

The Deadly 4-4 SCOTUS Split: What Happens in the Wake of Justice Scalia's Death

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With the Supreme Court coming out of recess today, the practical implications of Justice Scalia's death will become more apparent. Justice Scalia's death last week has a tremendous impact on the upcoming sessions of the Supreme Court.

Take, for instance, the late Justice's voting. The votes that Scalia cast in cases that have not yet been publicly decided are now void. If Scalia was part of an overwhelming majority or minority, the absence of his vote will not have much of an effect. But if Scalia was part of a slim, five-justice majority, the absence of his vote leaves the Court divided four to four. If no majority exists, the Court cannot issue a majority opinion, and the lower court's decision stands. The lower court's decision will simply be "affirmed by an equally divided Court."

The four-to-four split has the potential to impact quite a few cases before the Supreme Court this term, including two key labor and employment law cases:

Contraception ([Zubik v. Burwell](#)): The Affordable Care Act's contraceptive mandate requires employers to provide health insurance that covers some contraceptive costs. Currently, religious organizations, like churches, can apply for a religious exemption from that requirement. Religious non-profits, however, such as charities, schools, and hospitals, cannot obtain a religious exemption. A case currently before the Court presents the question of whether that exemption should be extended to these religious non-profits. While the extension seemed likely with Justice Scalia's vote, the case is now rumored to be split four to four. Without a majority opinion, the lower court's opinion, which refuses to extend the exemption, will likely be upheld.

Unions ([Friedrichs v. California Teachers Association](#)): Currently, public employees in 23 states and the District of Columbia must pay an "agency fee" to cover the cost of certain union activities, such as collective bargaining, even if they do not support a union on principle or for any other reason. During oral arguments on January 11, conservatives criticized that system as a violation of employees' First Amendment rights. It was widely expected that the Court would strike down any system that charged public employees regardless

of whether they agreed with the union — but without Justice Scalia’s vote, the Court may now be divided four to four. Further, if the Court is unable to render an opinion, the lower court’s ruling, which upheld the current system, would govern.

Of course, instead of “affirming by an equally divided court,” the Court could also order the cases currently in front of it to be reargued once a new Justice is confirmed. While [this has happened in the Supreme Court before](#), Republicans currently seem poised to block any new Justice from being appointed until after the November election. If that happens, it could be over a year before any cases can be reargued in front of a full Court.

More immediately, because the Justices did not meet for their regularly scheduled conference last Friday due to the ceremony at the Court honoring Justice Scalia, the Court will not issue regularly scheduled opinions or orders this week. Their regularly scheduled opinions and orders will be pushed to next week, to be considered along with next week’s regularly scheduled opinions.

The Court took on many incredibly controversial issues this term, including the above cases and affirmative action, voting rights, and abortion. The Court’s inability to render a decision in these and other cases could impact the legal landscape for years to come.

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