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POLITICS

Supreme Court Seems Poised to Deal Unions a Major Setback

By **ADAM LIPTAK** JAN. 11, 2016

WASHINGTON — The Supreme Court seemed poised on Monday to deliver a severe blow to organized labor.

In a closely watched case brought by 10 California teachers, the court's conservative majority seemed ready to say that forcing public workers to support unions they have declined to join violates the First Amendment.

A ruling in the teachers' favor would affect millions of government workers and culminate a political and legal campaign by a group of prominent conservative foundations aimed at weakening public-sector unions. Those unions stand to lose fees from both workers who object to the positions the unions take and those who simply choose not to join while benefiting from the unions' efforts on their behalf.

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 members' dues. The fees, the law says, are meant to pay for collective bargaining activities, 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. Monday's case, Friedrichs v. California Teachers Association, No. 14-915, asks

whether such workers must continue to pay for any union activities, including negotiating for better wages and benefits. A majority of the justices seemed inclined to say no.

Collective bargaining, Justice Anthony M. Kennedy said, is inherently political when the government is the employer. “Many critical points are matters of public concern,” he said, mentioning issues like tenure, merit pay, promotions and classroom size.

The best hope for a victory for the unions had rested with Justice Antonin Scalia, who has written and said things sympathetic to their position. But he was consistently hostile on Monday.

”The problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition,” he said.

The court’s four liberal members were on the defensive, asking whether there was good reason to overturn a 1977 decision by the court that allowed the fees.

“You start overruling things,” Justice Stephen G. Breyer said. “What happens to the country thinking of us as a kind of stability in a world that is tough because it changes a lot?”

Justice Elena Kagan focused on the practical consequences of a decision in favor of the challengers.

“This is a case in which there are tens of thousands of contracts with these provisions,” she said. “Those contracts affect millions of employees, maybe as high as 10 million employees.”

Michael A. Carvin, the lawyer for the teachers, emphasized what he said was the limited nature of the case. It was not, he said, an attack on the union’s exclusive representation of all workers. A decision in his clients’ favor, he added, would not affect private employers, who are not subject to the First Amendment.

Justice Ruth Bader Ginsburg asked whether workers “who paid these fees

against their will" were entitled to refunds.

Mr. Carvin answered that "all we're asking is for prospective relief."

The fact that so much attention was devoted to the aftermath of a decision favoring the challengers suggested that at least some members of the court viewed it as a foregone conclusion.

Unions say the teachers' First Amendment argument is a ruse. Nonmembers are already entitled to refunds of payments spent on political activities like advertising to support a political candidate. Collective bargaining is different, the unions say, adding that the plaintiffs are seeking to reap the benefits of such bargaining without paying their fair share of the cost.

The larger threat, the unions and their supporters say, is that a decision in the plaintiffs' favor would encourage many workers who are perfectly happy with the work of their unions to make the economically rational decision to opt out of paying for it.

Edward C. DuMont, California's solicitor general, arguing in support of the union, did not dispute that collective bargaining involved political issues that implicate workers' First Amendment rights.

"There are deep public policy implications to many of the topics and to the general tenor of public employee bargaining," he said.

But he said the government's interests outweighed those rights. "We need to be able to run our workplaces," he said.

Mr. DuMont added that workers remained free to speak out in other settings.

That did not sit well with Justice Kennedy. If a worker "is required to pay $500 for someone to espouse a belief that he doesn't share," Justice Kennedy said, it would be small comfort "that he is now free to go out and argue against it. That means he has to spend another $500 so that it balances out? That makes no sense."

David C. Frederick, a lawyer for the unions, urged the justices not to take a major step without more information. But Justice Kennedy indicated that the court might have all the information it needed. “We could assume,” he said, “that a state is always benefited and is more efficient if it can suppress speech.”

Limiting the power of public unions has long been a goal of conservative groups. Even before Monday’s argument, they had reason to be hopeful that their side would prevail in the case.

In 2014, the court stopped just short of overruling a 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 violated the First Amendment, the court said. But it was constitutional, the court added, to require nonmembers to help pay for the union’s collective bargaining efforts to prevent freeloading and ensure “labor peace.”

Justice Kagan said the 2014 ruling, along with one from 2012, “admittedly expressed some frustration with Abood.” But that was not enough, she said, to justify overruling a 40-year-old precedent.

Mr. Carvin responded that the recent decisions had “undermined the doctrinal underpinnings of Abood.” He said the court had overruled important precedents in similar circumstances in 2010 in the Citizens United campaign finance decision.

Some of the court’s conservative justices said the consequences for public unions would not be particularly negative should the challengers prevail.

“Why do you think that the union would not survive without these fees charged to nonmembers of the union?” Justice Scalia asked. “Federal employee unions do not charge agency fees to nonmembers, and they seem to survive. Indeed, they prosper.”

Justice Scalia seemed ready to vote to overrule the Abood decision.

"The problem is that it is not the same as a private employer, that what is bargained for is, in all cases, a matter of public interest," he said. "And that changes the situation."

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