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FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION: A PYRRHIC VICTORY FOR UNIONS

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INTRODUCTION

The U.S. Supreme Court's March 29, 2016 *per curiam* decision in *Friedrichs v. California Teachers Association* means that, for a time, unions have won the battle.[1] But the question concerning the lawfulness of fair share fees, crucial to the feasibility of collective bargaining, will undoubtedly return to the Court. Spearheaded by the Center for Individual Rights and the National Right to Work Legal Defense Fund, two conservative non-profit law firms,[2] union opponents are dedicated to stripping public unions of their right to charge non-members for collective bargaining negotiation and other services rendered.[3] This jeopardizes thousands of collective bargaining agreements across the country and not just those in the public sector.[4]

In past decisions, the Court, buttressed by empirical analysis, has

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[1] Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (per curiam).

[2] CTR. FOR INDIVIDUAL RTS., https://www.cir-usa.org/mission/ [https://perma.cc/QU8Y-VDJM]; NAT'L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/about/ [perma.cc/U449-9MRQ].

[3] Adele M. Stan, *Who's Behind* Friedrichs*?*, AM. PROSPECT (Oct. 29, 2015), http://prospect.org/article/whos-behind-friedrichs [https://perma.cc/XCR2-47SG].

[4] ANN C. HODGES, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, *FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION:* THE AMERICAN LABOR RELATIONS SYSTEM IN JEOPARDY 1 (2015), http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2292&context=law-faculty-publications [https://perma.cc/8J7U-9CZJ].

connected public and private union security. The *Friedrichs* plaintiffs sought to overturn the decades-long precedent *Abood v. Detroit Board of Education*. That 1977 case held that unions could charge fair share costs of collective bargaining to employees they represented and that objecting employees could refuse to fund the union's political activities.[5] Going into the oral argument, Justice Scalia was widely viewed to be the swing vote in *Friedrichs*, a theory that is supported by the Court's 4-4 split after his death.[6] Prior to Justice Alito's invitation to challenge public sector unions' fair share fees in *Knox v. SEIU Local 1000*[7] and *Harris v. Quinn*,[8] Justice Scalia had recognized that unions' statutory obligation to represent non-members was sufficient justification for mandatory fair share fees.[9] Regardless of how the case might have come out, a new Trump appointee to the Court means the future of unions in America is again under threat.[10]

Looking to exploit Alito's invitation in *Knox* and *Harris*, the *Friedrichs* plaintiffs sped through the lower courts, and, as a result, over the objections of the union respondents, no evidentiary record was established. The alarming speed at which they drove to the Court was an intentional litigation strategy.[11] Although their petition for rehearing was denied in June 2016,[12] the Center for Individual Rights will undoubtedly ask the court to rehear the case now that a new justice is sitting. The unions raised several procedural objections to the lack of an evidentiary record. Now several cases in the same vein of *Friedrichs* have been filed in the lower courts.[13]

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[5] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224-26, 233-34 (1977).

[6] Charlotte Garden, *What Will Become of Public-Sector Unions Now?*, ATLANTIC (Feb. 16, 2016), http://www.theatlantic.com/business/archive/2016/02/scalia-friedrichs/462936/ [https://perma.cc/5H97-V4HX].

[7] Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2295 (2012) (stating in dicta that "the union has no constitutional right to receive any payment from" nonmembers).

[8] Harris v. Quinn, 134 S. Ct. 2618, 2632 (2014) ("The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.").

[9] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 550 (2006) (Scalia, J., dissenting).

[10] Ann C. Hodges, *The Aftermath of* Friedrichs v. California Teachers Association, ACSBLOG (Apr. 4, 2016), http://www.acslaw.org/acsblog/the-aftermath-of-friedrichs-v-california-teachers-association [https://perma.cc/7658-LZPJ].

[11] Friedrichs v. California Teachers Association et al.*: Supreme Court Denies* Friedrichs *Petition for Rehearing*, CTR. FOR INDIVIDUAL RTS. (June 28, 2016) [hereinafter *Supreme Court Denies*], https://www.cir-usa.org/cases/friedrichs-v-california-teachers-association-et-al/ [https://perma.cc/9RKE-FVUB] .

[12] Friedrichs v. California Teachers Association, SCOTUSBLOG [hereinafter *Friedrichs* SCOTUSBLOG], http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/ [https://perma.cc/PL7R-MAM7].

[13] *See* Complaint at 1-3, Pelli v. Int'l Bhd. of Elec. Workers, Local 43, No. 5:17-cv-60 (N.D.N.Y. Jan. 18, 2017) (noting that three school workers in New York are challenging

Now that a Trump appointee to the Court is confirmed, these new cases will look to test the 4-4 decision.[14]

Friedrichs specifically asked the Court to overrule *Abood* and allow nonunionized public sector employees not to pay fair share fees on First Amendment grounds. These newly filed cases will undoubtedly frame the issue in a similar light. This article will discuss the legal and factual history of the *Friedrichs* case, explain why the Court should continue to uphold *Abood* in light of future *Friedrichs*-esque challenges, and analyze the future of litigation related to union fair share fees.

BACKGROUND

A free-rider problem occurs when a person derives a positive externality from the actions of another; in short, a benefit that the free rider did not pay for.[15] In certain situations, the beneficial effect is nonexcludable—the benefit cannot be withheld from the free rider. The free rider problem is not that any individual has been aggressed, violated, or suffered a detriment. It is instead a problem of what might have been, a problem of inefficient underproduction.[16] The nonexcludability of the good with respect to an individual free rider impairs a collective right: it weakens the feasibility and strength of the collective itself.[17] Economists faced with this problem search for an optimal Pareto-efficient solution.[18] The rational actor allows others to pay when payment is noncompulsory for a public good.[19] The effect of free riders on collective action risks a system-wide collapse.[20] This theory underlies the fair share or fair division principles behind taxes, pollution control, and other measures designed to redress externalities.[21]

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fair share fees and have filed suit against the electrical workers union and Governor Cuomo); Complaint at 1, Li v. Serv. Emps. Int'l Union Local 521, No. 5:17-cv-258 (N.D. Cal. Jan. 19, 2017) (noting that the National Right to Work Foundation is assisting two Santa Clara Valley Medical Center pharmacists in filing a suit against SEIU officials and the County of Santa Clara, California); Complaint at 1-3, Hartnett v. Pa. State Educ. Ass'n, No. 1:17-cv-100 (M.D. Pa. Jan. 18, 2017) (noting that four Pennsylvania school teachers initiated a suit against the Pennsylvania State Education Association).

[14] Hodges, *supra* note 10.

[15] *See generally The Free Rider Problem*, STAN. ENCYCLOPEDIA PHIL. (May 21, 2003), https://plato.stanford.edu/entries/free-rider/ [https://perma.cc/7VV5-6PLB].

[16] *Id.*

[17] NICHOLAS BARR, THE ECONOMICS OF THE WELFARE STATE 80 (3d ed. 1998).

[18] *Id.* at 49.

[19] *Id.* at 105.

[20] *Id.*

[21] *Id.* at 189 (explaining by analogy to unemployment insurance that fair share principles simply provide for individuals to share in the costs for the benefits and services they receive by paying a fair portion for those benefits and services).

The exclusive representation system in the United States takes effect when a majority of the bargaining unit votes for union representation.[22] This means unions must represent workers regardless of the individual workers' preferences.[23] Exclusive representation means ease of bargaining and contract administration for both the employer and the union.[24] The union is statutorily required to represent all workers fairly and without discrimination regardless of union membership status. If the union fails to do so, the worker is entitled to seek a legal remedy against the union.[25] For this representation, both members and non-members must pay a fair share fee.[26]

Congress has long recognized the importance of providing support and allowing for the ease of commerce and the potential threat to that commerce from labor strife and unrest.[27] In passing the National Labor Relations Act (the "Labor Act"), Congress addressed its finding that labor strife and unrest were motivated by employers' denial of the right of employees to organize and the refusal by employers to accept collective bargaining.[28] The inequality of individual bargaining depressed wage rates and purchasing power of wage earners, and jeopardized the free flow of commerce.[29] Experience showed that protecting the right to collective bargaining safeguarded commerce from injury and impairment.[30] Labor strife and unrest became widespread at the turn of the last century and heightened in the early years of the Great Depression.[31] Congress was forced to act.

In 1935 Congress enacted the National Labor Relations Act, which "recognized unions as legitimate representative of workers" in the private sector.[32] As a part of employer agreements, including those that predated the Labor Act, unions included union security clauses which "compel[led]

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[22] MICHAEL EVAN GOLD, AN INTRODUCTION TO LABOR LAW 25 (3d ed. 2014) (defining exclusivity of representation).

[23] *Id.*

[24] *Id.* at 25-26.

[25] *Id.* at 27.

[26] *Id.* at 31.

[27] National Labor Relations Act, 29 U.S.C. § 151 (1947) (setting forth Congress's findings and declaration of policy underlining the National Labor Relations Act).

[28] *Id.* ("The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . .").

[29] *Id.*

[30] *Id.*

[31] *See* Ann C. Hodges, *Imagining U.S. Labor Relations without Union Security*, 28 EMP. RESPONSIBILITIES & RTS. J. 135, 140, 143 (2016).

[32] GOLD, *supra* note 22, at 14; *see also, e.g.*, 29 U.S.C. §§ 151, 169.

membership in a labor organization in some sense of the word . . . ."[33] The Taft-Hartley amendments passed in 1947 provided that, *inter alia*, union security clauses were barred from including "closed shop" provisions.[34] Closed shops meant employers agreed to hire union members only, and an employee had to remain a union member for continued employment.[35] Taft-Hartley additionally provided that union security clauses could include union shop provisions where the employer agrees to hire union members or that new employees will become union members 30 days after hire.[36] Finally, the amendments permitted states to pass laws which barred union security clauses in the state (the birth of the misleading "right-to-work" laws).[37] There are also union security clauses known as agency shop provisions, which state that employees need not join the union in order to remain employed.[38] However, the nonunion worker must pay a fee to cover collective bargaining and other services rendered.[39]

In the 1956 case *Railway Employees' Department v. Hanson*, the Court interpreted the Railway Labor Act, and by extension the Labor Act, to constitutionally permit union shops that could collect fees to support the union's collective bargaining costs.[40] Five years later, the Court held that people who objected to joining the union should not have to pay for the union's political activities because such a requirement would violate the objectors' First Amendment rights.[41]

The Labor Act does not cover public sector unions, like the respondents in *Friedrichs*.[42] However, individual states have adopted their own versions

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[33] William B. Gould IV, *Organized Labor, the Supreme Court, and* Harris v. Quinn*: Déjà Vu All Over Again?*, 2014 SUP. CT. REV. 133, 134 (2014).

[34] 29 U.S.C. §§ 157, 158(a)(3); *see also* Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 33 (2011) ("[I]n 1947, Congress amended the NLRA to forbid the closed shop, but left the statute silent on the union shop, so that employers and unions were free to agree to such an arrangement." (footnote omitted)).

[35] *See* Mich. State AFL-CIO v. Callaghan, 15 F. Supp. 3d 712, 716 (E.D. Mich. 2014) (noting that the Taft-Hartley amendments removed "language authorizing closed-shop agreements that made union-membership a condition of obtaining employment").

[36] 29 U.S.C. § 158(a)(3).

[37] *Id.* § 164(b); Denise Oas et al., *Right-to-Work: A Legal Rights Perspective*, 67 LAB. L.J. 437, 439 (2016) ("The Taft-Hartley Act also authorized states to adopt right-to-work laws that would prohibit union security agreements requiring membership in a labor organization as a condition of employment.").

[38] GOLD, *supra* note 22, at 14.

[39] *Id.*

[40] Ry. Emps. Dep't v. Hanson, 351 U.S. 225, 233 (1956).

[41] Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 768 (1961).

[42] 29 U.S.C. § 152(2) ("The term 'employer' . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . .").

of the Labor Act that cover public employees. Like the Labor Act, these state laws, for example the California Agency-Shop Law at issue in *Friedrichs*, provide that unions are permitted to charge fair share costs of collective bargaining to employees they represent including those who objected to joining the union.[43] The Court held in *Abood*, as it did in earlier cases related to fair share fees in private sector unions, that charging non-members for collective bargaining was permissible, as long as those fees did not violate the non-members' First Amendment rights, namely fees funding political activity.[44]

Unions are allowed to charge non-union employees for the cost of representational duties and these fees are known as fair share agreements. In *Lehnert v. Ferris Faculty Association*, the Court's majority derived a three-part test from cumulative precedent to govern union charges of non-members. Under the test, activities chargeable to nonunion members must "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[45] Thus, fair share fees are divided into two categories: chargeable activities that are related to the union's representational duties and non-chargeable activities.[46]

In both the public and private sector, nonunion members have an ability to opt out of paying the non-chargeable portion and can challenge the categorization of the expenses as well as view the audited statements of those charges to facilitate such a challenge.[47] The exceptions to paying fair share fees include states that have passed right-to-work laws and an exemption for employees who conscientiously object to joining or supporting a union due to a religious conviction.[48] Employees with such a religious conviction typically have to donate the fees to a charitable organization identified in the union agreement. However, an employee with such a religious conviction would be responsible for paying the union for the reasonable cost of a grievance-arbitration procedure if requested by such an employee.[49]

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[43] HODGES, *supra* note 4, at 2.

[44] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977).

[45] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

[46] *See id.* at 516 (explaining that expenses "relevant or 'germane' to the collective-bargaining functions of the union" are generally "constitutionally chargeable to dissenting employees").

[47] HODGES, *supra* note 4, at 3.

[48] 29 U.S.C. §§ 169, 524a.

[49] *Id.* § 169.

PROCEDURAL HISTORY AND FACTS OF *FRIEDRICHS*

Petitioners in *Friedrichs* were Rebecca Friedrichs, nine other California public school teachers, and the Christian Educators Association International ("CEAI"), a non-profit organization that serves Christians working in public schools.[50] First, petitioners sought to overrule *Abood* by challenging the constitutionality of agency fee requirements for nonunion members.[51] Second, they challenged the practice of affirmatively opting out of nonchargeable fees as compelled speech.[52] The respondents were the California Teachers Association ("CTA"), the National Education Association ("NEA") and its local affiliates, as well as the superintendents of local school districts. California's then Attorney General Kamala D. Harris also intervened in the case and was a party throughout the appellate process.[53]

As the case progressed through the lower courts, attorneys for the plaintiffs asked the courts to rule against their clients with the interest of moving the case to the Supreme Court as quickly as possible.[54] The speed at which it reached the Court is a topic of some discussion.[55] From the first filing in district court until the day of the Court's decision, the litigation process took fewer than three years.[56] The speed at which the case was brought was an intentional litigation strategy: the Center for Individual Rights felt that lower courts did not have the authority to overturn Supreme Court precedent and only the Supreme Court itself could vindicate their clients' First Amendment rights.[57]

Friedrichs filed a complaint challenging the union's agency fee and opt-out requirements on April 30, 2013 in the Central District of California.[58] California Attorney General Kamala Harris intervened in the district court on September 19, 2013.[59] Friedrichs's complaint alleged that *Knox* had

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[50] Brief for the Petitioners at 16, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (No. 14-915).

[51] *Id.* at 60.

[52] *Id.* at i.

[53] *Id.* at iii.

[54] *Supreme Court Denies*, *supra* note 11.

[55] *See, e.g.*, Stan, *supra* note 3 (quoting CUNY School of Law Professor Frank Deale describing the litigation strategy as "collusive").

[56] *Friedrichs* SCOTUSBLOG, *supra* note 12.

[57] *Supreme Court Denies*, *supra* note 11; *see also* Stan, *supra* note 3 ("At each stage in the legal process, CIR attorneys asked the courts to rule against their own clients, with the apparent interest of moving the case up to the Supreme Court as quickly as possible.").

[58] Complaint, Friedrichs v. Cal. Teachers Ass'n, No. 8:13CV00676 (C.D. Cal. Dec. 5, 2013).

[59] Attorney General's Notice of Motion & Unopposed Motion to Intervene for the Purpose of Defending the Constitutionality of State Statutes, *Friedrichs*, No.

called *Abood* into question, which the district court could not revisit on its own.[60] Further, Friedrichs acknowledged the district court was precluded from granting relief on the opt-out concern because there was controlling Ninth Circuit precedent on the subject.[61] The plaintiffs sought a quick ruling to promptly take their claims to a forum that could vindicate them, and the district court obliged and entered a judgment against the plaintiffs on December 5, 2013.[62]

The plaintiffs appealed the district court's judgment to the Ninth Circuit Court of Appeals, again conceding that *Abood* foreclosed their claims.[63] They requested a quick ruling without delay for oral arguments so they could promptly take their claims to a venue that could vindicate them.[64] At both the district court and the circuit court, the plaintiff-appellants were successful in rebuffing the defendant-appellees' attempts to develop an evidentiary record.[65] In fact, on the pleadings alone it is difficult to pinpoint a major issue in which the plaintiffs specifically disagree with the union. On November 18, 2014, the Ninth Circuit declined the union's request to issue an advisory opinion and summarily affirmed the district court's ruling.[66]

Friedrichs petitioned the Supreme Court for *certiorari* and on June 30, 2015 a writ was granted.[67] Oral arguments were held on January 11, 2016,[68] and a *per curiam* decision was handed down March 29, 2016.[69] The 4-4 decision affirms the Ninth Circuit's holding and assures that *Abood* is

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8:13CV00676.

[60] *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriquez de Quijas v. Shearson /American Express, Inc., 490 U.S. 477, 484 (1989)) (describing the Court's view that only it may overrule its earlier precedents and that lower courts must apply the law that directly controls).

[61] Mitchell v. L.A. Unified Sch. Dist., 963 F.2d 258, 263 (9th Cir. 1992) (allowing opt-out regime).

[62] Order Granting Motion for Judgment on the Pleadings & Vacating Motion for Preliminary Injunction at 3-4, *Friedrichs*, No. 8:13CV00676.

[63] Plaintiff's Notice of Appeal, Friedrichs v. Cal. Teachers Ass'n, No. 13-57095 (9th Cir. Nov. 18, 2014); *cf.* Brief for the Petitioners, *supra* note 50, at 8-9.

[64] Appellants' Urgent Motion to Expedite and to Submit on the Papers at 1, *Friedrichs*, No. 13-57095.

[65] *See* Friedrichs v. Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014); *cf.* Opposition of Defendants-Appellees California Teachers Ass'n, *et al.* to Appellants' "Urgent Motion for Summary Affirmance or to Submit on the Papers," *Friedrichs*, No. 13-57095.

[66] *Friedrichs*, 2014 WL 10076847, at *1.

[67] Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015) (mem.).

[68] Lyle Denniston, *Argument Preview: New Threat to Public-Employee Unions*, SCOTUSBLOG (Jan. 4, 2016, 3:31 PM), http://www.scotusblog.com/2016/01/argument-preview-new-threat-to-public-employee-unions/ [https://perma.cc/6UZB-D55F].

[69] Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (per curiam).

still the law of the land.[70]

As provided by California state law, the individual school districts, of which the nine plaintiffs are employees, recognize a union as the exclusive bargaining agent of public employees.[71] Once a union is recognized as the exclusive bargaining representative, the union covers all public school employees in the district, including the plaintiffs.[72] These agreements provide that employees who do not join the union will incur "fair share service fees" that will be deducted from the employees' paychecks.[73] All nine plaintiffs were not members of a union but were required to pay the fair share service fees. California state law further provides that employees who must pay fair share service fees may opt-out of paying non-chargeable expenses.[74] New teachers can expect to pay approximately $600-650 per year in fair share service fees.[75] The unions inform the school districts of the total amount due under the agreement, and the districts deduct that amount from the employees' paychecks and deliver it directly to the union.[76]

ANALYSIS

The *Friedrichs* Court was confronted with two questions: first, whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment, and, second, whether requiring public employees to affirmatively object – or opt out – is a First Amendment violation.[77] As future cases will most likely be framed along the same lines as *Friedrichs*, the Court should uphold *Abood* because fair share fees do not conflict with the First Amendment rights of objecting employees. Further, the Court must contend with *stare decisis* and that the potential plaintiff is rehashing the same arguments from *Abood* without any relevant changes since the decision in law or society. Finally, any reversal is unwarranted based on the lack of an evidentiary record. I will address these three issues in turn below.

By focusing on the First Amendment narrowly and not considering exclusive representation more broadly, any future plaintiff is bound to fail. The Court has long held that a distinction exists between the speech of an

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[70] *Id.*; *Friedrichs*, 2014 WL 10076847, at *1.

[71] Brief for the Petitioners, *supra* note 50, at 2-3 (citing CAL. GOV'T CODE § 3544(a) (West 1977)).

[72] *Id.*

[73] *Id.* at 3-4.

[74] *Id.* at 3-4, 6.

[75] *See id*. at 7.

[76] *Id.* at 6-7.

[77] Brief for the Petitioners, *supra* note 50, at ii.

employee in a workplace and the speech of that employee as a citizen on public matters.[78] The Court has viewed collective bargaining in the exclusive representation system as a place for the government as employer to negotiate and bargain with the respective union over specific and, at times, statutorily mandated employment matters in private.[79] Further, nothing bars an objecting employee from voicing dissatisfaction with the union and issues of public concern regarding the government employer.[80]

The public employer may not compel an objecting employee to pay for the political activities of the union that are not germane to collective bargaining, preserving the objector's First Amendment rights.[81] However, public employers fundamentally must have the discretion to manage employee relationships, namely to institute fair share fee arrangements, in order to promote labor stability and efficient delivery of service, just as their private counterparts can.[82] The state's prerogative to promote that stability outweighs the objector's First Amendment interest to withhold fair share fees.

There are two driving reasons why any supposed violation of the interest is mitigated. First, the fair share fee arrangement does not prevent the objector from expressing his viewpoint on the union or public employer.[83] Compelled fee collection in this case does not equate to compelled speech. Second, the objector cannot withdraw his financial support because of a disagreement with the union.[84] In short, a minority of

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[78] *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 109 (1990) (Scalia, J., dissenting) ("[T]he patronage system does not have as harsh an effect upon conscience, expression, and association . . . ."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977) ("[P]ublic employees are free to participate in the full range of political activities open to other citizens."); City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 174-75 (1976) (noting the teacher was free to speak at a public meeting as a concerned citizen).

[79] *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 278-79, 282-83, 288 (1984); *Abood*, 431 U.S. at 223 ("As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." (quoting Machinists v. Street, 367 U.S. 740, 778 (1961) (Douglas, J., concurring))).

[80] *Abood*, 431 U.S. at 230 ("A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint.").

[81] *Id.* at 232-38.

[82] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) ("What is distinctive . . . about the 'free riders' . . . is that in some respect *they* are free riders whom the law *requires* the union to carry-indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests.").

[83] *See Abood*, 431 U.S. at 230.

[84] *See id.* at 222-23.

objectors should not be permitted to have sole veto power over the collective action of a democratically organized union which must speak with one voice and of which they are not members.[85]

The Court's employee-speech jurisprudence, developed in parallel to the above-mentioned jurisprudence on fair share fees, has held "the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'"[86] In *Pickering v. Board of Education*, the Court determined whether an employee had a First Amendment cause of action by applying a two-part test of whether the employee spoke "as a citizen" and "on a matter of public concern."[87]

States are permitted to limit the topics over which they collectively bargain, to restrict public access to the bargaining, and even to refuse to collectively bargain altogether.[88] As such, collective bargaining and similar activities constitute personnel administration falling within a State's position as an employer and manager of employees and services. Withholding fair share fees, public consequences of bargaining, and an employee's interaction in that process fail to rise to the level of citizen speech. A "government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[89] The question then "becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[90] Here, there is an adequate justification – the public employer's interest in the preservation of labor peace. Twenty-three states and the District of Columbia apply that "adequate justification": acting as employers with an eye toward labor stability, these government entities enter into agreements compelling fair

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[85] *See id.*

[86] NASA v. Nelson, 562 U.S. 134, 148 (2011) (quoting Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598 (2008)); *see also Engquist*, 553 U.S. at 598 ("[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 896 (1961))).

[87] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[88] *See, e.g.*, CAL. GOV'T CODE §§ 3540, 3543.2(a)(1) (West 2015) (limiting union dominion to "matters relating to wages, hours of employment, and other terms and conditions of employment"); *see also* Smith v. Ark. State Highway Emps., Local 351, 441 U.S. 463 (1979) (per curiam) (upholding the Arkansas State Highway Commission's policy of refusing to entertain grievances filed by a union rather than directly by the employee).

[89] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[90] *Id.*

share fees to manage their workforce.[91]

The second question posed in *Friedrichs* is whether requiring objecting employees to opt out of fair share fees for nonchargeable activities is consistent with well-settled First Amendment principles. *Hudson* reaffirmed the *Abood* framework: objecting employees were entitled to an explanation of the fair share fees and to challenge such fees, yet the burden remained on employees to opt-out.[92] The Court's past decisions indicate that the objector's right avoids any compulsion of expressive activity; a right to opt out avoids compelled speech, which is prohibited.[93] The Court has also made clear that the right to opt out is consistent with other constitutionally guaranteed rights—namely, the right against self-incrimination, the right to criminal counsel, and due process rights.[94] Further, the petitioners' claim of ignorance and inertia as a justification for an affirmative opt-in system would shift years of First Amendment jurisprudence from a right against compelled subsidization[95] to one against mistaken subsidization. Petitioners used a worst-case scenario that may never occur to justify their position, and such an argument is counter to the Court's finding in *Ohio v. Akron Center for Reproductive Health*.[96]

Scholars Catherine Fisk and Margoux Poueymirou also argue that forcing a union to pay for the representation of objectors who would no longer be required to pay is compelling the union's speech.[97] The statutorily mandated obligation to represent objectors without corresponding fair share fees would infringe on the First Amendment rights of unions and their

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[91] *See, e.g.*, Commc'ns Workers v. Beck, 487 U.S. 735, 749, 762-63 (finding that Congress carefully tailored the agency-shop solution to address the evils at which it was aimed by collecting only those fees and dues necessary to performing the duties of an exclusive representative).

[92] *See, e.g.*, Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986).

[93] *See, e.g.*, *id.*

[94] *See* Berghuis v. Thompkins, 560 U.S. 370, 382 (2010) (finding that suspects must affirmatively and unambiguously assert constitutional right to remain silent); Davis v. United States, 512 U.S. 452, 459 (1994) (finding that suspects must unambiguously assert right to counsel); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'").

[95] *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 558-59 (2005) (exploring the Court's "compelled-subsidy" jurisprudence).

[96] *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990) (explaining that mere possibility is insufficient to invalidate a statute on its face and declining to invalidate a statute on a facial challenge based upon a worst-case analysis that may never occur).

[97] Catherine L. Fisk & Margaux Poueymirou, Harris v. Quinn *and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 461-70 (2014).

members.[98] As fair share fees cover the cost of services rendered by the union and do not mandate political activity fees, such fees do not prohibit the objector from expressing their own views.[99] On the other hand, a union burdened by the free rider problem might have to expend money dedicated to political speech to cover the cost of the mandated representation.[100] This expenditure would interfere with the union and its members' protected speech.[101] *Abood* did not have to confront this paradox because it upheld the fair share system.[102] Accordingly, Fisk and Poueymirou advocate for upholding *Abood* as a "reasonable compromise in a situation with conflicting First Amendment rights at stake."[103]

The petitioners in *Friedrichs* asked the Court to overrule the nearly forty-year precedent in *Abood*. The Court, confronted with *stare decisis*, must find a "special justification" to disregard precedent.[104] Several factors weigh strongly in favor of affirming *Abood*. Not only has *Abood* been the bedrock of consequential union security agreement cases, but as exhibited by *amici*, it has also been the foundation of mandatory fees, including those for the bar association.[105] If *Abood* were overruled, thousands of collective bargaining agreements would be in jeopardy.[106] *Abood* has been a workable standard relied on by courts, being applied consistently and reaffirmed multiple times.[107] Petitioners in this case are rehashing the same arguments made in *Abood*, and since *Abood* was decided, there has been no significant factual, societal, or legal change. *Abood* is not an anomaly, as the petitioners would suggest. Instead, *Abood*'s key principles and application have governed numerous First Amendment cases about the mandatory

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[98] *Id.* at 488.

[99] *Id.* at 490-91.

[100] *Id.*

[101] *Id.*

[102] *See id.* at 452.

[103] HODGES, *supra* note 4, at 11 (citing Fisk & Poueymirou, *supra* note 97, at 490-91).

[104] *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)); *see also* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996).

[105] *See* Brief of Twenty-One Past Presidents of the D.C. Bar as Amici Curiae Supporting Respondents at 1, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681) (citing *Abood*'s support for integrated Bars such as the D.C. Bar); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 13-14 (1990) (applying *Abood* to find that the State Bar may constitutionally use the mandatory dues required of all members to fund activities germane to the State's interest in regulating the legal profession and improving the quality of legal services).

[106] HODGES, *supra* note 4, at 6.

[107] See Ellis v. Bhd. of Ry., Airline, and S.S. Clerks, 466 U.S. 435 (1984), for an example of the Abood standard as applied to an action challenging the dues payment obligation imposed by a union shop agreement.

subsidization of speech.[108] Just eight years ago, the Court, in a unanimous decision, upheld "the general First Amendment principles" espoused in *Abood*.[109] This consensus correctly recognizes *Abood*'s stand-out principle that the "vital policy interests" of public employers in fairly allocating the cost of service rendered by representative unions far outpace the smaller limitations on public employees' expressive freedom.[110]

In dicta in *Knox* and *Harris*, Justice Alito proffered arguments that seemed to invite a challenge to *Abood*.[111] But these arguments fail to meet the "special justification" needed to overrule precedent, particularly because these arguments were originally rejected by *Abood*.[112] Petitioner offers three considerations as counterarguments: (1) *Abood* did not hold fair share fees to exacting scrutiny; (2) *Abood* distinguished between collective bargaining and ideological activities; and (3) none of the stated governmental interests or justifications survive First Amendment review.[113]

The exacting scrutiny argument of petitioner fails to recognize the Court's precedents on the government as employer. A lower level of First Amendment scrutiny has always applied in the government as employer context.[114] The *Pickering* balancing test has been used in the past to weigh the government's interest against the First Amendment rights of government employees.[115] In fact, the *Pickering* balancing test was used to

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[108] *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (permitting universities broader leeway to mandate fees); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 472-74 (1997) (reaffirming *Abood*'s holding that assessments for a lawful collective program may sometimes be used to pay for speech over the objection of members); *Keller*, 496 U.S. at 12 (applying *Abood*'s holding to find that the State Bar's use of compulsory dues to finance political and ideological activities interfered with dissenting members' right to free speech).

[109] Locke v. Karass, 555 U.S. 207, 213 (2009).

[110] Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents at 13-17, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (No. 14-915).

[111] *See* Harris v. Quinn, 134 S. Ct. 2618, 2632 (2014) (raising several problems about the *Abood* Court's analysis, including failure to appreciate the conceptual difficulty of distinguishing expenditures made for collective-bargaining purposes and those made to achieve political ends); *see also* Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2290-94 (2012) (discussing the significance of *Abood* in assessing the constitutionality of an SEIU opt-out requirement).

[112] See United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996), for a discussion of the special justification requirement that courts apply in deciding whether to overrule cases.

[113] Brief for the Petitioners, *supra* note 50, at 10.

[114] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (finding that the government acted lawfully as an employer when it dismissed appellant from his teaching position after he sent a letter to a local newspaper that was critical of a tax increase recently proposed by the school board).

[115] *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 386 (2011) ("Courts balance the First Amendment interest of the employee against 'the interest of the State, as an employer,

uphold the constitutionality of the Hatch Act, and applying exacting scrutiny would call into question whether such restrictions on speech as those found in the Hatch Act can be upheld.[116] The Hatch Act regulates certain forms of political speech by employees of the Executive Branch of the federal government. This constriction is an example of constitutional regulation of the cornerstone of First Amendment protection – political speech.[117]

The petitioner's argument challenging *Abood*'s distinction between collective bargaining and ideological activity was raised and resolved in *Abood*.[118] The petitioner fails to recognize the differences between collective bargaining and political lobbying. First, the government may permissibly regulate employee statements that the government would otherwise not regulate if made by a citizen in public.[119] Second, if the speech is employee speech and implicates the government's prerogatives as employer it is not "political" speech as a citizen on a matter of public concern.[120] Third, petitioner's argument that the fiscal impact of collective bargaining raises it to the level of public concern is easily manipulable. This argument would make even the smallest concerns brought in aggregate into issues of great public concern.[121] In short, if the Court were to accept Petitioners' argument, all government personnel decisions would be areas of citizen speech, which would place an unfair administrative burden on the state. Finally, petitioner seeks to separate *Abood* from *Hanson* and *Street* because *Abood* deals with public sector unions and *Hanson* and *Street* deal with private sector unions.[122] The Court has consistently found that government employers should have the same latitude to structure their internal personnel operations as their private sector counterparts, so the petitioner's argument must fail.[123]

The third argument by petitioner—that none of the government interests

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in promoting the efficiency of the public services it performs through its employees.'" (quoting *Pickering*, 391 U.S. at 568)).

[116] *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564-65 (1973) (applying *Pickering* balancing to uphold the constitutionality of the Hatch Act's restriction on political speech by public employees); *see also* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upholding the Hatch Act).

[117] Hatch Act, 5 U.S.C. § 7321 (1993).

[118] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 252 (1977).

[119] Brown v. Glines, 444 U.S. 348, 354-58 (1980) (holding that soldier acting as a citizen may circulate petitions off base but may not do so on base).

[120] Garcetti v. Ceballos, 547 U.S. 410, 418-19 (2006).

[121] Harris v. Quinn, 134 S. Ct. 2618, 2642 n.28 (2014) (agreeing that issues with negligible fiscal effects are not of public concern).

[122] *See Abood*, 431 U.S. at 250-51 (Powell, J., concurring).

[123] *See generally id.* at 226 (majority opinion); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 776-77 (1961) (Douglas, J., concurring).

or justifications mentioned in *Abood* would survive First Amendment scrutiny—represents an effort to re-litigate *Abood*, which conflicts with *stare decisis*.[124] The petitioner mentions four justifications: (1) labor peace; (2) the free rider rationale; (3) criticism of the constitutional basis of the fair share system; and (4) criticism of fair-representation as a justification for fair share fees.[125]

The government's interest in labor peace is buttressed by decades-long evidence in private sector unions and is recognized by Congress as the effective means to maintaining stable labor relations.[126] In the majority opinion in *Machinists*, Justice Brennan rightly reasoned that "the complete shutoff of [a] source of income . . . threatens the basic congressional policy of . . . effective labor organizations."[127] Further arguments by petitioner as to the union's use of political funds to avoid bankruptcy come into conflict with the potential First Amendment compelled speech of unions and their members, as discussed *supra*.

Petitioner's argument that the free rider rationale is oxymoronic is unpersuasive. In *Abood* and, subsequently, *Lehnert*, the court concluded that the fair share fee is justified because of the statutory requirement of unions to "carry" objectors, which is a distinctive feature of the free rider issue.[128] The petitioner's further argument as to the constitutional basis of the fair share system fares no better. For example, petitioner argues that the "extraordinary fiduciary *power* - *which unions eagerly seize* - is tolerable only if accompanied by a fiduciary duty to not discriminate against the conscripted nonmembers."[129] Unions do not "seize" that duty: they may only assume it by and through the consent of a majority of employees.[130] Indeed, once employees choose collective representation, the union bargains collectively, which binds individual employees.[131] It is congressional policy to affirmatively encourage that process because it minimizes industrial strife when workers have a voice in the setting of working conditions and are not

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[124] Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2409 (2015) (quoting Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014)).

[125] Brief for the Petitioners, *supra* note 50, at 29-47.

[126] 29 U.S.C. § 151.

[127] *Machinists*, 367 U.S. at 772.

[128] *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., dissenting); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).

[129] Brief for the Petitioners, *supra* note 50, at 13 (second emphasis added).

[130] *See, e.g.*, Steele v. Louisville & N.R. Co., 323 U.S. 192, 204 (1944) (holding that unions are required to affirmatively consider requests of non-union members and "expressions of their views," a responsibility unions would not voluntarily go out of their way to assume).

[131] *See* Ellis v. Bhd. of Ry., Airline, and S.S. Clerks, 466 U.S. 435, 456 (1984) ("The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds.").

forced into abusive employment relationships by their inferior bargaining power as individuals when compared to highly organized corporate forms.[132]

The National Labor Relations Board enforces the Labor Act and has imposed a legal obligation upon unions to represent all employees irrespective of union membership. This goes beyond setting the initial terms of a collective bargaining agreement. Workers who enjoy the benefits of collective bargaining also may call upon the union to represent them at disciplinary proceedings, contest adverse employment actions, and lodge grievances relating to a wide range of employment issues.[133] This requires the expenditure of union funds. No organization may justly be required to render such services for free. Providing free riders a legal entitlement to deplete union funds without contributing anything to them strikes at the core of federal labor policy, which is to encourage free collective bargaining.[134] Unions, and hence collective bargaining, become infeasible when fewer and fewer members are required to pay for services rendered. Finally, petitioner's argument criticizing fair-representation as the basis for fair share fees is weak.[135] Under petitioner's framework, the union would still be responsible to represent objectors even though they withhold fees for services rendered.[136] Petitioner fails to recognize that the union in this case will represent non-union members on uncontroversial issues, for example wage increases, which directly benefit the objector.[137]

CONCLUSION

The Court should follow the wise yet grammatically poor adage—if it ain't broke, don't fix it. Congress long ago affirmatively encouraged and recognized the importance of the viability of unions and collective bargaining as an institution of American economic life. Fair share fees are an integral part of the union system, and a holding finding them unconstitutional puts the future of unions in doubt. Any resource challenge will weaken unions and their responsiveness to workers and by extension affect the balance of power between employee and employer. Without that balance in our existing labor relations system, the potential for labor unrest

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[132] 29 U.S.C. § 151.

[133] *Id.* § 159(a).

[134] *See* Morris v. Ernst & Young, LLP, 834 F.3d 975, 980 (9th Cir. 2016) (declaring that concerted activity—the right of employees to act together—is the essential, substantive right established by the NLRA); *see also* 29 U.S.C. § 151.

[135] *See, e.g.*, Brief for the Petitioners, *supra* note 50, at 44.

[136] 29 U.S.C. § 159(a).

[137] Brief for the Union Respondents at 48, Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (No. 14-915).

and strife that characterized the early decades of the last century might increase. *Abood* was a well-reasoned and workable compromise that both accommodated anti-union workers' First Amendment interests and recognized the robust federal policy in favor of collective bargaining. Regardless of who becomes the next sitting Justice, when presented with any new *Friedrichs*-esque cases the Court should continue to uphold *Abood*.

Over the last sixty years, the Court has found that Congress legislated to correct abuses and promote industrial peace.[138] It has further found that the industrial peace Congress sought was a legitimate objective and that Congress had great latitude in selecting the methods to obtain that objective.[139] The Court found that the desirability of labor peace and the avoidance of the free rider was no less important in the public sector than it was in the private sector.[140] Finally, the Court recognized that peace is maintained and the free rider is avoided by fair share agreements that promote stability.[141] The Court need look no further than its own advice on the need to uphold fair share fees.

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[138] Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 812 (1961) (Frankfurter, J., dissenting).

[139] Ry. Emps. Dep't v. Hanson, 351 U.S. 225, 233 (1956).

[140] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).

[141] Commc'ns Workers v. Beck, 487 U.S. 735, 755 (1988).