CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

KNOX v. SERVICE EMPLOYEES INTERN. UNION 132 S.Ct. 2277 (2012)

Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment. See, *e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (**"At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed"**); *Buckley v. Valeo*, 424 U.S. 1, 93, n. 127, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)* ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which `uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish"); *Cox v. Louisiana*, 379 U.S. 536, 552, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy"); *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 465, 27 S.Ct. 556, 51 L.Ed. 879 (1907) (Harlan, J., dissenting).

In particular, petitioners allege that the union has refused to accept refund

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requests by fax or e-mail and has made refunds conditional upon the provision of an original signature and a Social Security number. *Id.*, at 18-19. As this dispute illustrates, the nature of the notice may affect how many employees who object to the union's special assessment will be able to get their money back. The union is not entitled to dictate unilaterally the manner in which it advertises the availability of the refund.

For this reason, we conclude that a live controversy remains, and we proceed to the merits.

The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008). See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Mills v. Alabama*, 384 U.S. 214, 218-219, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). ***The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.*** See *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, 447-448, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam); West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713-715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) ***(The First Amendment protects "the decision of both what to say and what not to say" (emphasis deleted)).*** And the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

Closely related to compelled speech and compelled association is **compelled funding** of the speech of other private speakers or groups. See *Abood*, 431 U.S., at 222-223, 97 S.Ct. 1782. In *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334,

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150 L.Ed.2d 438 (2001), we considered the constitutionality of a state scheme that compelled such funding. The subject of the speech at issue—promoting the sale of mushrooms—was not one that is likely to stir the passions of many, but the mundane commercial nature of that speech only highlights the importance of our analysis and our holding.

A large producer objected to subsidizing these generic ads, and even though we applied the less demanding standard used in prior cases to judge laws affecting commercial speech, we held that the challenged scheme violated the First Amendment. We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy. *Id.*, at 414, 121 S.Ct. 2334. Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, *supra*, at 623, 104 S.Ct. 3244. Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association." *United Foods*, *supra*, at 414, 121 S.Ct. 2334.