FRIDRICH V. CALIFORNIA TEACHERS ASSOCIATION

I. Introduction

During the 2016 term, the Supreme Court heard Friedrichs v. California Teachers Association, which presented two questions to the court. First, should public sector “agency shop” arrangements be invalidated under the First Amendment?\(^1\) Second, does requiring public employees to affirmatively object, rather than affirmatively consent, to subsidizing nonchargeable speech by public-sector unions violate the First Amendment?\(^2\) In a non-precedential per curiam opinion that offered no explanation on the merits of the argument, the evenly-split Court affirmed the decision of the Ninth Circuit.\(^3\) The subsequent rehearing petition was denied, leaving the Ninth Circuit decision to stand.\(^4\)

In affirming the Ninth Circuit’s decision, the Supreme Court left in place its previous decision in Abood v. Detroit Board of Education.\(^5\) In Abood, the Court upheld the constitutionality of compelling employees to pay agency fees to their collective bargaining representative.\(^6\) As a result, “agency shop” arrangements remain valid under the First Amendment. The Court also upheld the constitutional validity of requiring public employees to affirmatively object to funding non-collective bargaining related activities.\(^7\) With the divided Court’s per curiam opinion, Friedrichs has for now reaffirmed the controlling power of Abood, leaving undisturbed the future abilities of public employee unions to raise funds to support their collective bargaining activities.

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2. Id.
II. Legal History

A. Agency Shops

“Agency shops” are workplaces, such as a school district, in which full membership of a union is not required of employees, but the union acts as the exclusive representative for all employees in that place of employment. While union members must pay union dues, the non-member employees are required to pay “agency fees” that are equivalent to union dues, as it is presumed that any collective bargaining by the union would benefit both members and non-members. Such arrangements are common in states with public employee collective bargaining. Of the 89 percent of public employees that are covered by a public-employee labor law, approximately 46 percent of state and local employees were engaged in some form of agency shop and required to pay either union dues or agency fees in 2010.

Under California law, the union in an agency shop agreement acts as the exclusive representative for all employees in bargaining unit. Such agency fees must not be greater than union dues, and may be applied to expenses incurred through lobbying activities only if they are “designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment.”

B. Abood v. Detroit Board of Education

Like Friedrichs, Abood involved a group of public school teachers who challenged the constitutional validity of a Michigan state law that allowed the inclusion of agency-shop clause in a collective bargaining agreement between the Detroit Federation of Teachers and the Detroit Board of Education. Plaintiffs asserted that they were ideologically opposed to collective bargaining in the public sector and that the union engaged in “activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve.” The plaintiffs argued that mandatory agency fees were impermissible compelled speech because the agency fees would be used not only to fund collective

12. See id. § 3546(a)-(b).
14. Id.
bargaining expenses, but also to fund political and other ideological activities with which the plaintiffs disagreed.15

The Supreme Court upheld the state law permitting the objected-to agency-shop clause, holding that mandatory agency fees could be required of the teachers so far as those fees related to “collective bargaining, contract administration, and grievance adjustment activities.”16 In order to resolve the plaintiffs’ First Amendment claims with the constitutional validity of agency shops, the Court distinguished between chargeable and nonchargeable union expenses. Chargeable expenses included expenses incurred by the union as a collective bargaining representative, including “collective bargaining, contract administration, and grievance adjustment activities.”17 Non-chargeable expenses included spending “for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.”18

The Court found that mandatory agency fees were constitutional if they funded chargeable expenses incurred by the union “act[ing] to promote the cause which justified bringing the group together.”19 Because the unions incurred those expenses representing both member and non-member employees in collective bargaining activities, states could require that non-members pay fees to support those expenses to minimize the free-rider problem in which union members would be unfairly subject to union dues that would benefit non-members who contributed nothing.20

However, the Court also acknowledged that “[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests” if those employees have ideological objections to the union’s activities.21 As such, the Court held that employees must have the option to opt out of paying fees that contributed to non-representation expenses, such as “contribut[ions] to political candidates? and to express political views unrelated to its duties as an exclusive bargaining representatives.”22 The Court thus upheld the constitutional validity of mandatory agency fees in Abood, so long as the unions distinguish between chargeable and non-chargeable expenses and give non-members the option to opt out of paying the portion of fees that fund non-chargeable expenses.23

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15. See id.
16. Id. at 225-26.
17. Id.
18. Id. at 235.
19. Id. at 223.
20. Id. at 222.
21. Id.
22. Id. at 235-38.
23. Id. at 237.
C. Harris v. Quinn

In Harris v. Quinn, many Illinois home-care workers who received state subsidies for assisting to people with medical or physical problems did not qualify as full state employees. These home-care workers included individuals who cared for disabled family members in their own homes. Following an executive order signed by the Illinois governor, these workers were declared to be public employees of Illinois State, and the Service Employees International Union (SEIU) was designated as the workers’ exclusive representative for collective bargaining. Subsequent collective-bargaining agreements required all non-member home-care workers to pay agency fees, deducted directly from their state subsidies. Plaintiffs brought suit for an injunction against the agency fee requirement and for a published declaration that the executive order violated the workers’ First Amendment rights by requiring them to pay agency fees to a union they did not want to support.

The Court found in favor of the plaintiffs, holding that the First Amendment prohibited the levying of mandatory agency fees onto home-care workers who did not join or support the union. Such provisions “unquestionably impose a heavy burden on the First Amendment interests of objecting employees.” Rather than overrule Abood, the Court found that the home-care workers were not full-fledged state employees, and thus the Abood rule, which applied only to public employees, did not apply.

Although the Court’s decision in Harris left the Abood rule in place, Justice Alito, writing for the majority, indicated that the Court would be open to revisiting Abood. In the Harris majority opinion, the Court questioned the applicability of two precedents that the Abood court used in its reasoning: Railway Employees’ Department v. Hanson and International Association of Machinists v. S.B. Street. Because both cases involved the private sector, the Harris Court found that 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.” The Court further questioned the propriety of the Abood Court’s decision to apply the Hanson rule applied to this case.

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25. Id. at 2627.
26. Id. at 2626.
27. Id.
28. Id.
29. Id. at 2643.
30. Id.
31. Id. 2638.
32. Id. at 2621.
35. Harris, 134 S. Ct. 2632.
and Street precedents, writing that “[t]he First Amendment analysis in Hanson was thin, and the Court’s resulting First Amendment holding was narrow,” and that Street involved a statutory decision rather than a constitutional decision.36

While the facts of Harris did not permit the Court to reach the question of overruling the Abood rule, the majority’s clear skepticism of Abood’s reasoning signaled that a majority of justices on the Court would be willing to revisit the issue given a case with applicable facts. Friedrichs was part of an effort to take up that invitation to revisit and overrule Abood.

III. Facts and Procedural History

Under California law, a union may become the exclusive bargaining representative for all public school employees within a school district if it can prove that a majority of employees in the unit wish to be represented by the union.37 Once a union becomes the exclusive bargaining representative in a school district, it may establish an “agency-shop arrangement” under which employees are required either to join the union or to pay an agency fee.38 Such agency fees are typically equivalent in amount to union dues.39

Agency fees are limited by California law to activities “germane to its function as the exclusive bargaining representative.”40 Expenses involved in germane activities are chargeable, while expenses unrelated to collective bargaining are nonchargeable.41 Such nonchargeable expenses include lobbying expenses unrelated to collective bargaining, donations to political campaigns, and other forms of political advocacy. Every year, public employee unions must estimate the expenses in each category and send a notice to all non-members.42 Non-members who do not wish to pay the nonchargeable portions of the agency fee must affirmatively object by notifying the union, which provides a rebate or fee-reduction for that year.43

In California, the exclusive bargaining representative status may be removed from a union by an agency shop only if a request for a vote for rescission of the arrangement is supported by 30 percent of the employees within the agency shop, and the vote itself passes by a majority of the

36. Id. at 2629-30.
42. See Cal. Gov’t Code § 3546(a).
43. See Regs. of Cal. Pub. Emp’t. Relations Bd. § 32993; see also Cal. Gov’t Code § 3546(a).
employees.\textsuperscript{44} If such a vote fails to receive majority support, the employees are not permitted to take another vote during the remainder of the set term of the collective bargaining agreement with the union.\textsuperscript{45}

Plaintiffs Rebecca Friedrichs and other public school teachers did not wish to be represented by the unions, including defendant California Teachers Association (“CTA”), which were the exclusive bargaining representatives of their school districts.\textsuperscript{46} The plaintiffs claimed that the nonchargeable portions of their agency fees, which required an affirmative objection, and the required financial contributions in support of any unions in the form of agency fees, “violated their rights to free speech and association under the First and Fourteenth Amendments.”\textsuperscript{47}

The District Court for the Central District of California granted Friedrichs’ motion for judgment on the pleadings in favor of CTA, holding that compulsory agency fees were constitutionally valid.\textsuperscript{48} With the goal of a quick ascension to the Supreme Court in order to overturn the \textit{Abood} holding, Friedrichs deliberately requested that the district court find in favor of the defendant. The district court agreed with the plaintiffs’ contention that the plaintiffs’ claims were foreclosed by \textit{Abood} as well as \textit{Mitchell v. Los Angeles Unified School District},\textsuperscript{49} both of which held the contested union-related actions to be constitutionally valid.\textsuperscript{50}

Friedrichs immediately appealed the judgment, again conceding that \textit{Abood} foreclosed the claim and moving for judgment against herself.\textsuperscript{51} At this point, the California Attorney General joined the case as an intervenor supporting the defendant unions, arguing that the Ninth Circuit should issue a published opinion regarding the controlling nature of \textit{Abood} and \textit{Mitchell}.\textsuperscript{52} The Ninth Circuit instead summarily affirmed the district court.\textsuperscript{53} Friedrichs then filed a petition for a writ of certiorari.

When the Court granted Friedrichs’ writ of certiorari, many observers predicted that Justice Scalia’s vote would result in a decision in favor of Friedrichs, overturning \textit{Abood}.\textsuperscript{54} After his death, the 8-member Supreme

\begin{itemize}
\item \textsuperscript{44} See \textsection 3546(d).
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} See Friedrichs v. California Teachers Ass’n, 2013 WL 9825479, at *1.
\item \textsuperscript{47} \textit{Id.} at *2.
\item \textsuperscript{48} \textit{Id.} at *3.
\item \textsuperscript{49} See \textit{Abood v. Detroit Bd. of Education}, 431 U.S. 209, 232 (1977) (holding public-sector agency shops to be constitutionally valid); \textit{Mitchell v. L.A. Unified School District}, 963 F.2d 258, 263 (9th Cir. 1992) (holding opt-out regimes for agency fees to be constitutionally valid).
\item \textsuperscript{50} \textit{Id.} at *2.
\item \textsuperscript{51} Brief for Petitioners at *8-9, \textit{Friedrichs v. California Teachers Ass’n}, No.14-915 (U.S. Sept. 4, 2015).
\item \textsuperscript{52} \textit{Id.} at *9.
\item \textsuperscript{53} Friedrichs v. California Teachers Ass’n, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014).
\item \textsuperscript{54} See David G. Savage, \textit{Supreme Court to Hear California Teacher’s Suit—A ‘Life or Death’ Case for Unions}, L.A. TIMES (June 30, 2015), http://la.ms/1RZOSPZ (“The California case... poses a
Court failed to reach a decision, and ultimately issued a 4-4 non-precedential *per curiam* opinion that affirmed the lower courts’ decisions, upholding the application of agency fees to non-members of unions for now.

**IV. Legal Reasoning**

Following Justice Scalia’s death, the 8-member Supreme Court failed to arrive at a majority decision, resulting in a 4-4 *per curiam* decision that affirmed the Ninth Circuit decision. The split vote left any potential overturning of the *Abood* and *Mitchell* precedents regarding union agency fees for another day.

Both the Ninth Circuit and the Central District of California arrived at their decisions to grant and uphold judgment on the pleadings in favor of the defendants under *Abood* and *Mitchell*, finding that the precedents controlled the issues in *Friedrichs*. In 1977, the Supreme Court held in *Abood* that it was constitutionally valid to compel employees to support an exclusive bargaining representative. In 1992, the Ninth Circuit held in *Mitchell* that the First Amendment does not require non-members of unions to affirmatively consent to pay agency fees and that unions may require non-members to affirmatively opt out of agency fees that fund nonchargeable expenses.

**V. Analysis**

Per the procedural history of the *Friedrichs* case, starting from the plaintiffs’ request for judgment for the defendants in district court, the plaintiffs intended to challenge the *Abood* precedent and the union fee mandates imposed on public sector workers in “agency shop” arrangements in the Supreme Court. Prior to Justice Scalia’s death, *Friedrichs*, one of the Court’s most closely watched cases in the 2016 term, was expected to result in a 5-4 vote in favor of the plaintiffs, which would have overturned *Abood*. This expected decision, with Justice Scalia’s vote, would have held that “agency shop” arrangements and affirmative objective requirements to
subsidizing political speech by public sector unions constituted violations of the First Amendment.

If not for Justice Scalia’s untimely death, the result likely would have significantly decreased the ability of unions to raise funds, and would have expanded the scope of the First Amendment to include collective bargaining.\textsuperscript{60} Friedrichs argued that “California law recognizes that public-sector bargaining resolves important political issues.”\textsuperscript{61} Given the essential role that it plays in modifying government policies, the plaintiffs argued that collective bargaining was inherently political speech.\textsuperscript{62} Accordingly, a mandated agency fee was the equivalent of compelling public employees to “fund specific, controversial viewpoints on fundamental matters of education and fiscal policy.”\textsuperscript{63} Agency fees would thus be unconstitutional for infringing upon the employees’ First Amendment right to associate and speak freely by demanding that the employees support political speech through financial payments to unions that also constitute political entities.\textsuperscript{64} Further, the Friedrichs plaintiffs argued that requiring employees to opt out of subsidizing the unions’ political speech required individuals to affirmatively voice their disagreement with their unions, therefore violating their First Amendment right to “withhold support for political messages.”\textsuperscript{65} But such financing of “political contributions . . . must be made voluntarily and free of coercion.”\textsuperscript{66} Under that argument, it would be impermissible to require employees to affirmatively opt-out of nonchargeable political expenses by “affirmatively prevent[ing] [their unions] from conscripting their money.”\textsuperscript{67} Plaintiffs argued that an affirmative opt-in to such use of agency fees is the appropriate structure to avoid involuntary or coerced political contributions.\textsuperscript{68}

If a majority decision had been reached in favor of the plaintiffs, the decision not only would have prohibited mandated agency fees to unions by non-members, effectively overruling Abood, but it also would have expanded the definition of political speech protected under the First Amendment to include collective bargaining activities themselves. If Abood had been overruled, it would have much the same effect of the right-to-work laws: unions, by their nature, would continue to represent all employees, including those who do not financially contribute to support any of the union’s

\textsuperscript{60} See Laura Moser, \textit{Why an Upcoming Supreme Court Case Has Teachers Unions Feeling Very, Very Nervous}, SLATE (July 8, 2015), http://slate.me/1HbPSry; Savage, supra note 52.

\textsuperscript{61} Brief for Petitioner at 5, Friedrichs v. California Teachers Ass’n, 136 S.Ct. 1083 (2016) (No. 14-915).

\textsuperscript{62} Id. at 9-10.

\textsuperscript{63} Id. at 10.

\textsuperscript{64} Id. at 10-11.

\textsuperscript{65} Id. at 60.

\textsuperscript{66} Id. at 61.

\textsuperscript{67} Id.

\textsuperscript{68} Id.
activities. Secure in the knowledge that they would be represented by the unions, many employees would likely stop paying dues and agency fees, causing the unions’ revenues to fall substantially while their expenses remain the same. The free-rider problem would be exacerbated, undermining one of the policies underlying Abood. Further, because Abood allowed for an opt-out rather than an opt-in structure for nonchargeable political expenses, overruling Abood would likely significantly decrease union spending on political campaigns, resulting in a decrease in union power in the political arena and disproportionately impacting the Democratic party.

Instead of instigating the consequences discussed above, the Supreme Court, lacking a ninth justice, issued a 4-4 per curiam decision that upheld Abood. In continuing to allow union fees to be collected from both member and nonmembers of unions in agency shop arrangements, the Court left in place the funding of unions whose collective bargaining efforts benefit all employees within the agency shop, including non-members. Further, the opt-out structure regarding nonchargeable expenses will also remain in place. States continue to be permitted to allow unions to collect agency fees from non-member employees whose interests they represent.

VI. Conclusion

Originally designed to challenge the forty-year-old Abood precedent, Friedrichs ended up leaving Abood in place for the time being, preserving the status quo regarding agency fees paid by non-members to unions and the affirmative opt-out system employed by many states for decades. However, another case, previously stayed pending the outcome of Friedrichs, is currently pursuing the same procedural strategy that Friedrichs used to be heard by the Supreme Court in a relatively short timeframe. That case, Janus v. AFSCME, No. 15-cv-01235, may succeed in Friedrichs’s original mission to overturn Abood, invalidate agency shops and agency fees under the First Amendment, and require affirmative consent rather than affirmative objections to subsidizing nonchargeable speech by unions. Janus is unlikely to reach the Supreme Court within the current term, allowing ample time for

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69. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221-222 (1977) (holding that a union must “fairly and equitably” represent all employees regardless of union membership.

70. See Moser, supra note 58.

71. See id. (finding that agency shops and agency fees “counteract[] the incentive that employees might otherwise have to become ‘free riders’ to refuse to contribute to the union while obtaining benefits of union representation.”).

72. See Epps, supra note 52 (explaining that the “radical step” of overturning Abood would “deal a long-lasting blow to union power – and, perhaps by coincidence, the Democratic Party.”).

73. See Friedrichs v. California Teachers Ass’n, 136 S.Ct. 1083, 1083 (2016).
a new Supreme Court Justice to take the current empty seat. The Supreme Court’s *per curiam* decision in *Friedrichs* leaves open the possibility of a future precedential decision revisiting *Abood* in a later case. *Janus* may well be the next labor union case to keep an eye on.

*Abood, Harris, Friedrichs*, and presumably *Janus* raise the following two questions based on the First Amendment: (1) should agency fees be allowed at all when collective bargaining is inherently political, particularly in the public sector,\(^\text{74}\) and (2) whether the affirmative opt-out for nonchargeable union costs does enough to protect public employees’ interest against compelled political speech, or whether an affirmative opt-in structure would be more effective in protecting that interest.

In practice, however, these cases concern the ability of states to encourage unionization by creating collective bargaining structures for public employees that allow unions to collect agency fees from non-member employees. In the past 50 years, states have passed a rapidly increasing number of laws that enable public-sector bargaining, which covered only 2 percent of the workforce in 1960 but 63 percent by 2010.\(^\text{75}\) In 2010, wages for public employees in states that provided for a legal duty to bargain were 5 to 8 percent higher than wages found in states without such a legal framework.\(^\text{76}\) The positive difference in wages demonstrate that state encouragement of unionization results in higher wages, and thus a better living, for public employees, “but not of the magnitude suggested by fears that they would shift governmental resources towards extravagant public-employee compensation.”\(^\text{77}\)

When the Supreme Court hears *Janus* or any other similar case, it should consider the fact that agency-shop structures are associated with “significantly higher wages ranging from 2 percent to 7 percent for public employees.”\(^\text{78}\) Overturning *Abood* would undercut the states’ ability to encourage unionization and diminish the unions’ ability to represent public employees. Collective bargaining has resulted in higher public employee wages and offset employer monopsony power.\(^\text{79}\) Given the clear beneficial effects of state laws that promote collective bargaining and unionization, the Supreme Court should not prohibit agency fees that are critical to the continued collective bargaining activities of unions. Although collective bargaining is arguably political, that political nature is used to benefit public

\(^{74}\) See *Abood*, 431 U.S. at 228-29 (holding that “decisionmaking by a public employer is above all a political process.... [Collective bargaining] gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector.).

\(^{75}\) JEFFREY H. KEEFE, LAWS ENABLING PUBLIC-SECTOR COLLECTIVE BARGAINING HAVE NOT LED TO EXCESSIVE PUBLIC-SECTOR PAY, ECONOMIC POLICY INSTITUTE 11 (2015).

\(^{76}\) Id. at 12.

\(^{77}\) Id.

\(^{78}\) Id. at 13.

\(^{79}\) Id. at 15.
employees by acquiring higher wages. Given the success of the agency fee structure and the affirmative opt-out structure, and the likely decrease in union power if either agency fees or the affirmative opt-out were to be prohibited, the Supreme Court would only benefit public employees if it continues to uphold *Abood*.

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