THE PUBLIC SECTOR

Will high court wipe out mandatory nonmember union fees?

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In 2010, the U.S. Supreme Court issued one of its more extraordinary decisions in decades, *Citizens United v. Federal Election Commission*, ruling that the First Amendment forbids the government from restricting corporations or labor unions from contributing to political campaigns. Unions and private-sector corporations—usually at opposite ends of the political spectrum—equally celebrated the decision, while advocates of campaign funding reform condemned it as a veritable train wreck for democracy.

This term, another First Amendment case, *Harris v. Quinn*, puts the shoe on the other foot for the labor movement. Conservative pundits hope the Supreme Court will use this case as a vehicle for prohibiting "agency shop," a key funding mechanism for unions. Some union advocates believe that *Harris* even threatens the principle of "exclusive representation," which underpins public-sector collective bargaining.

Exclusive representation

"Exclusive representation" is the concept that a union representing a majority of employees in an appropriate bargaining unit has the right and duty to represent all members of that unit. This feature has been embedded in private- and public-sector labor law for decades. Exclusive representation enables the union to speak for all members of the bargaining unit, even employees who fundamentally disagree with its perspective. Courts have upheld this principle, ruling that the "labor peace" resulting from collective bargaining is sufficient to offset any intrusion on individual freedoms.

Exclusive representation doesn't come cheaply. Most unions are large bureaucracies that need substantial financial resources to fund overhead and programmatic activities such as campaign contributions. Most of this funding comes from the dues of voluntary union members. But it's been the law in the public sector for decades that "agency shop" provisions may require nonmembers to pay an "agency fee" equivalent to dues and assessments as a condition of continued employment. Agency shop thus seeks to prevent "free riders"—employees who reap the benefits of a union's representation but don't pay their "fair share" of the cost of representation—while promoting labor peace.

Harris v. Quinn

The plaintiffs in *Harris* are a group of personal assistants providing one-on-one in-home care to Medicaid recipients in Illinois, which, like many states, allows for exclusive representation. Under collective bargaining statutes, the state plays the role of both employer and the originator of legislation.

This dual role allowed the personal assistants to make a unique argument—the combination of agency shop and exclusivity coercively imposed on them a representative not of their choosing and infringed on their right to free expressive association guaranteed by the First Amendment. Their most compelling sound bite: *"A political system predicated on citizens choosing their representatives in government cannot tolerate government choosing representatives for its citizens."*

On those bases, the personal assistants asked the federal court to void agency shop and exclusivity, principles that are allegedly incompatible with the right of employees and other unions to petition the government in public forums. Both the trial and appellate courts dismissed the case, and the assistants appealed.

The Supreme Court agreed to hear the case. In mid-January 2014, the Court conducted oral argument in which the personal assistants—represented by the powerful National Right to Work Committee—battled with representatives of organized labor, other states that implemented collective bargaining, and lawyers representing the United States itself. Observers have opined that the assistants' arguments appeared to gain traction among some of the Court's conservative wing.

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Conclusion

Will the Court's decision more than negate the First Amendment gains labor unions netted in the *Citizens United* decision? Or will history regard this case as a mere near miss over what could have been a cataclysm for public-sector unions? Stay tuned for an answer later this spring.

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