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POLITICS

# Mandatory Union Fees Getting Hard Look by Supreme Court

By **ADAM LIPTAK** JAN. 8, 2016

FRESNO, Calif. — Harlan Elrich is a high school teacher in California, and that means he must pay about \$970 a year to a labor union. He teaches math, and he said the system did not add up.

“I get to choose what movie I want to go see,” Mr. Elrich said. “I get to choose what church I want to go to. I get to choose what gym I want to join.”

He should have the same choice, he said, about whether to support a union.

Mr. Elrich and nine other California teachers have sued the union, saying that they are being forced to pay to support positions with which they disagree, in violation of the First Amendment. Their lawsuit, if it is successful, will be the culmination of a decades-long legal campaign to undermine public unions.

And there is good reason to think they will win. The Supreme Court, which will hear arguments in the case on Monday, has twice suggested that the First Amendment bars forcing government workers to make payments 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,” Justice Samuel A. Alito Jr. wrote for the majority in 2012 in one of the cases. Inviting a new legal challenge, he

wrote, “We do not revisit today whether the court’s former cases have given adequate recognition to the critical First Amendment rights at stake.”

The new case is that challenge. The court’s decision, expected by June, will affect millions of government workers of all kinds and may deal a sharp financial and political blow to public unions. (The ruling is unlikely to have a direct impact on unionized employees of private businesses, as the First Amendment restricts government action and not private conduct.)

“It’s scary,” said Steve Rosenthal, a former A.F.L.-C.I.O. political director, noting that “most of the growth in the labor movement over the last few decades has been in the public sector.”

“It’s part of a concerted effort trying to dismantle the labor movement and to weaken workers’ rights in this country,” he added. “At the same time that we are facing a near crisis in the elimination of the middle class, people are also trying to destroy one of the main vehicles to the middle class.”

Limiting the power of public unions has long been a goal of conservative groups, and some California teachers detected a political agenda in Mr. Elrich’s suit, which was organized by the Center for Individual Rights, a libertarian group partly financed by conservative foundations.

“It’s corporate special interests that are backing this,” said Reagan Duncan, a first-grade teacher in Vista, Calif. The core issue in the case is not free speech but basic fairness, she said, arguing that Mr. Elrich and the other plaintiffs sought to take a free ride on the union’s work, which includes negotiating for higher wages and better benefits for all workers.

“It’s not right for some people to get union benefits for free while others have to pay,” she said. “If I went to a grocery store, I wouldn’t walk out with my groceries and not pay while the guy behind me had to pay for my groceries and his groceries.”

Mr. Elrich said he could do fine without the union’s help. “I can negotiate for

myself,” he said. “I’m a good teacher, highly respected, and I can go anywhere.”

Under California law, which is similar to ones in more than 20 other states, public employees who choose not to join unions must pay a “fair-share service fee,” also known as an agency fee, which is typically equivalent to members’ dues. The fees, the law says, are meant to pay for collective bargaining activities, including “the cost of lobbying activities.”

Such fees are constitutional, the Supreme Court ruled in 1977 in *Abood v. Detroit Board of Education*. “To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests,” Justice Potter Stewart wrote for the majority. But, he wrote, “such interference as exists is constitutionally justified” to prevent freeloading and to ensure “labor peace.”

What crossed a constitutional line, though, he added, was forcing objecting workers to pay for “ideological activities unrelated to collective bargaining.”

Mr. Erlich said he got a refund of “between \$350 and \$400 a year” based on the union’s determination of what part of its activities were political. But he and the other plaintiffs say that everything the union does in negotiating with the government is political and that the *Abood* decision should be overruled.

“In this era of broken municipal budgets and a national crisis in public education,” a brief for the plaintiffs said, “it is difficult to imagine more politically charged issues than how much money local governments should devote to public employees, or what policies public schools should adopt to best educate children.”

“Yet California and more than 20 other states,” the brief continued, “compel millions of public employees to pay hundreds of millions of dollars to fund a very specific viewpoint on these pressing public questions.”

Karen Cuen, an elementary school music teacher in Chino Hills, Calif., and a plaintiff in the suit, gave an example. “I disagree with seniority-based layoffs, seniority-based school assignments,” she said.

Ms. Duncan, the first-grade teacher and union supporter, said the line between politics and collective bargaining was clear. “I do absolutely understand not wanting your money going to actual political campaigning,” she said.

“But when you think of politics, you think of political campaigns like school board races and ballot propositions,” she said. “I don’t think it’s political to care about working conditions as far as class size or your benefits.”

In the new case, *Friedrichs v. California Teachers Association*, No. 14-915, Solicitor General Donald B. Verrilli Jr., representing the Obama administration, urged the justices to leave the *Abood* ruling alone. Reaping the benefits of collective bargaining, he said, is not the same as being compelled to support a political position.

“The typical worker would surely perceive a significant difference between, on the one hand, contributing to a union’s legal and research costs to develop a collective-bargaining proposal for his own unit, and, on the other hand, making a political contribution to a union-favored candidate for governor,” Mr. Verrilli wrote.

Kamala D. Harris, California’s attorney general, told the justices in a brief that workers who objected to the positions taken by unions suffered no First Amendment injuries because “they remain free to communicate their views to school officials, their colleagues and the public at large.”

There is no serious dispute that allowing workers to choose to pay nothing to the unions representing them would cause at least some workers to opt out, weakening unions’ financial clout.

“I am sure most will continue to pay their dues,” said Vincent Variale, a lieutenant in the New York City Fire Department’s emergency medical services division and a union official. “But we live paycheck to paycheck. It’s human nature that if you can get something for free, you may take advantage of that. So there may be some people who do that.”

The plaintiffs were more sanguine.

“They might lose 10 percent, maybe 15 tops,” Mr. Elrich said. “But I think there’s enough people in the schools that are supportive of the unions that they would still be in the union.”

According to the plaintiffs, relying on slightly dated statistics, 9.7 percent of California workers represented by the National Education Association are nonmembers who pay agency fees rather than dues. If all of those employees stopped paying fees, their brief said, the union would still enjoy robust financial support and revenues in the hundreds of millions of dollars.

Ms. Cuen said the unions might need to improve to keep their members.

“If they’re worried about not getting forced money from everyone, what does that say about their product?” she asked. “So maybe if we win the case and they’re worried about people leaving in droves, they might need to improve their product and make it a little more user-friendly.”

In 2014, in *Harris v. Quinn*, the Supreme Court stopped just short of overruling the *Abood* decision, ruling only that the home health care aides who had brought the suit did not have to pay union fees because they were not full-fledged government workers.

In dissent in the 5-to-4 decision, which divided along ideological lines, Justice Elena Kagan suggested that her side had dodged a bullet. “Readers of today’s decision,” she wrote, “will know that *Abood* does not rank on the majority’s top-ten list of favorite precedents — and that the majority could not restrain itself from saying (and saying and saying) so.”

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