



## Will Trump Lawyers Switch Sides in Supreme Court Labor Case?

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Speculation has been simmering for months that the Trump administration might ask the Supreme Court to ban public sector unions from collecting mandatory fees. Calling for a decision that could significantly reduce labor movement finances and political influence would be a major shift in approach for the federal government.

The question will be answered by midnight Dec. 6. That's the deadline facing the Justice Department if the solicitor general wants to file a friend-of-the-court brief supporting the National Right to Work Legal Defense Foundation in its decades-long crusade against government unions.

The foundation, which represents an Illinois public employee in the landmark case *Janus v. AFSCME*, says the U.S. Constitution bans public sector unions from requiring nonmembers to pay "agency" fees for collective bargaining coverage. It already has the support of various conservative and limited-government advocates.

Regardless of whether the government weighs in, legal scholars presume a union loss in *Janus*. The deeper concern among labor movement supporters who spoke with Bloomberg Law is that the Justice and Labor departments might wade into a separate legal argument designed to further restrict union representation for government workers. The Supreme Court could hear oral arguments in the case as soon as February.

Worker advocates fear that the DOJ and the DOL would co-author a brief in *Janus* that goes beyond the agency fee question to also urge the justices to declare it unconstitutional for unions to serve as the exclusive bargaining representative for employees in a public sector workplace. Patricia Smith, the Obama-appointed DOL solicitor, said flipping from the government's position in a similar case less than two years ago, *Friedrichs v. California Teachers Association*, would be alarming on its own. But to use the *Janus* brief as an opportunity to roll back public sector collective bargaining would be "a radical expansion of the First Amendment to undermine collective bargaining," Smith, now a senior counsel at the National Employment Law Project, told Bloomberg Law.

Patrick Semmens, a vice president for public information at the National Right to Work Legal Defense Foundation, told Bloomberg Law, "We would, of course, welcome a brief from the administration in support of Mark Janus' position that mandatory union fees for public

employees violate the First Amendment.” Semmens declined to speculate on any specifics of the government’s possible argument.

The Labor Department declined to comment on this story out of deference to the DOJ solicitor general’s office. A DOJ spokeswoman also declined to comment.

The DOL acting solicitor, Nicholas Geale, flagged the upcoming *Janus* briefs as a noteworthy labor law development when addressing a roomful of conservative lawyers, including National Right to Work Legal Defense Foundation (NRTWLDF) attorneys, at the Federalist Society convention in November.

### DOL Weighed In on *Friedrichs*

Smith as DOL solicitor helped write the government’s 2015 brief in *Friedrichs*. The U.S. at that time advanced the argument that the Supreme Court’s 40-year precedent allowing unions to collect fees from nonmembers is essential to prevent the “free-riding” problem: when workers benefit from union contracts without providing financial support. In the wake of Justice Antonin Scalia’s death, the court deadlocked 4-4 in *Friedrichs* in 2016.

Craig Becker, general counsel of the union umbrella organization AFL-CIO, said he’s heard some gossip about the government’s *Janus* brief but declined to prejudge the solicitor general.

“The federal government’s interest in the case is as an employer in being able to structure its employment relationships in the way that it believes is efficient and effective, and therefore, in not being overly constrained by the First Amendment in its employment relations,” Becker told Bloomberg Law. “That’s the argument that was made by the solicitor general in *Friedrichs*, and it is still consistent with the federal government’s interest in this case.”

### Justice Department Meeting

The *Friedrichs* debate will soon be reheard in *Janus* with a fully staffed court. The addition of Justice Neil Gorsuch to the bench has unions representing firefighters, teachers, police officers, and state and local government employees bracing for a loss that could deplete their treasuries.

On the issue of public sector agency fees, there is mounting anticipation that the ideological shift in a Republican executive branch means the federal government will now oppose the union position.

“I have heard that there’s at least some question or thought about” the government flipping, Patrick Wright, vice president for legal affairs at the Mackinac Center for Public Policy, told Bloomberg Law. “We’re obviously hopeful that the United States would be on the right side, but it’s far more important to get Justice Gorsuch there.” Wright wrote Mackinac’s amicus brief asking the Supreme Court to hear *Janus*.

The NRTWLDF earlier this year met with the solicitor general’s office to request that the government file an amicus brief in support of the foundation.

The DOJ has demonstrated this year a willingness to switch positions from the Obama administration on two other major workplace law cases—joining employers to argue that the federal ban on sex discrimination doesn’t apply to sexual orientation bias and that businesses are legally permitted to force workers to sign arbitration clauses that prevent them from collectively filing lawsuits.

## ‘Next Round of Litigation’

The NRTWLDF and other conservative groups consider it their next frontier after stripping compelled agency fees to go after public unions’ right to represent those who don’t pay dues.

“There are cases percolating up about people being forced to accept the union as their exclusive representative,” Ilya Shapiro, a Cato Institute lawyer, told Bloomberg Law. “That’s probably the next round of litigation.” Shapiro filed a brief on behalf of Cato, the conservative-leaning think tank, in support of the high court taking up *Janus*.

In fact, the right-to-work group asked the Supreme Court in *Hill v. SEIU* to ban exclusive representation in the public sector, but the justices denied to hear that case in November.

That still wouldn’t preclude the Trump DOJ and DOL from using *Janus* to test the justices’ willingness to address government union bargaining rights in a later proceeding. But that argument would be met with fierce opposition from the left.

“If they were to take such a radical step to undermine workers’ rights, I have no doubt that it would be motivated not by a genuine concern about constitutional rights but by a desire to destroy the labor movement,” Sharon Block, who was both a National Labor Relations Board member and DOL policy official in the Obama administration, told Bloomberg Law.

The Supreme Court hasn’t been receptive thus far to the notion that “monopoly unions” constitute a First Amendment violation and that workers should be allowed to negotiate their own terms with employers free of a union’s influence.

## Does DOJ Brief Matter?

But the more pressing matter remains the seemingly certain outcome that government unions will no longer be able to rely on agency fees that have served as their lifeblood. And within hours, the public may know where the DOJ stands.

## How much influence would a government reversal have?

“Sometimes people refer to the solicitor general as the 10th justice because that institutional role gets a lot of respect from the nine true justices,” Charlotte Garden, a labor law professor at Seattle University Law School, told Bloomberg Law. “I think the union was facing an uphill climb anyway, and the government flipping sides would just add to the steepness.”