



# LEGAL VIEWPOINT

## Supreme Court Clears Path to End State Employees' Automated Union Political Contributions

By Maurice A. Thompson

OHIO LAWS SEPARATING UNION politics and government employment should never have been struck down, and the legislature should reinstate them. The United States Supreme Court has just upheld an Idaho law banning deductions from state employees' paychecks for the political purposes of their unions. Although Ohio once implemented an identical protection, an Ohio appellate court struck it down on First Amendment grounds in 1998. At the end of February, in *Ysursa v. Pocatello Education Association*, the Supreme Court made it clear that such laws are permitted by the federal Constitution. This leaves no doubt that Ohio's 1998 ruling was erroneous. Accordingly, the Ohio legislature should now reinstate Ohio's separation of union politics and government employment.

### The Current State of Affairs

Currently, in Ohio, there is no law in place to prohibit public employee unions from (1) gaining access to funds through automatic deductions from government employees' paychecks; and (2) using those funds for political purposes. Nationally, labor unions spend as much as \$800 million per year on political campaigns. This is more than is spent by the Republican and Democrat parties combined.<sup>1</sup>

Meanwhile, the political expenditures of public employee unions are big business. The American Federation of State, County, and Municipal Employees (AFSCME) spends over 22 percent of its annual budget, over \$34 million, on political contributions. The Ohio Chapter alone spends nearly \$1 million per year on politics, and employees at least ten executives with six-figure incomes.<sup>2</sup> The Ohio Chapter of the National Education Association, comprised of state-employed teachers, spends over \$3.1 million per year on politics and lobbying, and at least ten of its employees draw salaries over \$145,000.

These numbers force one of two conclusions: either (1) public employee unions have plenty of money to spend on controversial political activities, and thus can and should operate without the state's assistance in automatic payroll deductions from state employees; or (2) public employee unions only have such a vast amount of money to spend on controversial political activities because of the state assistance of automatic payroll deductions from state employees. Either of

these conclusions supplies a compelling rationale for separating politics from government by ending the practice of automatic payroll deductions from government employees for union political activities.

### Past Efforts to Separate Politics and Public Employment

In 1995, Ohio enacted the Campaign Finance Reform Act, also known as Senate Bill 8, to make significant changes in Ohio's campaign finance law. Before the enactment of S.B. 8, "any employer," including government, could facilitate political payroll deductions for its employees. S.B. 8 eliminated a public employer's authority to deduct political contributions from an employee's wages or salary. The provision stated:

No public employer shall deduct from the wages and salaries of its employees any amounts for the support of any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue.

However, by 1998, in *United Auto Workers, Local Union 1112 v. Philomena*, the Court of Appeals for the Tenth District Court of Ohio struck down this provision, and the Supreme Court refused to review the decision. As a result, the political check-off for transferring money from government employee to unions was reinstated.

In concluding that this separation of politics and state employment was unconstitutional, the UAW court relied solely on the federal Constitution,<sup>3</sup> and concluded that the separation "impinge[d] upon the fundamental

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### Accordingly, Ohio should reinstate its own separation of union politics and government employment.

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right to engage in political expression."<sup>4</sup> Interestingly, the Ohio appellate court took the convenience of unions and union employees into account:

The record establishes that for many employees, including public employees, payroll deduction is the most advantageous way to make political contributions. Significant to this court is the reality that for people on a budget, donating

to causes they support is easiest if they may do so in small weekly, biweekly, or monthly increments.

Upon such reasoning, SB 8's seemingly reasonable restrictions on political paycheck deductions were invalidated.<sup>5</sup>

### **The Idaho Statute Mirrors Ohio's Invalidated Statute**

*Ysursa*, the recent United States Supreme Court case, featured a challenge to Idaho's Voluntary Contributions Act. The Supreme Court explained that "[u]nder [the act], a public employee may elect to have a portion of his wages deducted by his employer and remitted to his union to pay union dues. *He may not, however, choose to have an amount deducted and remitted to the union's political action committee, because Idaho law prohibits payroll deductions for political activities.*"<sup>6</sup>

In the face of a challenge similar to that waged by Ohio's unions in 1998, i.e. First Amendment grounds, the Court nevertheless upheld the validity of the ban:

Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities. Idaho's public employee unions are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor. Idaho's decision to limit public employee payroll deductions as it has does not infringe the unions' First Amendment rights. \* \* \* And the State's response to the problem is limited to its source-political payroll deductions. The ban plainly serves the State's interest in separating public employment from political activities.<sup>7</sup>

Accordingly, the separations of politics and public employment similar to that enacted in Ohio are clearly constitutional.

### **Ysursa vindicates Ohio's efforts to separate politics from government employment**

On every front, the Supreme Court's *Ysursa* decision uproots the flawed reasoning of the Ohio appellate Court. First, Ohio's rationale for the legislation was constitutionally valid. In support of the Ohio legislation, its sponsors emphasized "the corruption potential presented by the knowledge public employers would obtain from administering payroll deduction of political contributions for employees under their supervision," and the importance of

"bipartisan public support of government, confidence in the system of representative government, and reduction of partisan pressure on or by public employees."<sup>8</sup>

Nevertheless, the Ohio court concluded that these purposes were insufficient: "[t]his court sees no close connection between allowing political contributions to be made by way of payroll deduction and concerns that employees will feel coerced to make contributions or do so, not to express personal belief, but to curry favor."

Perhaps not surprisingly, in *Ysursa*, the United States Supreme Court reached the opposite conclusion, stating that "[t]he ban furthers Idaho's interest in separating the operation of government from partisan politics."

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### **Thirdly, convenience to unions is no justification for automatic payroll deductions.**

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Secondly, while the Ohio court applied the highest standard of constitutional scrutiny, "strict scrutiny," to the Ohio statute, the U.S. Supreme Court explained that such scrutiny is not appropriate: "[w]hile in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones."<sup>9</sup> Thus, the Court explained "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."<sup>10</sup> Given that the State has not infringed on First Amendment rights, "the State need only demonstrate a rational basis to justify the ban on political payroll deductions."<sup>11</sup> And under rational basis review, a statute like Idaho's, and formerly Ohio's, is "justified by the State's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics."<sup>12</sup>

The First Amendment prohibits government from "abridging the freedom of speech"; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. *Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee check-offs for political activities.* Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity.

Thirdly, convenience to unions is no justification for automatic payroll deductions. The Ohio court emphasized that “payroll deduction is the most advantageous way to make political contributions. Significant to this court is the reality that for people on a budget, donating to causes they support is easiest if they may do so in small weekly, biweekly, or monthly increments.”<sup>13</sup>

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## **Finally, any move towards freedom from the influence of labor unions appears to spur economic growth.**

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The *Ysursa* court rejected such strained reasoning. It concluded that “unions face substantial difficulties in collecting funds for political speech without using payroll deductions...While publicly administered payroll deductions for political purposes can enhance the unions’ exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities.”<sup>14</sup> In other words, a decision not to assist fundraising that may, as a practical matter, result in fewer contributions is simply not the same as directly limiting expression.<sup>15</sup>

With constitutional concerns alleviated, Ohio should again separate government employment from politics.

With the constitutional path now cleared, there are several compelling reasons to “re-enact” the payroll deduction prohibition of Senate Bill 8. These include (1) curtailing coercion and favoritism; (2) fostering government accountability; and (3) acknowledging the disconnection between member preferences and how funds are spent.

First, ending political payroll deductions protects dissenting employees. As the Pacific Legal Foundation has observed, “unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities.”<sup>16</sup> This is particularly true in the case of “[d]issenting workers in offices where public employee unions have substantial power to govern the terms of employment and even to deduct funds from paychecks.”<sup>17</sup>

The political atmosphere of the unionized workplace puts an extremely heavy burden on workers to remain silent about their own opposition to union policies. This silence may include a reluctance to *not* make political contributions. The history of unionism is replete with examples of threats, coercion, intimidation, and violence

directed at workers who do not agree with union goals, policies, or tactics.<sup>18</sup> Between 2000 and 2007, the National Labor Relations Board received 1325 complaints of union-sponsored threats and 546 reports of harassment. Meanwhile, unions routinely use high-pressure tactics to manipulate workers into contributing money for union political campaigning.<sup>19</sup> The Pacific Legal Foundation cites many cases featuring such tactics.<sup>20</sup>

In Ohio, government employees who are required to be union members may legitimately fear that their superiors, i.e. partisan politicians or appointees of partisan politicians, will pay attention to who is contributing and who is not. Failing to contribute may make work-life more difficult for professional government workers. This is even more true for employees who work underneath politicians or appointees that rely upon such contributions to retain their positions.

The harms of such retaliation and favoritism extend to the Ohio taxpayer. When less competent employees are promoted on the basis of their political loyalty, while more competent employees are overlooked, the government agency’s management is more likely to make poor management decisions. Poor management of a public agency ultimately results in waste of taxpayer dollars, a lack of responsiveness, and a lack of accountability. Decisions may also be based more on political expediency than productivity.

There is a second way in which impliedly coerced political contributions from public employees harms the employee and Ohio: such contributions are often not used in accordance with the employee’s preferences. This creates distortions between the political will for certain causes and the funding available for those causes.

For instance, a 1996 poll revealed that 62 percent of AFL-CIO members opposed that union’s decision to spend \$35 million on advertising for the Democrat party.<sup>21</sup> Similarly, the Teamster’s Union contributed \$56 million to Bill Clinton, even though its own internal polling indicated that its members preferred Ross Perot, and then George H.W. Bush.<sup>22</sup>

The numbers are often even worse for public sector employee unions. Between 1990 and 2004, 94 percent of the donations made by the National Education Association political action committee went to Democrats, even though only 45 percent of public school teachers count themselves as Democrats.<sup>23</sup> Such disconnections between member preferences and union spending habits have the effect

of rendering potentially unpopular political causes more palatable than they may otherwise be.

Finally, any move toward freedom from the influence of labor unions appears to spur economic growth. According to the National Institute for Labor Relations Research, citing U.S. Labor Department statistics, Idaho's paycheck protection and right-to-work laws have facilitated significant economic growth: "In the decade before its Right to Work law first took effect in 1986, Idaho's employment growth was barely more than half the national average. But over the past two decades, Right to Work Idaho repeatedly topped the nation in job creation."<sup>24</sup> Meanwhile, Ohio's labor policies have driven jobs from the state, and at the time of this publication, Ohio's unemployment rate stands at a staggering 9.4 percent, and national survey of top Chief Operating Officers reveals that they view Ohio as "48<sup>th</sup>" of the 50 states in terms of workforce quality-- no doubt a reflection on Ohio's highly unionized climate.

### Conclusion

The *Ysursa* case clearly demonstrates that Ohio's separation of union politics and government employment, as articulated in Senate Bill 8, should never have been struck down. The path is now clear to reinstitute this legislation, and for the reasons cited above, it is important that the General Assembly re-effectuate the will of the people of Ohio.

### ENDNOTES

1 See Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics*, at 44-46 (2004); Herbert R. Northrup, *the Teamsters' Union Attempt to Organize Overnight Transportation Company: A Study of a Major Union Failure*, 30 *Transp. L.J.* 127, 155-68 (2003).

2 Center for Union Facts, <http://www.unionfacts.com/unions/unionProfile.cfm?ID=512927&year=2006>

3 *United Auto Workers, Local Union 1112 v. Philomena* (1998), 121 Ohio App.3d 760, 700 N.E.2d 936 (noting "[t]here are few Ohio cases interpreting Ohio constitutional provisions because the parallel federal provisions have usually been construed as imposing restrictions upon state action the same as or greater than the Ohio provision," and that "[appellant's] rely heavily on federal case law, as will this opinion").

4 *UAW*, supra, citing *Austin v. Michigan Chamber of Commerce* (1990), 494 U.S. 652, at 666, 110 S.Ct. 1391, at 1401, 108 L.Ed.2d 652, at 668-669.

5 *UAW*, supra. The Court also posited an equal protection argument, noting that "[t]hat there is no constitutional right to payroll deduction for political contributions does not end the inquiry. If authorizing private employee payroll deduction for political contributions makes it easier for private employees than public employees to engage in political expression, R.C. 3599.031(H) infringes upon the political expression rights of public employees." However, Neither Ohio's Equal Protection Clause, nor the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, prohibits the State from banning automatic payroll deductions for political purposes. The *UAW* court came to the wrong conclusion of Constitutional law, even as it existed at the time, a point made clear by the 6th Circuit in *Toledo Area AFL-CIO Council v. Pizza* (1998), 154 F.3d 307, at 312 (stating "[w]e are aware of the Ohio Court of Appeals decision in *United Auto Workers Local Union 1112 v. Philomena*, \* \* \*. In reaching its conclusion that O.R.C. § 3599.031(H) was unconstitutional, the Ohio Court relied exclusively on federal case law. We disagree with our Ohio counterparts' interpretation of this case law," because "the status of being a public employee has never been deemed either a suspect or a quasi-suspect classification," and because "[t]here is no significant difference between the Ohio statute and what a large corporation might do by ordering all of its subsidiaries to stop administering the deductions and [p]ublic employees have no greater right than their private-sector counterparts to challenge such decision.")

6 *Id.* In 2003, the Idaho Legislature passed the Voluntary Contributions Act (VCA). That legislation, among other things, prohibited payroll deductions for political purposes. It provides: "Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee." § 44-2004(2).

7 *Ysursa v. Pocatello Educ. Ass'n* (2009),--- S.Ct. ---, 2009 WL 436709, citing *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 37 L.Ed.2d 796.

8 *United Auto Workers, Local Union 1112 v. Philomena* (1998), 121 Ohio App.3d 760, 700 N.E.2d 936.

9 *Ysursa*

10 *Ysursa v. Pocatello Educ. Ass'n* (2009),--- S.Ct. ---, 2009 WL 436709, citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); cf. *Smith v. Highway Employees*, 441 U.S. 463, 465, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979) ( *per curiam*) ("First

Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize [a labor] association and bargain with it”).

11 *Id.*, at 546-551, 103 S.Ct. 1997. (internal quotation marks omitted)

12 See *Civil Service Comm’n v. Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (public perception of partiality can undermine confidence in representative government); *Public Workers v. Mitchell*, 330 U.S. 75, 96-100, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (Congress may limit political acts by public officials to promote integrity in the discharge of official duties); cf. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 809, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (limitations on speech may be justified by interest in “avoiding the appearance of political favoritism”); *Greer v. Spock*, 424 U.S. 828, 839, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (upholding policy aimed at keeping official military activities “wholly free of entanglement with partisan political campaigns of any kind”).

13 *United Auto Workers, Local Union 1112 v. Philomena* (1998), 121 Ohio App.3d 760, 700 N.E.2d 936.

14 *Yursa*, supra.

15 Cf. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (“Although [a union] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to

such funds as may be necessary to realize all the advantages of that freedom” (internal quotation marks omitted)).

16 *Yursa*, supra., Brief Amicus Curiae of Pacific Legal Foundation in Support of Neither Party, p. 7.

17 *Id.*

18 See Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics*, at 44-46 (2004); Herbert R. Northrup, *the Teamsters’ Union Attempt to Organize Overnight Transportation Company: A Study of a Major Union Failure*, 30 *Transp. L.J.* 127, 155-68 (2003).

19 Center for Union Facts, *When Voting isn’t Private: The Union Campaign Against Secret Ballot Elections 19* (2007).

20 *Yursa*, supra., Brief Amicus Curiae of Pacific Legal Foundation in Support of Neither Party, p. 7.

21 Donald Beachler, *Race, God, and Guns: Union Voting in the 2004 Presidential Election*, 10 *WorkingUSA: Journal of Labor and Society*, at 311-325 (2007).

22 F.C. Duke Zeller, *Devil’s Pact: Inside the World of the Teamster’s Union* 346 (1996).

23 Center for Union Facts, [www.unionfacts.com/articles/unionpolitics](http://www.unionfacts.com/articles/unionpolitics).

24 National Institute for Labor Relations Research, *Freedom to Associate of Necessity Means as Well Freedom Not to Associate* ([www.nilrr.org/node/67](http://www.nilrr.org/node/67)).

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