Opinion: Lawsuit threatens public unions' rights

By Peter Scheer

Public employee unions face a new, and mortal, threat. It's not the unfunded liability of union pension plans or municipal governments' resort to bankruptcy to void union contracts. It's not state initiatives to restrict collective bargaining rights or other outpourings of voter resentment. No, the new existential threat facing government unions comes from . . . the First Amendment.

In a scarcely-noticed lawsuit filed earlier this month in federal district court in Los Angeles, a conservative nonprofit, the Center for Individual Rights, claims that California's system for collecting union dues from government employees abridges free speech safeguards by compelling employees to subsidize union political advocacy and activities with which they disagree.

On first look, the suit looks like a loser because the challenged union practices were upheld in a 20-year-old US Supreme Court decision, Abood v. Detroit Board of Education. Nonetheless, on second look, the suit has a very respectable chance of succeeding because of a 2012 Supreme Court decision, Knox v. SEIU, in which five justices said, in effect, that the Abood decision was a mistake. Also, the plaintiffs are represented by Jones Day, one of the biggest and best law firms in the country, which wouldn't have taken the case unless prepared to litigate all the way to the nation's highest court.

And if they prevail? Public employee unions, not just in California but across the country, would lose the bulk of their dues funding—and with it, the ability to wield decisive

political influence in state and local governments everywhere. That is a big deal.

Non-management government employees in California, as in many states, are required to belong to a union, and pay union dues, whether they want to or not. However, employees can't be forced to pay for union political activities—as opposed to union representation on pay, benefits, job security and like issues—because of first amendment protections against "forced association" with political viewpoints. The question is: how, practically-speaking, to enforce this right?

The Supreme Court in Abood approved a system that requires employees, if they don't wish to pay for their union's political activities, to "opt out"—meaning, they must pay all dues first, then apply to receive a prorated refund later. The theory of the lawsuit filed Monday, Friedrichs v. California Teachers Association, is that an opt out procedure is constitutionally defective because it compels employees to make a loan to the union for its political activities, and because even the unions' supposedly nonpolitical activities—such as opposition to charter schools or support for higher taxes to pay for pension benefits—are fraught with political and ideological choices that are objectionable to some employees.

The lawsuit contends that the first amendment requires an "opt in" procedure. While it may seem trivial, the difference between opt out (where the default is that the union has all your money and you have to ask for a portion to be refunded) and opt in (where the default is that the union has to persuade you to give money to support its political activities) is the difference between public employee unions that are rich and powerful and unions that are poor and politically neutered.

Last year in the Knox case, the Supreme Court decided, 5-4, that the first amendment requires California government unions

to use an opt-in dues collection procedure for special dues assessments needed to finance political campaigns. Justice Allito, writing for five justices, went out of his way to raise doubts about the Abood decision and, in effect, to invite a test case to overturn it. The Friedrichs v. California Teachers Association lawsuit is an RSVP to that invitation.

How will the unions respond? In 2012 California unions spent some $75 million to defeat a ballot initiative, Prop 32, that would have shifted California's default from opt out to opt in. Now, consider that a successful Supreme Court challenge would yield the same result, not only in California but across the nation, and that it would be immune from legislative repeal. Organized labor, once it figures out what is happening, will treat this litigation like the existential threat that it is.

Peter Sheer is executive director of the First Amendment Coalition.