XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
ALEXANDRA ROBERT GORDON
KEVIN A. CALIA
Deputy Attorneys General
NELSON R. RICHARDS
Deputy Attorney General
State Bar No. 246996
2550 Mariposa Mall, Rm. 5090
Fresno, CA 93721
Telephone: (559) 477-1688
Fax: (559) 445-5106
E-mail: Nelson.Richards@doj.ca.gov
Attorneys for Defendant
Attorney General Xavier Becerra

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

RYAN YOHN, et al.,

Plaintiffs,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Defendants.

8:17-cv-00202

DEFENDANT ATTORNEY GENERAL'S OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Judge: Hon. Josephine L. Staton
Hearing Date: April 28, 2017
Time: 2:30 p.m.
Courtroom: 10A
Action Filed: February 6, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The motion for judgment on the pleadings should be denied because it contravenes both the letter and spirit of the Federal Rules of Civil Procedure and would unfairly limit the State of California's ability to defend this challenge to important state laws and the precedent authorizing them. Plaintiffs' attempt to bring the case to judgment against themselves, and thereby prevent any factual development, raises substantial due process and federalism concerns. They cite no case in which a court has granted judgment on the pleadings in favor of a defendant over that defendant's objection.

Plaintiffs did not file this lawsuit to lose. They aspire to convince the Supreme Court to reevaluate its First Amendment jurisprudence on public-sector unions fees and strike down state laws regulating those fees. A full record, developed in this Court, is necessary to a just and fair resolution of this challenge.

BACKGROUND

I. CALIFORNIA'S EDUCATIONAL EMPLOYMENT RELATIONS ACT.

The California Legislature adopted the Educational Employment Relations Act in 1975 to "promote the improvement of personnel management and employer-employee relations" in California public schools. Cal. Gov't Code § 3540. In the preceding years, the State witnessed a series of public-employee work stoppages that leaders feared could reach a "crisis stage." Assemb. Res. 51, 1972 Reg. Sess. (Cal. 1972); *see also San Diego Teachers Ass'n v. Super. Ct.*, 593 P.2d 838, 845 (Cal. 1979). Earlier efforts to give public school employees a voice in setting the terms and conditions of employment were deemed "deficien[t]" because they "omitted a number of key elements" that had helped to "formulat[e] peaceful labor relations in the private sector," including an option to bargain collectively and a mechanism for doing so using one representative for all employees. *Pac. Legal Found, v. Brown*, 624 P.2d 1215, 1218-19 (Cal. 1981). The Act sought to address these concerns.

Under the Act, a majority of employees in an appropriate bargaining unit may decide that the entire unit will bargain collectively with a public school employer, using one bargaining representative. Cal. Gov't Code §§ 3543(a), 3543.1(a) 3543.3, 3544. When recognized as the exclusive bargaining representative, a union "assume[s] an official position in the operational structure of" a school. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983). The union does not simply negotiate a contract for the bargaining unit, for example, but is required to do so in a prescribed way. *See* Cal. Gov't Code § 3543.6(c) (requirement to meet and negotiate with employer in good faith); *id.* § 3543.6(d) (requirement to participate in good faith in impasse procedures). The union also assumes contract-administration responsibilities that the school district and individual employees might otherwise perform less efficiently or not at all. *See id.* § 3543(b) (grievance arbitration). In discharging these functions, the exclusive representative must "fairly represent each and every employee in the appropriate unit." *Id.* § 3544.9.

Public school employees have no obligation to join an organization acting as their exclusive bargaining representative. *See* Cal. Gov't Code §§ 3543(a), 3543.6(b); *Cumero*, 778 P.2d at 190. Once a majority of employees elects to be represented by a union, the employer will bargain only with that union, Cal. Gov't Code §§ 3543(a), 3543.3; but the Act "guarantees each employee in the unit the free choice of joining the union, refraining from participation in any union, or joining a rival union." *Cumero*, 778 P.2d at 190. Neither the union nor the employer may coerce, discriminate against, or impose or threaten reprisals against any employee for declining to participate or for exercising any other right under the Act. Cal. Gov't Code §§ 3543.5(a), 3543.6(b); *Cumero*, 778 P.2d at 178 n.4.

If a represented employee does not join the union, the Act requires the employer, upon notice from the bargaining representative, to deduct from the employee's salary an "[a]gency fee," not to exceed the dues payable by union

members, to cover the employee's pro rata share of "chargeable" expenses. *See* Cal. Gov't Code § 3546(a); *see also id.* § 3546.3 (allowing opt out for religious objectors). Chargeable expenses include "the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." *Id.* § 3546(a).

A union may also include in its agency fee the cost of certain "nonchargeable" activities unrelated to collective bargaining. Nonmembers are entitled, however, "to receive a rebate or fee reduction upon request, of that portion of their fee that is" attributable to any such activity. Cal. Gov't Code § 3546(a). Each year, the union must send a written notice to all nonmembers setting forth the amount of the agency fee, the percentage of the fee attributable to chargeable expenses, the basis for that allocation, and a description of the process for declining to pay any nonchargeable amount. Cal. Code Regs. tit. 8, § 32992(a); *see also id.* § 32992(b)(1) (notice must include audited report used to calculate chargeable and nonchargeable expenses or certification from auditor). Nonmembers must have at least thirty days to opt out of paying nonchargeable amounts, *id.* § 32993(a), (b), and any collection of fees in violation of these provisions is an unfair practice, *id.* § 32997.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Plaintiffs claim that requiring public-school teachers to pay agency fees and requiring teachers who are not union members to affirmatively "opt out" of paying the non-chargeable portion of fees violates the First Amendment. Compl. ¶¶ 2-6, ECF No. 1. They further allege that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), "may restrict the ability of lower federal courts to grant Plaintiffs the relief they seek." Compl. ¶ 92. After filing the complaint, Plaintiffs moved against themselves for judgment on the pleadings, arguing that their claims are foreclosed

by *Abood* and *Mitchell*. Mot. for J. on the Pleadings Mem. of P. & A. (MJP), ECF No. 97-1. A few weeks later, Defendants filed their answers. ECF Nos. 109-110.

Most of the allegations of the complaint are disputed. *See generally* Answer of Def. Atty. Gen. (State Answer), ECF No. 109. The only undisputed facts are as follows: Defendant CTA is an affiliate of Defendant NEA, and Defendant NEA is a public-sector union. State Answer. ¶¶ 19-20, ECF No. 109. Various local teachers association defendants are affiliates of CTA and NEA. State Answer ¶¶ 21-28. Various individual defendants hold the offices that Plaintiffs have alleged. State Answer ¶¶ 29-36. Venue is proper in this Court. State Answer ¶ 39. Only a nonmember of a union may participate in the opt-out process. State Answer ¶ 65. And the earlier case of *Friedrichs v. California Teachers Association* (No. 14-915) raised the same legal challenges, in which an equally divided Supreme Court affirmed the Ninth Circuit decision denying the challenges based on *Abood* and *Mitchell*. State Answer ¶ 93.

LEGAL STANDARD

A party may move for judgment on the pleadings "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). To prevail, the moving party must "clearly establish[] that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984) (quotation marks omitted). "Federal courts may decline to enter judgment on the pleadings when they perceive that hasty or imprudent use of this summary procedure would impede the strong policy in favor of deciding cases on their merits." *Santos v. Reverse Mortg. Solutions, Inc.*, No. 12-3296-SC, 2012 WL 4891597, at *4 (N.D. Cal. Oct. 12, 2012) (quotation marks omitted).

ARGUMENT

Plaintiffs contend that judgment on the pleadings should be entered in Defendants' favor because, under *Abood* and *Mitchell*, the legal insufficiency of

their claims "is clear on the face of the Complaint." MJP at 2. Not only is this incorrect, but Plaintiffs also intend to ask the Supreme Court to overturn *Abood* and *Mitchell*—and thus ultimately obtain judgment in *their* favor. *See, e.g.*, *id.* Granting judgment now, before the State can develop an evidentiary record on which to defend California law and longstanding Supreme Court precedent, would be unfair and contravene basic due process and federalism principles. Because virtually all the facts alleged in plaintiffs' complaint are disputed and this Court provides the proper forum for adducing facts and resolving factual disputes between the parties, Plaintiffs' motion for judgment on the pleadings should be denied. Allowing this case to proceed to discovery respects California's significant interests in defending its laws, while imposing no burden on Plaintiffs beyond that which they voluntarily undertook by filing suit.

I. THE MOTION SHOULD BE DENIED BECAUSE IT WAS FILED IN CONTRAVENTION OF THE RULES.

Plaintiffs' motion should denied for failing to follow the correct procedure. Rule 12(c) provides that motions for judgment on the pleadings may be filed "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). Plaintiffs filed the complaint on February 6, 2017, and moved for judgment on the pleadings on March 1. The Attorney General answered 29 days later, on March 30. Plaintiffs not only failed to follow the rules, but they also failed to justify their request. A motion by a party for judgment against its own interest is by its nature highly irregular, especially when opposed. Plaintiffs cite no case in which a court has granted judgment on the pleadings in favor of a defendant over that defendant's objection. The operative standard in this circuit requires *the moving party* to "clearly establish . . . that *it* is entitled to judgment as a matter of law," not that the *other* side is entitled to judgment. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) (citing *Doleman*, 727 F.2d at 1482) (emphasis added).

Plaintiffs' reliance on *Friedrichs*, *see* MJP at 1-2, is thus misplaced because, there, the parties stipulated to judgment on the pleadings, *see Friedrichs v. California Teachers Association* (Case No. 8:13-cv-676), ECF Nos. 87-88. This is a different case, and the State is not bound by a stipulation in another matter.[1] Likewise, Plaintiffs cite no case in which a court sua sponte granted judgment on the pleadings for a party over its objection that doing so would prejudice its ability to defend the case on appeal. *See* MJP at 2-3 (citing *Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981); *Hoang Van Tu v. Koster*, 364 F.3d 1196, 1200 (10th Cir. 2004); *Lyman v. Loan Correspondents, Inc.*, No. 06-cv-01174, 2009 WL 3757398, at *1 (C.D. Cal. Nov. 6, 2009).)

One court that encountered a similar self-directed motion for judgment on the pleadings called it "improper on its face," and noted that the attempt raised concerns about "gamesmanship." *Penn Mut. Life Ins. Co. v. Greatbanc Trust Co.*, 887 F. Supp. 2d 822, 826 (N.D. Ill. 2012) (denying motion for judgment on pleadings where the party requesting judgment against itself appeared to be using the procedure to manipulate the standard that accepts that facts are not in dispute). This Court should be similarly vigilant. The haste with which Plaintiffs seek to have judgment entered in Defendants' favor would both prejudice the State and "impede the strong policy in favor of deciding cases on their merits." *See Santos*, 2012 WL 4891597, at *4.[2]

---

[1] Plaintiffs mistakenly contend that the State stipulated to file an answer "setting forth all the facts those Defendants believe relevant to this case." MJP at 3. As is customary, the parties simply agreed to an extension of time to respond to the complaint, not to the content or form of that response. Stip. to Extend Time to Respond to Initial Compl. at 2, ECF No. 82.

[2] As a general matter, both the drafters of the rules and courts have been alert to parties' attempts to use the rules to disadvantage their opponents. *See, e.g.*, *In re Allbrand Appliance Television Co.*, 875 F.2d 1021, 1022 (2d Cir. 1989) ("It was for deliverance from th[e] 'sporting theory of justice' as Roscoe Pound termed it, that the Federal Rules of Civil Procedure were promulgated. The Federal Rules turned away from this instinct of gamesmanship in favor of decisions on the merits." (internal citations omitted)); *Krakauer v. Indymac Mortg. Servs.*, Civ. No. 09–00518 ACK–BMK, 2013 WL 1181289, at *4 (D. Haw. Mar. 19, 2013) (continued…)

II. THE MOTION SHOULD BE DENIED IN LIGHT OF THE NUMEROUS FACTUAL DISPUTES AND SERIOUS FAIRNESS CONCERNS.

Due process requires that defendants not be deprived of the ability to choose how to defend the claims against them. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process of law signifies a right to be heard in one's defense" (quotation marks and citation omitted)); *Condit v. Dunne*, 225 F.R.D. 100, 109 (S.D.N.Y. 2004) ("To deny defendant access to any information that may support [an affirmative defense] would deny defendant his right to due process."). Plaintiffs' attempt to leapfrog the tribunal that settles facts will impair the State's ability to defend these important laws. It would also offend federalism principles because it would force the State to defend longstanding statutes on an incomplete record. *See Great W. Shows Inc. v. Los Angeles County*, 229 F.3d 1258, 1263 (9th Cir. 2000) ("We are mindful of the considerations of comity when we are being asked to invalidate, on federal constitutional grounds, a local California law."); *Valenti v. Rockefeller*, 292 F.Supp. 851, 867 (W.D.N.Y. 1968) (three-judge district court) (recognizing "the basic principle of federalism which requires that a federal court exercise great caution before striking down a state statute as repugnant to the Constitution."), *aff'd*, 393 U.S. 405 (1969) (per curiam).

To adequately defend against Plaintiffs' challenges to California's agency-fee laws, the record must be developed to adduce facts and evidence regarding, for example: (1) the nature of the State's interest in agency fee requirements and the alleged burden on Plaintiffs' First Amendment rights; (2) the benefits of the opt-out requirement and the alleged burden on Plaintiffs; and (3) the extent of reliance on *Abood* in California. Each of these areas is central to Plaintiffs' theories and is currently the subject of factual dispute, making judgment on the pleadings

---

(…continued)
("The Court may properly reject Plaintiffs' attempt to manipulate the FRCP for their purposes.")

inappropriate. Indeed, courts have often noted the importance of having a fully developed factual record when evaluating laws under the First Amendment. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665, 668 (considering First Amendment challenge to federal broadcasting regulation, discussing Court's inability to rule on the record presented, and remanding "to permit the parties to develop a more thorough factual record"); *McConnell v. FEC*, 251 F. Supp. 2d 176, 206-07 (D.D.C.) (three-judge district court) (noting, in a First Amendment challenge to campaign finance statute, that the court agreed with defendants that "extensive discovery was necessary to review the evidentiary grounds" for the law), *aff'd in part rev'd in part*, 540 U.S. 93 (2003).

A. There are factual disputes about the State's interest in agency-fee laws and the alleged burden on Plaintiffs' First Amendment rights.

Plaintiffs' constitutional claims put squarely at issue both the State's interests in its laws and Plaintiffs' First Amendment interests.

The pleadings reveal that the facts about both of these interests are in dispute. For example, the complaint alleges that "[t]here is no compelling or even persuasive *evidence* that compulsory agency fees are needed to achieve 'labor peace' in California or its public schools, or to prevent 'free riding' on unions' collective-bargaining." Compl. ¶ 89 (emphasis added). It further contends that there is no "compelling or even persuasive evidence" that the agency-fee law is the least restrictive means of achieving the State's policy goals. *Id.* The State denied these allegations. State Answer ¶ 89. Similarly, the complaint alleges that "[t]here is no justification . . . for mandating that Plaintiffs make contributions to support collective bargaining . . . ." Compl. ¶ 86. The State has denied that allegation.[3] State Answer ¶ 86.

[3] These examples are illustrative. The State's answer denies most of the allegations of the complaint.

Plaintiffs will presumably contend that the allegations in the complaint must be taken as true, regardless of the State's denials. That approach would prejudice the State's interests by preventing it from disproving allegations detrimental to its interests. Nor can Plaintiffs prevail on their current motion if the State's denials negate the complaint's allegations for purposes of the motion, place material facts in dispute, and make judgment on the pleadings improper. *See Austad v. United States*, 386 F.2d 147, 149 (9th Cir. 1967) ("For purposes of a motion for judgment on the pleadings, . . . [t]he allegations of the moving party which have been denied are taken as false."). Under that approach, judgment on the pleadings would be inappropriate because all facts denied by the State would be in dispute. *See Hal Roach Studios*, 896 F.2d at 1550 (explaining that "allegations of the moving party which have been denied are assumed to be false" and that judgment on the pleadings is proper only where "no material issue of fact remains to be resolved"). Plaintiffs' motion should be denied because they have not carried their burden on the motion. They have not explained what they believe the controlling legal standard is or how they have satisfied that standard here.

Moreover, the facts supporting the State's defense of its laws are not only necessary for analyzing Plaintiffs' challenge, they require development beyond the pleadings. Properly developing them will require the State to adduce its own evidence and engage in discovery with the other parties. For example, the State would seek and adduce evidence about California's interests in its agency-fee laws, Plaintiffs' claims that they are burdened, and the activities funded by agency fees.

If the Supreme Court is inclined to reconsider *Abood* and *Mitchell* in this case, developing evidence on these and other topics, and resolving any factual disputes in this Court, will permit an informed analysis of the competing public policy and constitutional interests required to judge Plaintiffs' challenge to the State's agency-fee law.

B. There is a factual dispute about the nature of the burden imposed by the opt-out requirement.

Plaintiffs also challenge the laws allowing unions to include nonchargeable expenses in their fees so long as employees can opt out of paying those fees. *See* Compl. ¶¶ 90-93. Material facts with regard to this claim are also in dispute. The complaint alleges that the opt-out process administered by defendant unions imposes "a serious burden" on Plaintiffs and "creates an environment susceptible to contrary pressure by union personnel." *See* Compl. ¶ 91. It claims that there is a "strong likelihood" that public employees who do not join the union "prefer not to subsidize the union's explicitly political expenditures . . . ." *Id.* The State's answer denies these allegations. State Answer ¶ 91. These disputed facts preclude judgment on the pleadings. *See Hal Roach Studios*, 896 F.2d at 1550. To effectively defend against Plaintiffs' challenge, at a minimum, the State would seek and adduce evidence about its interests in the opt-out rule, opt-out methods, and Plaintiffs' allegations that they are burdened by opt-out requirements and are pressured to not opt out.

C. Evidence of the State's reliance on precedent is necessary to allow proper consideration of Plaintiffs' argument that the Supreme Court should depart from the doctrine of stare decisis.

Plaintiffs' intention to ask the Supreme Court reassess *Abood* implicates the doctrine of stare decisis, which "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *See United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (internal quotation marks omitted). The State, local school districts, public-sector unions, and public employees have been entering into collective-bargaining agreements and ordering their affairs for decades in reliance on *Abood* and *Mitchell*. Reliance of that sort places the "considerations favoring stare decisis . . . at their acme." *Kimble v. Marvel Entm't Grp.*, 135 S. Ct. 2041, 2410 (2015) (referring to stare decisis in

this context as "superpowered"). If Plaintiffs are successful in obtaining Supreme Court review, a record of the scope and nature of reliance on *Abood*—for example, how many contracts rely on the agency-fee law and how many public employees are subject to those contracts—will therefore be important both to the State's ability to defend the principle of stare decisis in this case, and to the Supreme Court's consideration of the doctrine.

III. THE MOTION SHOULD BE DENIED BECAUSE THE COMPLAINT STATES A CLAIM.

Plaintiffs' motion should also be denied because it states viable claims for relief. State law strikes a careful balance and imposes strict limits on unions' use of agency-fee revenues, including special protections for religious objectors. Plaintiffs' allegations, if taken as true, state claims that the unions have transgressed state (and federal) law. For example, the complaint alleges that chargeable fees are being used to "provide economic support to nonchargeable union activities" and that Plaintiffs are being "forc[ed] . . . to pay for political and ideological activities . . . that the unions themselves admit are nonchargeable . . . ." Compl. ¶¶ 4, 86. If true, that would violate *Abood*'s holding that nonmembers cannot be forced to pay for nonchargeable activities. *See Abood*, 431 U.S. at 235-36. Similarly, one Plaintiff alleges that he is a religious objector whose requests to opt out from paying any union fees under California Government Code section 3546.3 have not been honored, stating a claim under state law and federal law. Compl. ¶ 17; *see, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 168 (9th Cir. 1987). Plaintiffs also allege that the process their particular unions use for opting out of nonchargeable costs is "unnecessarily burdensome," Compl. ¶ 2, and creates "an environment susceptible to contrary pressure by union personnel," *id.* ¶ 91. These allegations, too, may state a cognizable legal claim. Moreover, plaintiffs likely will claim, as the plaintiffs in *Friedrichs* did, that these alleged violations are reasons to strike down state law. The constitutionality of

duly enacted state statutes should not depend on bare allegations of noncompliance that the State has not had an opportunity to investigate.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for judgment on the pleadings.

Dated: April 7, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
ALEXANDRA ROBERT GORDON
KEVIN A. CALIA
Deputy Attorneys General

/s/ Nelson Richards
NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Defendant
Attorney General Becerra

SA2017105707
95220910.doc