwise."

In 2014, in a 5-to-4 decision, the court stopped just short of overruling the Abood decision. Justice Alito wrote the majority opinion, and the court's four liberal

members dissented. Again, he seemed to invite a legal challenge that would settle the question for good.

A third case, Friedrichs v. California Teachers Association, soon arrived. When it was argued in January 2016, there seemed to be little question that Justice Alito's views would carry the day. But Justice Scalia died the next month, and unions breathed a sigh of relief when the case ended in a 4-to-4 tie.

The law is not a science experiment, and it is not always easy to assess the impact of a given justice. But there are exceptions. Once in a while, an almost identical legal question reaches the court after a change in personnel.

The new case, Janus v. American Federation of State, County and Municipal Employees, No. 16-1466, will shine a spotlight on Justice Gorsuch, who now holds the decisive vote on a momentous question about the fate of the organized labor movement.

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