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Supreme Court's Big Labor Case Is About Free Speech, Not Unions

Monday, the Supreme Court hears oral arguments in a case that could stop forcing unionized workers to pay for activities they disagree with.

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"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." So proclaimed the Supreme Court more than 60 years ago in *West Virginia State Board of Education v. Barnette* (1943).

Yet in 1977, in *Abood v. Detroit Board of Education*, the court went astray from its dedication to protecting freedom of speech and association in one particular but significant context. It ruled that states could require public-sector workers who were *not* union members to pay "agency fees" to support union politicking, so long as this political activity was pursued in the context of collective bargaining. Today, half the states have such "agency shop" laws.

The rationale is that whatever concessions the unions secure benefit *all* workers, so even non-members should be forced to pay if the state (at the behest of the union) wants them to. Rebecca Friedrichs and nine other teachers in California decided they don't necessarily like those "benefits"—maybe they prefer merit pay to tenure protections, or smaller class sizes rather than pension guarantees—and filed a lawsuit, which has now made it up to the Supreme Court.

On January 11, the justices will hear oral argument in *Friedrichs v. California Teachers Association*, a case that gives the court an opportunity to correct the First Amendment anomaly it created in *Abood*. More than 50 briefs have been filed in the case, with numerous nonprofits, social scientists, politicians, unions, public policy organizations, and others weighing in.

I Shouldn't Have to Fund My Opponents

Although the defendant unions characterize the case as an attack on the labor movement generally, that mischaracterizes the teachers' concerns and arguments. As Friedrichs and her colleagues say in their briefs, the issue is that many workers disagree not only with their unions'

openly political activities—electioneering and the like—but also with the positions their unions take in collective bargaining.

The plaintiffs aren't asking the court to dismantle unions. They're simply asking it to acknowledge workers' rights under the First Amendment not to pay for speech and de facto lobbying with which they disagree.

In *Abood*, the court justified allowing the government to force workers to financially support unions they disagree with because such a rule was thought to promote labor peace and prevent free-riding. Neither of those justifications holds water.

A ruling for the plaintiffs won't lead to labor unrest because *Friedrichs*doesn't question the government's authority to designate a particular union as the exclusive representative of a class of workers. These teachers merely ask for the right not to fund that exclusive representative if they disagree with its goals. As the Supreme Court itself said in the 2014 case of*Harris v. Quinn*, "A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked."

Nor will a ruling for the plaintiffs create a free-rider problem. To reiterate, the basis for the lawsuit is that many workers disagree with their union's collective bargaining activities. As is true of Friedrichs herself, for example, some teachers would prefer to take a small pay cut so more teachers can be retained, while their union may continue to argue for higher and higher salaries.

Facts on the ground nationally also belie the contention that *Friedrichs* is a facial attack on all unions. As the Mackinac Center for Public Policy pointed out in its amicus brief, Michigan and Wisconsin both recently adopted laws that allow non-member workers to decide whether to fund collective bargaining—bringing the total number of such states to 25—and neither state has seen the demise of unions.

Unions Should Represent Their Members

Will unions have to work harder to collect the same amount of money in member dues that they now collect in dues plus agency fees? Yes. But the result will be that unions will become more responsive to the workers they represent.

In American politics, elections serve the function of keeping representatives accountable to their constituents. When your representative makes decisions you dislike, you have a choice whether to re-elect that person. Similarly here, if your union fights for too many policies you dislike, you should have the choice not to financially support it. Unions that are unresponsive to the workers they claim to represent will indeed decline, but those that become better representatives for their members will flourish.

A decision in favor of the *Friedrichs* plaintiffs will not destroy unions but instead will protect the First Amendment rights of workers and improve the quality of representation unions provide. Ultimately, everyone—workers, unions that protect workers' interests, taxpayers, even the court in its constitutional jurisprudence—will be better off.

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