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Challengers to public union fees ask Supreme Court for second chance

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(Reuters) - The California school teachers who unsuccessfully challenged public sector union fees filed a long-shot petition on Friday asking the U.S. Supreme Court to rehear the case after a ninth justice joins the court.

The high court handed public sector unions a victory in March when its 4-4 split decision in *Friedrichs v. California Teachers Association* upheld the 2015 ruling from the 9th U.S. Circuit Court of Appeals, which found that fees charged to nonunion public school teachers did not violate the First Amendment.

The legal challenge, backed by the conservative Center for Individual Rights and argued by Michael Carvin of Jones Day, appeared destined to succeed before Justice Antonin Scalia died Feb. 13.

"The court is familiar with the record in this case, has already determined that it is an appropriate vehicle for deciding the questions presented, has already expended significant resources digesting the briefs and presiding over argument, and is presumably prepared to issue a decision once a tie-breaking justice is confirmed," the plaintiffs argued in their petition.

Yet they appear to face long odds to convince the Supreme Court.

"Petitions for rehearing are filed routinely in many cases, but expecting they will be granted is a Hail Mary pass," said Stephen Wermiel, a constitutional law professor at American University. "This one is even more so since they're asking the court to hold it indefinitely."

The refusal by the Senate's Republican leadership to even hold hearings for Merrick Garland, the Obama administration's nominee to the high court, could mean that Scalia's eventual replacement would not join the court until as late as mid-2017.

Another factor weighing against the plaintiffs is the strong likelihood that the underlying legal issue in *Friedrichs* will come before the high court in the future in other cases, Wermiel said.

Other lawsuits attacking the constitutionality of fees charged to nonunion public workers are currently being litigated in federal courts. One notable example is *Janus v. AFSCME*, a lawsuit in Chicago federal court backed by the National Right to Work Legal Defense Foundation and Illinois' Republican Governor Bruce Rauner. There is also a case under submission at the 5th Circuit that involves fees paid by nonunion workers at a private railroad company, but a ruling in that case could affect public sector unions.

While the Supreme Court has occasionally ordered cases to be reargued - including in landmark cases such as *Brown v. Board of Education*, *Roe v. Wade* and *Citizens United v. FEC* - it did so on its own rather than in response to any outside requests.

The *Friedrichs* plaintiffs conceded that rehearing a case is "extraordinarily rare" after the court has reached a decision. They argued that it is "quite common," however, to order rehearing to avoid a deadlock.

Despite the slim chance that the court will grant the petition, there are public relations concerns that may have motivated the plaintiffs to ask for a rehearing, said Timothy Johnson, a political scientist at the University of Minnesota who has written extensively about the Supreme Court.

The plaintiffs can use the petition to show their supporters that they are doing everything they can to fight public sector unions, Johnson said. The petition also highlights what is at stake in the presidential election, as the winner will likely name the justice who will replace Scalia and cast the deciding vote on public sector union fees charged to nonmembers, he said.

The case is *Friedrichs v. California Teachers Association*, U.S. Supreme Court, No. 14-915.

For the petitioner: Michael Carvin of Jones Day

For the respondent: David Frederick of Kellogg Huber Hansen Todd Evans & Figel