

POLITICS

Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4

By ADAM LIPTAK MARCH 29, 2016

WASHINGTON — The Supreme Court handed organized labor a major victory on Tuesday, deadlocking 4 to 4 in a case that had threatened to cripple the ability of public-sector unions to collect fees from workers who chose not to join and did not want to pay for the unions' collective bargaining activities.

It was the starkest illustration yet of how the sudden death of Justice Antonin Scalia last month has blocked the power of the court's four remaining conservatives to move the law to the right.

A ruling allowing workers to refuse to pay the fees would have been the culmination of a decades-long campaign by a group of prominent conservative foundations aimed at weakening unions that represent teachers and other public employees. Tuesday's deadlock denied them that victory, but it set no precedent and left the door open for further challenges once the Supreme Court is back at full strength.

When the case was argued in January, the court's conservative majority seemed ready to say that forcing public workers to support unions they had declined to join violates the First Amendment. Justice Scalia's questions were consistently hostile to the unions.

His death changed the balance of power in this case, and most likely in many others. The clout of the court's four-member liberal wing has increased significantly. Its members — Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — can create deadlocks, as they did Tuesday,

and they can sometimes attract the vote of Justice Anthony M. Kennedy for a liberal result.

Should Senate Republicans relent and confirm Judge Merrick B. Garland as Justice Scalia's replacement, the power of the court's liberals might only grow.

Union officials said they were elated by Tuesday's decision, but they remain wary of future efforts to diminish their effectiveness.

"We know the wealthy extremists who pushed this case want to limit the ability for workers to have a voice, curb voting rights and restrict opportunities for women and immigrants," said Mary Kay Henry, the president of the Service Employees International Union.

The case was brought by the Center for Individual Rights, a libertarian group that pursued an unusual litigation strategy. Responding to signals from the Supreme Court's more conservative justices, the group asked the lower courts to rule against its clients, 10 teachers and a Christian education group, so they could file an appeal in the Supreme Court as soon as possible.

Terence J. Pell, the group's president, said he was disappointed with Tuesday's tie vote.

"With the death of Justice Scalia, this outcome was not unexpected," he said. "We believe this case is too significant to let a split decision stand."

"Either compulsory dues are an acceptable exception to the First Amendment or they are not," Mr. Pell said. "A full court needs to decide this question, and we expect this case will be reheard when a new justice is confirmed."

Under California law, public employees who choose not to join unions must pay a "fair share service fee," also known as an "agency fee," typically equivalent to the dues members pay. The fees, the law says, are meant to pay for some of the costs of collective bargaining, including "the cost of lobbying activities." More than 20 states have similar laws.

Government workers who are not members of unions have long been able to obtain refunds for the political activities of unions, like campaign spending. The

case the court ruled on Tuesday, *Friedrichs v. California Teachers Association*, No. 14-915, asked whether such workers must continue to pay for any union activities, including negotiating for better wages and benefits. A majority of the justices had seemed inclined to say no.

Relying on a 1977 Supreme Court precedent, the United States Court of Appeals for the Ninth Circuit, in San Francisco, upheld the requirement that the objecting teachers pay fees. Tuesday's announcement, saying only that "the judgment is affirmed by an equally divided court," upheld that ruling and set no new precedent.

The unions defending the compulsory fees said the teachers' First Amendment arguments were a ruse. Collective bargaining is different from spending on behalf of a candidate, the unions said. They said the plaintiffs were seeking to reap the benefits of such bargaining without paying their fair share of the cost.

Limiting the power of public unions has long been a goal of conservative groups, and they seemed very close to victory when the case was argued in January.

In 2014, the court stopped just short of overruling the foundational 1977 decision and declaring that government workers who choose not to join unions may not be forced to pay fees in lieu of dues. In the 1977 decision, *Abood v. Detroit Board of Education*, the Supreme Court made a distinction between two kinds of compelled payments.

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 to prevent freeloading and ensure "labor peace."

Tuesday's decision was the second deadlocked case since Justice Scalia died, and there will almost certainly be more by the end of the term in June. But there is no reason to think that ties will dominate the docket.

In recent years, the court has split 5 to 4 about a quarter of the time. In the term that ended last June, there were 19 such cases, and Justice Scalia was in the

majority in just six of them.

“On eight-person courts the justices reach far fewer 4-4 decisions than we would expect,” said Lee Epstein, a law professor and political scientist at Washington University in St. Louis. “They seem to work hard to minimize them because they’re so inefficient. They can hold over cases, cast strategic votes to avoid a decision down the road that may be even worse ideologically, write narrowly and dump cases on procedural grounds.”

After Tuesday’s deadlock, some critics of public unions said they would turn to other forums.

“With a divided court, thousands of public servants around the nation must still financially assist a government union that they disagree with,” said Trey Kovacs, an analyst with the Competitive Enterprise Institute, a libertarian group. “Now it is up to state legislatures to provide public employees with the freedom to choose whether or not to pay for union representation.”

Union officials, too, were looking ahead. “The Supreme Court today rejected a political ploy by the wealthy corporate special interests backing this case,” said Eric C. Heins, the president of the California Teachers Association. “Now it’s time for senators to do their job and appoint a successor justice to the highest court in our land.”

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