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Supreme Court Limits, But Doesn't End Union Fees

By Tony Mauro

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The ability of public employee unions to charge non-members for their share of the costs of collective bargaining remains intact after a U.S. Supreme Court decision Monday that labor leaders feared would be a "kill shot" for their movement.

Ruling in *Harris v. Quinn*, a 5-4 majority said that Illinois home care workers who objected to joining a state-recognized union could not be forced to pay so-called agency fees, in part because they are not "full-fledged" state employees. But the court stopped short of overturning the 1977 case that allowed agency fees in public employment, in spite of a frontal First Amendment attack on the precedent mounted by union critics in the case.

If the court allowed the union fee in the Illinois case, Justice Samuel Alito Jr. wrote for the majority, “we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."

Alito emphasized the unusual arrangement governing the Illinois home care workers in the case. They are employed by the people they take care of, but they are regarded as state employees for the sole purpose of collective bargaining. Referring to the workers who challenged the fee, Alito said, "All they seek is the right not to be forced to contribute to the union, with which they broadly disagree."

The White House and labor leaders criticized the ruling, noting that home care workers represent a growing segment of the workforce. "We are disappointed that the Supreme Court has carved out a group of workers—homecare workers who provide critical support to the elderly and people with disabilities in their own homes," a statement issued by the White House said.

Much of the reaction to Monday's decision focused on the viability of the 1977 Supreme Court precedent that was at stake in the case. In *Abood v. Detroit Board of Education*, the court said the First Amendment allowed public employee unions to charge a fee to non-members, since unions must negotiate pay and benefits for the entire workforce, not just members. *Abood* has survived decades of attack. But two years ago in *Knox v. Service Employees*, a majority led by Alito called *Abood* into question, describing it an "anomaly" under the First Amendment.

So on Monday, when Chief Justice John Roberts Jr, announced that Alito would deliver the opinion in Harris, it seemed almost certain that *Abood* would be overturned—which unions said would allow "free-riders" to benefit from union representation without paying for it, starving unions of much-needed revenue.

But while repeatedly attacking *Abood* and saying the court would not extend its reach, Alito said it would not be overturned. Roberts joined the opinion, along with Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas.

Some union critics shrugged off the court's avoidance of Abood, confident that the court will overturn it in a subsequent case. Ilya Shapiro of the Cato Institute said, "As with campaign finance, voting rights, and so much else, the direction in which the court is going is clear, and we'll just have to wait for the next suitable case to put the nail in the coffin of compelled unionization."

But the decision Monday bore some signs of a struggle over taking that step, and raised the possibility that a justice in the majority favored overturning *Abood* at first—but at the last minute changed his mind, depriving that position of a fifth vote.

Justice Elena Kagan's dissent included a lengthy discussion of *stare decisis*—preserving precedent—that she might have written to counter a majority vote against *Abood*. She may have decided to leave it in the opinion even though the majority stepped back from overturning the precedent.

William Jay of Goodwin Procter said that and other factors may make it premature to predict that *Abood* will be overturned in the next union case that comes along.

Jay acknowledged the current court's occasional practice of issuing a warning about a precedent in one case, then actually overturning in the next one. "But here, they already gave the warning in the *Knox* case, but they didn't take the next step of overturning it," said Jay. "Maybe the votes weren't there."

Kagan in her dissent acknowledged that "readers of today's opinion will know that *Abood* does not rank on the majority's top-ten list of favorite opinions—and that the majority could not restrain itself from saying (and saying and saying) so." But, she added, "Save for an unfortunate hiving off of ostensibly 'partial-public' employees, *Abood* remains the law." Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor joined Kagan. ("Hiving off," a phrase never before used in a Supreme Court decision, is a Britishism that means separating from a larger group.)