No. 14-915

IN THE
Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,
Petitioners,
v.
CALIFORNIA TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

California School Employees Association ("CSEA") is a California public school employee union which represents, through its 740 separate chapters, the non-certificated employees (*i.e.*, non-teachers) – the custodians, maintenance workers, groundskeepers, bus drivers, clerical workers, instructional assistants, and food service workers – in K-12 school districts, community college districts, and county offices of education. Each CSEA chapter is the exclusive representative of a unit of these employees in each district. Each school district is a separate school employer. School districts in California vary enormously in size: some are small rural districts with only one or two school sites, while some are large urban school districts. The majority of school districts falls somewhere in between. The aggregate number of non-certificated employees represented by the 740 CSEA chapters is approximately 225,000 employees; however, since each CSEA chapter is the exclusive representative in an individual district, CSEA's representational activities occur within these individual bargaining units, which vary from a few

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk.

employees to, in a small percentage of cases, more than 1,000 employees.

As a California public school employee union, CSEA is regulated by the Educational Employment Relations Act ("EERA"), Cal. Gov't Code § 3540 et seq., the statute at issue in this case. As a result, CSEA and all of the employees it represents will be directly affected by the Court's decision in this case. Under EERA, all of the employees in a bargaining unit share the costs of their representation equally. If Petitioners, with nothing but their overblown rhetoric that "everything is political," prevail in this case, the entire cost of union representation would be foisted onto those unit employees willing to pay not only their own portion of those costs, but also the costs of the employees who would reap the benefits of representation without payment.

INTRODUCTION

Petitioners have asked the Court to ignore almost 40 years of thoughtful Court precedent in the area of public sector labor and constitutional law, and to overrule *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). Petitioners have asked this Court to hold that *all* public sector union representational activities on behalf of bargaining unit employees constitute political advocacy, thereby triggering Petitioners' First Amendment rights, so that Petitioners do not have to pay anything – not even an agency fee – to the union for their representation. Not only do Petitioners assert that this Court has

been wrong for 40 years on this issue, but also that the courts, including this Court, are suddenly incapable of adequately discerning the *Abood* distinction between chargeable expenditures (those germane to collective bargaining) and nonchargeable expenditures (those not germane to collective bargaining, including political advocacy) in the public sector.

Petitioners are, in effect, asking this Court to, by judicial fiat, convert all state public sector labor statutes into "right to work" statutes, thus abrogating the right of the states to fashion their own public sector labor statutes, including an agency fee provision, in the manner that the states determine best effectuates the states' public policies.

CSEA's concerns are several. CSEA's most important concern is that the Court understand and squarely face, rather than ignore, the actual workplace realities of public sector labor relations. At the end of the day, the Court's decision in this case will be of little use if it is predicated on nothing more than Petitioners' hyperbolic complaints about union political expenditures and alleged union political influence rather than an understanding of the very focused, work-related contract negotiation and enforcement activities that public sector unions – including CSEA– engage in.

Year in and year out, in order to fulfill their representational duties under EERA, CSEA representatives and chapter leaders deal with

myriad bargaining and other representational issues, as do all other public sector unions. Not only during the work day, but in the evenings and on weekends, CSEA representatives meet with members individually or in groups to assist them with individual or collective employment issues. Every day, CSEA representatives sit down with school district administration personnel to bargain and to resolve these issues, through both formal and informal actions. It is grinding, hard work which focuses intensively on the employees and their work place at each public school site. That is the world in which CSEA representatives live. The characterization of union representational activity as *per se* "political advocacy" or "influencing public policy" is so far outside the real world of public school employment and labor relations as to be ludicrous. A public employer, while clearly a governmental entity, is also, in the final analysis, just an employer with much the same work-related issues as a private sector employer. These are the issues that are addressed by public sector unions on behalf of the unit employees. Imagine a custodian who asks the CSEA representative to help him on a sick leave problem with the human resources administrator in the school district office: the custodian, the CSEA representative, and the school administrator would all be surprised to hear that their discussion implicates important First Amendment issues of "public policy" or "political advocacy." Imagine a CSEA negotiating team and a school district negotiating team meeting over a bargaining proposal for a 3% wage increase for its food service workers, or a proposal regarding the process for the district's bus

drivers to bid on their bus routes: both teams would be surprised to hear that their negotiations implicate important First Amendment issues.

It is true that these union representational activities do not make the headlines, and pundits from all points of view do not focus their comments, their articles, or their time, on these activities since, admittedly, there is limited public interest in such mundane activities. That does not mean that these bread-and-butter activities – which are the raison d'être of union representation – do not exist. It is critical that this Court not ignore this reality in its consideration of this case.

The bottom line is that the Court has not been mistaken for the past four decades of agency fee jurisprudence. The Court has engaged in a very sensible line-drawing in applying the distinction between chargeable and non-chargeable expenditures, which protects an agency fee payer's First Amendment rights not to subsidize the political activities of a public sector union and which, at the same time, affirms the states' rights to enact public sector labor statutes which establish the exclusive representative status of a union, chosen by the majority of the unit employees, and which require or permit the use of agency fee to ensure that all members of a bargaining unit pay their fair share of union representation. Nothing has occurred in the intervening decades to change this legal equation: while not headline-making, unions' representational activities and obligations have not evaporated into thin air. Nevertheless, Petitioners demand that the

Court abandon its traditional judicial role of determining the constitutionality of an expenditure, *i.e.*, whether it is chargeable or nonchargeable, on a case-by-case basis. Petitioners' demand that the Court simply impose a blanket prohibition on fair share payments instead, must be rejected.

ARGUMENT

I. STATES HAVE THE RIGHT TO ESTABLISH A REQUIREMENT FOR PAYMENT OF AN AGENCY FEE TO THE EXCLUSIVE REPRESENTATIVE AS PART OF THEIR PUBLIC SECTOR LABOR RELATIONS STATUTES.

Petitioners demand that the Court eliminate all agency fee payments in the public sector. Even though the union has a statutory duty to represent all unit employees, Petitioners assert that employees, who do not want to pay anything to the union, cannot be constitutionally compelled to pay for representation provided to them. Petitioners assert that they should be allowed to reap the benefits of the union's efforts as to their employment – their wages, their health benefits, their vacation leave, their sick leave, their differential pay, their promotional opportunities, their grievances, their issues with their supervisors, etc. – gratis. Payment, from Petitioners' viewpoint, rests with all the other unit employees in the unit, who must bear Petitioners' costs.

Petitioners' arguments make no inroads on the Court's well-established precedent that union representational activities germane to collective bargaining in the public sector do not constitute "political advocacy" or "ideological advocacy" so as to infringe impermissibly upon an agency fee payer's First Amendment rights.

To arrive at their desired conclusion, Petitioners request the Court to ignore the settled judicial criteria for evaluating First Amendment rights, specifically, the consideration of the context in which the issue arises and the balancing of the interests involved. First, Petitioners request the Court to ignore the undisputed fact that the states have the right to enact public sector labor statutes which provide for exclusive representation by a union regarding employee wages, hours, and terms and conditions of employment. *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 279 (1984). Second, Petitioners request the Court to ignore the fact that the states, in imposing a duty of fair representation on the union to represent all of the unit employees, have a vital interest in ensuring that all unit employees also share the costs of such representation fairly. This Court's well-reasoned precedent – from *Abood* through *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302 (1986), *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), and *Locke v. Karass*, 555 U.S. 207 (2009) – have repeatedly recognized that states have the right to require

agency fee payments in the public sector to prevent free riders and thereby prevent a situation where only some of the employees in a bargaining unit shoulder the burden of the entire cost of union representation.

Third, Petitioners request the Court to ignore the fact that a government workplace is still just that – a workplace – and that the function of a public sector union is to represent employees on their employment-related matters in the workplace. Public entities do not function simply as sovereigns over the citizenry, but also as employers vis-à-vis their employees and, as the Court has consistently recognized, must have wide latitude to manage their operations. Employees' First Amendment rights are therefore determined in the context of the public entity functioning as an employer, and not as a sovereign entity. *Garcetti v. Ceballos,* 547 U.S. 410 (2006); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (*NTEU*); *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968). Fourth, Petitioners request the Court to ignore the constitutional validity of an agency fee requirement as affirmed by the Court's precedent on "forced subsidization" of associations in the context of an important regulatory scheme: the *Abood* agency fee is appropriately considered by the Court as the textbook example of a legitimate requirement to pay a fee. *Glickman*, *supra,* 521 U.S. 457; *United Foods, supra,* 533 U.S. 405.

The determination of a First Amendment issue requires judicial balancing of the governmental interests in promulgating a law or taking a particular action with an employee's free speech interests. Petitioners have not articulated their free speech interests at stake here beyond their abstract invocation of what they characterize as the "quintessentially political act" of collective bargaining. See, *e.g.*, Pet. Brief, p. 9. Respondent California Teachers Association and other *amici curiae* address the above legal issues at length. However, CSEA wishes specifically to address Petitioners' unqualified assertion that union representation under public sector labor statutes constitutes *per se* "ideological advocacy" which impermissibly infringes upon Petitioners' First Amendment rights. Petitioners' refusal to acknowledge the express purpose of these statutes, including the Educational Employment Relations Act at issue here, and the express representational functions of public sector unions, warrants further comment.

The essence of exclusive representation is that the union represents, and speaks for, all unit employees on employment issues pertaining to wages, hours, and terms and conditions of employment (hence the term "*collective* bargaining"). The states have a strong governmental interest in enacting such exclusive representation statutes to provide for systems to *manage the workforce* of public entities in regard to their employees' wages, hours, and terms and conditions of employment. These statutes recognize that a governmental entity is an employer

and therefore acts qua employer vis-à-vis its employees; the statutes also establish that the union, as the exclusive representative, works within that traditional employer-employee framework. Thus, public sector employers and public sector unions engage in the same traditional employer-employee activities as do their counterparts in the private sector.[2]

These statutes establish the circumscribed nature of the union's representational duties and the specific workplace forum in which the union performs these duties. The union's statutory *duty* is to be the voice of *all* the unit employees; its representational

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[2] The Court in *Harris v. Quinn*, 134 S.Ct. 2618 (2014), expressly recognized the traditional employer functions of a public employer. In distinguishing between the employment of in-home care personal assistants, whose employers were essentially the private individuals who had hired them, and the employment by the State of "full-fledged public employees," the Court recognized that, *as an employer*, the State engages in routine employment-related activities:

> [T]he State establishes all of the duties imposed on each employee, as well as all of the qualifications needed for each position. The State vets applicants and chooses the employees to be hired. The State provides or arranges for whatever training is needed, and it supervises and evaluates the employees' job performance and imposes corrective measures if appropriate. If a state employee's performance is deficient, the State may discharge the employee in accordance with whatever procedures are required by law.

Id., at 2634.

purpose is to improve their wages, hours, and terms and conditions of employment. The union thereby provides a collective voice that employees would not have if they attempted to negotiate over their wages and working conditions individually. By the same token, this system provides that the employer need communicate only with the exclusive representative on these work-related matters, and need not contend with a cacophony of employee voices. Under these statutes, public entities do not cede their policy-making authority to either their rank-and-file employees or to their representatives. Governmental policies are not driven by rank-and-file governmental employees, whether represented by a union or not.

The Educational Employment Relations Act ("EERA"), Cal. Gov't Code § 3540 et seq., which covers California public school employment, is such a typical public sector labor statute. Under EERA, unlike the statutory framework in *Harris*, the public school employer possesses the traditional employer control over the public school employees, while the exclusive representative has the traditional responsibility of representing the employees in collective bargaining, contract administration, and other employment matters related to wages, hours, and terms and conditions of employment.

The purpose of EERA is "to promote the improvement of personnel management and employer-employee relations within the public school systems" through a system of exclusive representation. Cal. Gov't Code § 3540. Under EERA, the exclusive representative is selected by a

majority of the employees of a public school employer, *e.g.*, a school district, in an appropriate bargaining unit.[3] Cal. Gov't Code § 3544. The exclusive representative has the right to represent the unit employees "*in their employment relations with the public school employer*." Cal. Gov't Code § 3543.1 (emphasis added). EERA expressly imposes a duty of fair representation on the exclusive representative: the union must "fairly represent *each and every employee* in the appropriate unit." Cal. Gov't Code § 3544.9 (emphasis added).[4]

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[3] EERA provides that certificated employees and non-certificated employees must be in separate bargaining units. Cal. Gov't Code § 3545(b)(3).

[4] EERA also requires that each unit employee pay an agency fee to the exclusive representative, which may not exceed union dues and which "shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." Cal. Gov't Code § 3546(a). EERA thus protects agency fee payers from having to pay fees other than those for activities germane to collective bargaining. Agency fee payers have the right to a reduction of the fee not devoted to the above cost, as set forth in regulations of the California Public Employment Relations Board (PERB). *Ibid.* The PERB agency fee regulations establish the procedural and substantive requirements for annual *Hudson* notices, including objection procedures, challenge procedures, and the escrow of agency fees. 8 CCR §§ 32990-32997. EERA also provides for control over the agency fee by the employees in the unit, who can rescind agency fee by majority vote in an election, and can also reinstate agency fee by majority vote. Cal. Gov't Code § 3546(d)(1), (d)(2).

Thus, under EERA, the exclusive representative represents unit employees, individually or collectively, in a wide variety of representational activities, all specifically focused on employment-related matters. These are normal, mundane employment matters that all public school employers and public school unions must deal with, whether during contract negotiations, contract administration, or in resolving work-related issues as they arise. For example, CSEA representatives and employers collectively bargain over a wide variety of issues, all of which are directly focused on work-related matters: wages, health benefits, rest periods, meal periods, shift differential pay, disciplinary procedures, promotional opportunities, evaluation procedures, site transfers, reassignments, on-call pay, standby pay, equipment, uniform allowances, workweek and work hours, vacation leave, sick leave, bereavement leave, etc.

CSEA representatives also represent employees or groups of employees on a daily basis on a wide range of work-related matters: these matters may be resolved formally through a grievance process if covered by contract, by filing an unfair practice charge with the state labor board, or through other means. For example, a food services department does not provide required training on food safety to the food services workers: the CSEA representative will ensure that the training is given. A maintenance department does not provide appropriate safety gear to its mechanics in operating certain equipment: the CSEA representative will ensure that the proper gear is provided. A

transportation department changes the work schedule of a group of bus drivers: the CSEA representative will demand to bargain if it is a unilateral change or file a grievance if the work schedule is set by contract. A school administration office does not allocate the correct amount of sick leave days to an employee and thereby depletes the employee's sick leave hours bank incorrectly: the CSEA representative will ensure that the sick leave bank is correct. A maintenance and operations department head calls a groundskeeper into a meeting for an interview about his conduct which might lead to discipline: the CSEA representative will be present to represent the employee.

These activities, all inextricably tied to work-related matters, are the very essence of union representation in the public sector and cannot be characterized as political advocacy. The workplace reality in which public sector unions such as CSEA function, in carrying out their contract bargaining and enforcement duties, cannot be ignored.

It should also be noted that EERA confines collective bargaining to wages, hours, and terms and conditions of employment. EERA provides that the public school employer has the duty to meet and negotiate with the exclusive representative over "matters within the scope of representation." Cal. Gov't Code §§ 3540.1(h), 3543.5(c). The scope of representation is "limited to matters relating to wages, hours of employment, and other terms and conditions of employment." Cal. Gov't Code § 3543.2(a)(1). EERA expressly provides that *"[a]ll*

matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating," except that an employer may consult, if it so chooses, with employees or unions on matters outside the scope of representation. Cal. Gov't Code § 3543.2(a)(4) (emphasis added). EERA does not require or authorize negotiations over matters of school district policy or managerial prerogatives.

Thus, a school district retains complete managerial discretion under EERA to run its operations, to determine the type and level of services to be offered to the students, and to make public policy as it sees fit. Even as to collective bargaining over wages, hours, and working conditions ("matters within the scope of representation"), there is nothing in EERA that requires a school employer actually to agree to any matter within the scope of representation. The school employer is required only to meet and negotiate with the exclusive representative with the good faith intent of reaching agreement. Cal. Gov't Code § 3540.1(h). Once the school employer has completed the negotiation and impasse procedures in EERA, the employer may implement its final offer. Cal. Gov't Code §§ 3548-3548.3.

Petitioners nevertheless assert that, since wages and benefits[5] entail governmental expenditures, all union

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[5] Pointing to articles on public sector unions, Petitioners refer to employee pension benefits as a major public policy issue affected by unions. Pet. Brief, pp. 25, 26. Petitioners ignore the fact that, in California, pension benefit levels are not negotiable for certificated school employees such as respondents, under the

representational activities, including collective bargaining over wages, hours, and terms and conditions of employment, are somehow transformed into "ideological advocacy," arguing that government spending implicates "public policy." Petitioners ignore the workplace realities, as well as the express purpose of public sector labor statutes. In enacting statutes which provide for exclusive representation and agency fees, state legislatures are obviously aware that collective bargaining could have an effect on the expenditures of a public employer, but have concluded that any incidental effect on public policy is outweighed by the vital public interests furthered by a fair share allocation for union representation.

Petitioners' challenge to the validity of agency fees seems less an attempt to vindicate the First Amendment rights of fee payers than a back-door assault on public sector collective bargaining. In fact, so abstract is Petitioners' challenge that they cannot articulate how a fee payer's free speech rights are impermissibly infringed upon because that fee payer personally opposes the union's position on a particular item in collective bargaining. Instead, Petitioners assert that, if a unit employee disagrees with the supposed public policy implications of a

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State Teachers Retirement System, Cal. Educ. Code § 22000 et seq., or the non-certificated school employees represented by CSEA, under the California Public Employees Retirement System, Cal. Gov't Code § 20000 et seq., since the pension benefit levels are set by statute. Cal. Educ. Code § 24202; Cal. Gov't Code §§ 21353, 21354.1.

single issue affected by the union's bargaining position, the employee has the constitutional right not to pay for *any* of the representation provided by the union. Under this wholly unworkable scenario, a fee payer who objects to the union's bargaining for a 5% wage increase, on the ground that it involves public policy, would not have to pay for any of the other representation provided to the fee payer by the union.

Under public sector labor statutes, including EERA, a unit employee's rights in collective bargaining and representation are necessarily subordinate to majority rule: that is the essence of collective representation and collective bargaining. If the service fee payer feels that the fiscal consequences of a bread-and-butter bargaining issue advocated by the union offends the fee payer's sense of public policy, the fee payer remains free to speak out in a public forum and express how he or she thinks the public money should be spent.

Indeed, EERA provides for a public forum for the school district to receive public input in regard to the initial proposals for a collective bargaining agreement, as well as the final agreement. Cal. Gov't Code §§ 3547, 3547.5. By the same token, EERA ensures that the collective bargaining forum, *i.e.*, the negotiation process and any subsequent mediation or factfinding in the impasse process, is not open to the public and is confined to the exclusive representative. Cal. Gov't Code § 3549.1. EERA thus creates a public forum whereby citizens, including district employees, may voice their

opinions, while reserving the negotiating forum to the exclusive representative. *See City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (school employee had the constitutional right to speak at public forum of school board meeting, even though the bargaining forum was reserved to the exclusive representative).

In sum, EERA reflects the state's vital interest in managing the workforce in school employment with a system of exclusive representation, if the employees so choose, and to ensure that the costs of representation are fairly allocated among all unit employees. EERA also protects any First Amendment rights of non-union members: they are not required to contribute to union political activities, their agency fee procedural rights are protected, and they are not prohibited from expressing their concerns in a public forum. Therefore, Petitioners' First Amendment rights have not been violated. Any infringement on Petitioners' free speech rights caused by compelled payment of an agency fee for their workplace representation is so attenuated that it is far outweighed by the state's vital interest in authorizing a system of exclusive representation in public sector employment and payment of a fair share fee to be allocated equally among all the unit employees for their representation.

For four decades, the Court has successfully and rationally decided the constitutionality of expenditures in the public sector, with its line-

drawing between chargeable and nonchargeable expenditures. *Abood*, 431 U.S. at 236; *Lehnert*, 500 U.S. at 518; *Locke v. Karass*, 555 U.S. 207 (2009). Petitioners now urge the Court to abandon its judicial role of determining the constitutionality of expenditures as they arise – which is the very essence of the judicial function – and instead urge the Court to make a sweeping legislative declaration that states can no longer authorize payment by public employees to their union for their own representation. Petitioners' suggestion to simply avoid these issues by determining that all union representational activities constitute political advocacy, in a classic "throwing the baby out with the bath water" scenario, must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted, Date: Nov. 12, 2015

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