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Looming US Supreme Court Ruling Could Be Big Challenge to Public Sector Unions in New Jersey

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Between 1999 and 2013, three public sector unions spent over \$75 million on political activity in New Jersey, according to a 2014 analysis of special interest spending by the New Jersey Election Law Enforcement Commission.

New Jersey Education Association (NJEA), the Communications Workers of America (CWA) and American Federation of State, County, and Municipal Employees (AFSCME) spent those millions on lobbying, direct contributions to candidates, and independent spending. They ranked in the top 15 special interest spenders during the period.

Public sector unions like these have made meaningful contributions to public life in New Jersey and often been influential players in Garden State elections.

Nationally, 34.4 percent of all public workers belonged to a union in 2016, compared to 6.4 percent in the private sector, according to the U.S. Bureau of Labor Statistics.

In perhaps a matter of days, the U.S. Supreme Court may issue a ruling that has a direct impact on public-sector unions. The case is named *Janus v. AFSCME*. It involves the constitutionality of so-called “agency fees,” which are required to be paid by non-union public employees who nevertheless benefit from union bargaining.

“Agency” or “fair share” fees are less than union dues paid by members and cannot be used for lobbying or other political purposes.

Mark Janus, an Illinois State employee, challenged the policy of public sector unions charging “agency fees.” He maintains that they are a violation of his First Amendment rights in that they compel him to support political organizations and candidates that he may or may not support.

The lawsuit by the Right to Work Legal Defense Foundation and Liberty Justice Center contends that all activities of public-sector unions are political because they involve government resources.

“Public employee unions and collective bargaining are inherently political...because what we are talking about is the allocation of resources and tax dollars,” said Deborah La Fetra, a senior attorney at the Pacific Legal Foundation, told [Insidersources.com](https://www.insidersources.com) on October 19, 2017. She contends a 1977 case that upheld agency fees stemmed from “a completely unrealistic sense of what a public employee union does, and how it works in terms of the political arena.”

It was January 17, 1962 when President John F. Kennedy signed executive order 10988 allowing federal employees to unionize.

The issue now in question was first addressed in 1977, when the U.S. Supreme Court in *Abood v. Detroit Board of Education* ruled that non-union public employees could be required to pay a fee to offset the costs of negotiating union contracts.

More recent Supreme Court rulings have drifted away from this precedent-setting case.

In *Knox v. SEIU* (2012), the High Court held that public employee unions could not impose fees in mid-year to build a fund specifically to engage in political activities.

In perhaps another harbinger of things to come, the Supreme Court ruled against public sector unions in *Harris v. Quinn* (2014), when it held that home health care aides, whose salaries are paid by Medicaid, are not required to pay “agency fees.”

Friedrichs v. California Teachers Association (2016), a case similar to *Janus* in challenging the *Abood* decision, ended in a 4-4 tie. This left in place the ruling of the Ninth Circuit Court of Appeals, which upheld “agency fees.” The deadlock occurred following the death of Justice Antonin Scalia.

The big question now is whether the *Janus* case will severely curtail political activity by New Jersey public worker unions and foster labor unrest.

AFSCME’s brief said the *Janus* claim that “all collective bargaining is inherently political” is “false-and unsupported by an evidentiary record.”

But with recent appointee Justice Neil Gorsuch being a noted disciple of Justice Scalia, popular opinion holds that the new justice will side with conservative court members in upending the public-sector unions by finding agency fees unconstitutional.

That’s not a sure thing if Gorsuch follows the path of his mentor. While Judge Scalia sided with the majority in the 2012 and 2014 cases, he ruled differently in the *Abood* case. He stated in *Abood*, “the free ridership would be not incidental, but calculated, not imposed by circumstances, but mandated by public decree.”

So, though odds are the High Court will find “agency fees” unconstitutional, there is a possibility, though remote, that they will be upheld on the basis of precedent.

If the Court delegitimizes “agency” fees, what impact will it have on public sector unions in New Jersey and elsewhere?

Defenders of the *Abood* precedent predict dire consequences if it is overturned. Free speech advocates predict unions will survive any initial blast wave from such a ruling.

In a Star-Ledger column on February 20, 2018, Charles Wowkanech, president of the New Jersey State AFL-CIO, said that the Janus case “is a direct attack on collective bargaining rights and undermines the ability of all workers to join together and negotiate with their employer for better wages, benefits and working conditions.”

Holding a similar view is New Jersey Attorney General Gurbir Grewal, who in January joined 19 other states and the District of Columbia in filing an amicus brief before the high court.

The group cites “a substantial interest in avoiding the vast disruption in state and local labor relations that would occur if the Court were now to overrule Abood’s approval of public-sector collective-bargaining arrangements utilizing agency-fee rules.”

Its brief notes that between 1965 and 1970, there were more than 1,400 work stoppages nationally by state and local public workers. “Public sector collective-bargaining laws were enacted to protect the public from the harmful effects of public-sector work stoppages and other disruptions in government operations,” it adds.

Patrick Duncan, former manager of the New Jersey School Board Association’s labor relations unit, agreed in a May 15, 2018 op-ed column that the fallout could be substantial.

“If the Supreme Court decides as expected, and nixes agency shop fees for New Jersey’s public sector, there may be significant changes to the political dynamic in the state,” said Duncan, who is special assistant for labor relations in the West Windsor-Plainsboro Regional School District.

Daniel DeSalvo, a senior fellow at the Manhattan Institute, took a different view in an op-ed column that ran in the Star-Ledger on June 10, 2018.

“A ruling in favor of public workers who do not want to pay into union coffers will be a victory for first Amendment rights. But its impact on the Garden State’s politics will be more limited than many assume. The unions will lose some members and money but not enough to dramatically alter their political standing. Public unions in New Jersey will remain potent forces.”

Paul Secunda, a labor law professor at Marquette University Law School, told [Huffpost.com](https://www.huffpost.com) on February 26, 2018 that an adverse ruling will affect some unions more than others. “The unions that are run well and have dedicated members will come out okay, and those that are just relying upon the mandatory fees will not.”

New Jersey is predominantly a blue State with a strong union presence. As noted above, public sector unions have historically been major players in elections.

The Democratically-controlled Legislature already has approved legislation (S-2137) that would boost a public union’s ability to recruit new members. The proposal, which is sitting on Governor Phil Murphy’s desk, is a direct response to the Janus case.

Steps like this could soften the blow of the high court overturning the Abood precedent.

If history and tradition are any guide, there may be a slight drop-off in their spending but not enough to dampen significant public-sector union participation in New Jersey’s electoral process.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.