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High Court Tie Leaves Public Union Fees in Place

A deadlocked Supreme Court left standing an earlier ruling by the 9th Circuit allowing public-sector unions to require nonunion employees to pay “agency” or “fair share” union fees as long as they do not include portions for political activities. Although the 4 to 4 ruling sets no precedent, it does leave intact the ability of public employee unions to collect fees from nonmembers in California.

Background

California law allows a union to become the exclusive bargaining representative for the public school employees of a school district if a majority of the employees want to be represented. A public-sector union may establish an “agency shop” arrangement and require public-sector workers to either join the union or pay the equivalent of union dues in the form of an “agency” or “fair share” fee as a condition of employment. The mandatory agency or fair share fee is intended to cover collective bargaining related costs the union incurs and prevent nonunion members from “free riding” on the union’s bargaining efforts.

Under the Supreme Court’s 1977 landmark decision in *Abood v. Detroit Board of Education*, public employees who do not join a union can be compelled to contribute to the cost of collective bargaining activities but they cannot be required to pay for the union’s political or ideological activities that they oppose. In non-right-to-work states like California, public employee unions must notify nonmembers of the chargeable (related to collective bargaining) and nonchargeable (unrelated to collective bargaining) portions of the so-called agency fee, and give them the opportunity to affirmatively opt out of the nonchargeable portion each year. However, the unions do not have to refund the fee.

In 2013, a group of nonunion teachers from several school districts sued the California Teachers Association, similar organizations, and school districts challenging the constitutionality of both the state law authorizing teachers’ unions to charge agency fees to nonmembers and the opt-out requirement. In *Friedrichs v. California Teachers Association et al.*, the teachers argued that requiring them to support an agency shop arrangement financially violated their



rights to free speech and association under the First and Fourteenth Amendments. The district court held that it was bound by the *Abood* decision to uphold those practices. The U.S. Court of Appeals for the 9th Circuit [affirmed](#).

Supreme Court Weighs In

When the Court accepted the case, it gave the justices the opportunity to consider the constitutionality of compulsory union fees and to overrule *Abood*. The questions presented to the Court were whether the First Amendment prohibits: (1) public sector agency shop arrangements; and (2) requiring public employees to affirmatively opt-out of subsidizing nonchargeable speech by public sector unions, rather than requiring employees to affirmatively opt-in.

The case was [argued](#) before the Court on January 11, 2016, several weeks prior to Justice Antonin Scalia's death. Following oral argument, Court observers anticipated a 5 to 4 decision that would hold it unconstitutional for unions that represent government workers to charge fees to workers who are not union members, even when the fees covered only the costs of collective bargaining.

After Justice Scalia died, the Court could have decided on its own to set the case for re-argument next term. Instead, it issued a 4 to 4 decision that leaves the lower court ruling in place but with no precedential weight. A one-sentence per curiam [ruling](#) issued yesterday stated simply that "The judgment is affirmed by an equally divided Court." With that, the Court left it to another day to consider the continued viability of agency fees. In the meantime, the 9th Circuit's ruling upholding mandatory fees stands.

The 9th Circuit

This judicial circuit covers:

Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

Comment. Shortly after the ruling, the Center for Individual Rights, which represents the plaintiff teachers in the *Friedrichs* case, [announced](#) that it will file a petition for rehearing with the Court.

In Closing

This decision marks the second time that the Court has split evenly in a case it heard prior to Justice Scalia's death. The tie decision sets no precedent but effectively maintains the *status quo*. Whether the Court will agree to rehear the case remains to be seen. At least for now, union agency or fair share fees in the public sector remain constitutional in the 9th Circuit.

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