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High Court Deals Public Employee Unions Key Defeat

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The U.S. Supreme Court weighed in on the fight over the rights of public employee unions Thursday, dealing the unions another major defeat.

By a 5-to-4 vote, the court ruled that when unions set up special political funds to fight for or against referendums on the ballot, nonmember government workers may not be assessed fees to support that fund unless they affirmatively agree.

The Original Fee

The court's ruling came in a challenge to a special assessment levied seven years ago in California by the Service Employees International Union. The SEIU is the exclusive bargaining representative for all California state employees, regardless of whether they are union members. In July 2005, the union decided to create a special fund to fight several anti-union propositions on the upcoming November ballot. It sent out an emergency assessment to pay for its campaign, and the state comptroller automatically collected the money from employees' paychecks.

Some state employees who were not members of the union challenged the fees in court. These nonmembers normally pay some union dues because — as the courts have ruled for decades — nonmembers would otherwise be free riders, reaping the benefits of union negotiation for salary and benefits without paying for it.

But this special assessment — totaling $12 million — was aimed primarily at fighting referendums that the union considered hostile. And although the union eventually refunded money to nonmembers who objected, the U.S. Supreme Court said that was not enough.

The Decision

Writing for five members of the court, Justice Samuel Alito said that refunding the money later meant that those who objected had essentially given the union a loan. That, Alito said, unconstitutionally forced these individuals to subsidize a political effort they disagreed with.

The court majority did not leave matters there, however. It went on to say that when the union notifies nonmembers of a special assessment, the burden is on the union to get nonmembers to opt in. An opt-out provision is not enough, the court said. We have already "tolerated" union "impingement" on the First Amendment by allowing annual dues assessments for the union's nonpolitical activities, Alito said. But allowing an opt-

out system for special assessments like this one, he said, "represents a remarkable boon for unions," a boon that crosses the line of what is permissible under the First Amendment.

According to Alito, "there is no way to justify" putting the burden on nonmembers to opt out.

Opt-Out Versus Opt-In

Justices Sonia Sotomayor and Ruth Bader Ginsburg agreed that the union should have provided specific notice of the special assessment, but they said an opt-out provision would be sufficient to protect the First Amendment rights of nonmembers who objected.

Sotomayor blasted the majority for reaching out to decide issues that had not been briefed or argued before the court — namely, the opt-out versus opt-in question. She noted that the majority's opinion "strongly hints" that an opt-out rule for regular union dues assessments — and not just special assessments — would be found similarly invalid. Were that forecast to come to fruition, it would mean that millions of dollars that unions now collect would likely not be available to them.

'An Extraordinary Opinion'

Justices Stephen Breyer and Elena Kagan picked up that theme in their dissent. Breyer gave a rare oral dissent from the bench on Thursday. He noted that the court, without hearing argument, had issued a broad decision that effectively declares existing laws in many states unconstitutional.

"This court does not normally find state laws unconstitutional without, at least, giving those who favor the law an opportunity to argue the matter," he said sardonically.

Reaction to the decision from all quarters was pretty unanimous: The court struck a big blow to public employee unions. Also, the language of the opinion suggested that five justices may be prepared to do more damage in the future — even if it means reversing decades of labor and First Amendment law.

It is "an extraordinary opinion," says Steven Schwinn, a professor at John Marshall College of Law in Chicago.

Not only did the court reach out to decide more than it had been asked to, Schwinn says, but it "gratuitously beat up on unions."

"It puts a thumb on the scale against the unions," he adds, whereas previously, "the thumb had been on the scale in favor of the unions."

Future Implications

Ilya Shapiro of the libertarian Cato Institute agrees that the decision represents a big hit to public employee unions.

"It's not as big as [Wis. Gov.] Scott Walker's surviving recall, but it's pretty big," he says.

Schwinn explains that, while the case itself is narrow — dealing only with special assessments rather than regular union dues — the majority opinion could have much wider reach.

"The reasoning of the court and the language that Justice Alito uses strongly suggest that the court is ready to overturn the regular fee assessment process," he says. "And if the court were to do that, that would be a really big hit for public unions."

In light of the court's 2010 decision allowing corporations to spend money for political campaigns, Thursday's ruling prompted speculation about what the implications might be for shareholders who object to such corporate expenditures. Harvard Law professor Benjamin Sachs argues that objecting nonunion members and objecting shareholders are analogous.

"If we give union members the right to opt out, to refuse to fund union political speech, we ought to give shareholders the right to opt out of funding corporate political speech," Sachs says. "Not to do that is to prejudice unions as against corporations when it comes to political spending. And when you treat two political speakers unequally like that, then I think the First Amendment is itself implicated."

Three More Decisions

Broadcasting 'Fleeting' Vulgarity

If the union case was a sleeper that exploded like a firecracker in court on Thursday, a separate case, involving broadcast regulations, turned into a fizzle. And instead of reaching out to decide a broad issue as it did in the union case, the court decided less than it was asked to in the broadcast case.

At issue was whether the Federal Communications Commission could constitutionally impose stiff fines on broadcasters for the fleeting use of vulgarity on TV or radio. Three years ago, the court punted on the same case, sending it back to the lower courts after a procedural decision. This year, it was back again for a constitutional decision — or so everyone thought. Instead, the court ducked again.

The history of the issue actually dates to 1978, when the court ruled that the FCC could punish broadcasters for the deliberate and repeated use of vulgarity. That, however, was an era when a handful of TV networks were the sole purveyors of TV fare. And yet, the

FCC still regulated with a relatively light hand, declining to punish what it called "fleeting" vulgarity.

During George W. Bush's administration, however, that changed. The FCC adopted new rules authorizing stiff fines for even fleeting use of indecency.

Among the agency's first targets were Fox and ABC — both cited retroactively. Fox was cited for a live broadcast of the Billboard Awards when Cher and Nicole Richie used the F-word. The agency also fined ABC for a brief showing of a woman's nude buttocks during its drama *NYPD Blue*.

The networks challenged the penalties in court, going up to the Supreme Court in 2009, then back down to the lower courts, and then back up again this year. But after six months of consideration, the justices dodged the big question again on Thursday. Writing for the court, Justice Anthony Kennedy said the penalties were invalid because they covered conduct that occurred before the new rules went into effect. Thus, the court said, the networks did not have notice beforehand that the fleeting use of vulgarity could subject them to penalties.

The court left for another day the larger question: whether, in an era of hundreds of cable channels, the FCC can impose stiff fines for the fleeting use of indecency on the relatively small number of over-the-air channels.

Sentencing Decisions: Fines And Cocaine

Two more decisions Thursday dealt with criminal sentencing. In one, the court applied the same rule to criminal fines as it does to prison sentences. By a 6-to-3 vote, the court said that judges cannot impose stiff fines based on any fact that has not been found by a jury. Specifically in this case, the jury found that Southern Union Co. had improperly stored hazardous mercury, in violation of the law. The judge fined the company $38 million, based on his assessment of a 762-day violation. But the jury had not specifically made a finding as to the duration of the violation.

The final case centered on a 2010 law that lessened the disparity between mandatory minimum sentences for drug offenses involving crack cocaine and those involving powder cocaine. Before the 2010 law, sentences for crack cocaine were 100 times more severe than for powder cocaine. The result was that the penalty for possessing 5 grams of crack cocaine was the same as the penalty for possessing 500 grams of powder cocaine. In 2010, Congress changed the law, lowering the ratio from 100-to-1 to 18-to-1.

The question before the court was which sentencing regime should apply to defendants who committed their crimes *before* the new law became effective but were *sentenced* after.

The court, by a 5-to-4 vote with the court's most conservative justices in dissent, said that those offenders were entitled to the more lenient sentencing scheme.