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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RYAN YOHN, *et al.*,

Plaintiffs,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Defendants.

CASE NO.: 8:17-cv-00202-JLS-DFM

UNION DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutory Authorities

State Statutory Authorities

Federal Rules and Regulations

The Union Defendants[1] respectfully submit this memorandum in opposition to Plaintiffs' Motion for Judgment on the Pleadings ("MJP") (Dkt. No. 97).

INTRODUCTION

On February 6, 2017, Plaintiffs filed a 33-page, 102-paragraph complaint larded with factual allegations that are by turns false, misleading, one-sided, and incomplete. Then, less than a month later and before Defendants had responded, Plaintiffs filed a motion asking the Court to dismiss their *own* complaint on the pleadings "as soon as is practicable," while preserving their right to appeal the very dismissal they invite. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings ("MJP MPA") at 3, Dkt. No. 97-1. Plaintiffs have chosen this highly unusual course of action because they wish to take this case to the Ninth Circuit and Supreme Court with the presumption that their allegations are true, while depriving Defendants of their right to investigate or contest those allegations or place them in context.

The Court should deny Plaintiffs' motion. The motion is procedurally improper because it was filed before Defendants answered. Further, there is no procedure for a plaintiff to move for judgment on the pleadings in favor of an objecting defendant – while preserving the plaintiff's right to appeal – and thereby to force that defendant to defend on appeal an unwanted judgment on the pleadings that presumes the complaint's factual allegations are true. In the *Friedrichs* litigation, the union defendants *stipulated* that they would not oppose entry of judgment on the pleadings in their favor. In light of how that stipulation was used

[1] California Teachers Association ("CTA"), National Education Association ("NEA"), Westminster Teachers Association, Eureka Union Teachers Association, Porterville Educators Association, San Juan Teachers Association, Carlsbad Teachers Association, Riverside City Teachers Association, and Pittsburg Education Association (collectively, "the Unions" or "the Union Defendants").

to prejudice the *Friedrichs* defendants, the Union Defendants (who are not identical to the *Friedrichs* defendants) have not entered into such a stipulation here.

The Court should also decline the invitation to enter judgment on the pleadings *sua sponte.* Such a judgment would substantially prejudice the ostensibly "winning" Defendants, who do not wish to litigate a case on appeal based on the "losing" parties' artfully pleaded "alternative facts," which falsely suggest problems with current precedent and mischaracterize union activities and the collection of agency fees. The complaint also alleges facts that, read in the light most favorable to Plaintiffs, state several viable legal claims under current law, so there is no legal basis for a judgment on the pleadings. Finally, dismissal on the pleadings would prejudice the interests of justice by depriving the appellate courts of an accurate, developed record on which to consider important constitutional questions.

In sum, the Unions do not consent to the entry of judgment on the pleadings and do not agree that the complaint fails to state claims for relief. Because the Unions have the right to defend this case on the basis of a properly developed record, the Court should treat this case like any other lawsuit and allow it to proceed in the ordinary course of litigation.

ARGUMENT

I. Plaintiffs' motion should be denied as procedurally improper.

A. A motion for judgment on the pleadings cannot be filed before the pleadings are closed.

Rule 12(c) provides in relevant part: "*After the pleadings are closed*–but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c) (emphasis added). Plaintiffs filed their motion on March 1, 2017, nearly a month before the pleadings closed on March 30. Where, as here, a party files a "motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) before any answer [i]s filed," that motion is "procedurally premature" and

must be "denied." *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005). On that basis alone, Plaintiffs' motion should be denied.

B. There is no procedure for a plaintiff to move for dismissal of its own claims while preserving its right to appeal.

Plaintiffs' motion also should be denied because, under the Federal Rules of Civil Procedure, "[j]udgment on the pleadings is proper when … the *moving* party is entitled to judgment as a matter of law." *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989) (emphasis added). By contrast, Plaintiffs move for judgment on the pleadings against themselves, while simultaneously seeking to preserve their right to appeal the very adverse judgment they seek. This is an option the Federal Rules do not provide. Rather, the settled rule is that a party that seeks judgment against itself is foreclosed from arguing on appeal that the trial court erred in granting its request. *See, e.g., Thunderbird, Ltd. v. First Fed. Sav. & Loan Ass'n of Jacksonville*, 908 F.2d 787, 794 (11th Cir. 1990) ("Having invited the entry of summary judgment against themselves, appellants cannot now claim the trial court erred by taking the very action appellants urged upon it."). Such "claims on appeal are precluded from review under the principle of 'invited error,' which … 'compels appellate courts to affirm when the party inducing the error raises it on appeal.'" *Id.* (quoting *Trawick v. Manhattan Life Ins. Co. of New York*, 484 F.2d 535, 539 (5th Cir. 1973)).

To be sure, in *Friedrichs*, the union defendants *stipulated* to an aberrant and unprecedented procedure that allowed entry of judgment on the pleadings against the plaintiffs in that case to avoid the need for further trial court litigation. *See* Stipulation Regarding Pending Motions and Amendment of Answer, *Friedrichs v. CTA*, No. 8:13-cv-00676, Dkt. No. 87 (RJN, Exh. A); Order Approving Stipulation Regarding Pending Motions and Amendment of Answer, *id.* Dkt. No. 88 (RJN, Exh. B); Order Granting Motion for Judgment on the Pleadings (Doc. 81) and

Vacating Motion for Preliminary Injunction (Doc. 71), *id.* Dkt. No. 106 (RJN, Exh. C). The Unions are not willing to so stipulate here.[2]

Plaintiffs assert that "[u]nder the stipulation that Plaintiffs and these Defendants filed on February 22, the Union Defendants and the California Attorney General will file their Answers on March 30, setting forth *all the facts those Defendants believe relevant to this case*." MJP MPA at 3, Dkt. No. 97-1 (emphasis added). That assertion is incorrect. The stipulation merely sets a date for a response to the complaint. Dkt. No. 82 at 1. The Unions have since filed a normal answer, as provided in Rule 8. Dkt. No. 110. The answer is not the place for a defendant to affirmatively set out "all the facts." Rather, a defendant in its answer must "admit or deny the allegations asserted against it" and "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(b)(1)(B); *id*. Rule 8(c); *see also id*. Rule 8(b)(1)(A). Plaintiffs cannot insist that the Union Defendants do more than Rule 8 requires: "Defendants, not Plaintiff[s], get to decide how to defend a case." *Kehler v. Bridgestone Ams. Tire Ops., LLC*, No. 15-cv-127, 2016 WL 8316770, at *4 (D. Wyo. Oct. 20, 2016). Moreover, if the facts in the complaint would be taken as true on appeal, which is what Plaintiffs will argue if judgment is entered on the pleadings, then whether the answer sets forth additional facts does not matter, as Plaintiffs will disregard those facts just as the *Friedrichs* plaintiffs did.

[2] The *Friedrichs* stipulation was limited to the *Friedrichs* litigation. Moreover, Defendants Westminster Teachers Association, Eureka Union Teachers Association, Porterville Educators Association, San Juan Teachers Association, Carlsbad Teachers Association, Riverside City Teachers Association, and Pittsburg Education Association were not parties to *Friedrichs*, so they could not be bound by any stipulations or rulings in that case. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 894-904 (2008) (recognizing general rule against nonparty preclusion). All the Plaintiffs and many factual allegations in the pleadings are also different here.

Because the Unions do not consent to Plaintiffs' procedurally improper motion for judgment on the pleadings, the motion must be denied.

II. The Court should not enter judgment *sua sponte* over the Defendants' objection.

Plaintiffs point out that district courts have authority to enter judgment *sua sponte*. MJP MPA at 2-3, Dkt. No. 97-1. But none of the cases on which Plaintiffs rely involved a grant of judgment over the objection of the "winning" party.[3] Aside from the absence of any precedent to support a sua *sponte* judgment over the "winner's" objection, the Court should reject the invitation to enter judgment *sua sponte* here because: (1) the judgment would unfairly prejudice Defendants on appeal; (2) the factual allegations of the complaint, read in the light most favorable to Plaintiffs, state viable claims under current precedent that defendants are entitled to disprove in this Court as meritless; and (3) the interests of justice would be served by appellate proceedings that are based on an accurate record.

A. Defendants would be unfairly prejudiced by the entry of judgment on the pleadings because Plaintiffs will argue on appeal that the factual allegations in their complaint are true.

The appellate proceedings in *Friedrichs* make clear why granting judgment on the pleadings would unfairly prejudice the Defendants in this case. The *Friedrichs* defendants assumed that, because they acquiesced in the *Friedrichs*

[3] *See Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981) (holding an appellate court may affirm a dismissal on alternative grounds; no indication the appellee opposed the dismissal); *Van Tu v. Koster*, 364 F.3d 1196, 1200 (10th Cir. 2004) (affirming a dismissal on limitations grounds although one of the prevailing defendants had not formally joined in the motion to dismiss; that defendant did not oppose dismissal, had in fact earlier sought dismissal on other grounds, and had raised the statute of limitations as an affirmative defense); *Lyman v. Loan Correspondents, Inc.*, No. 06-cv-01174-CJC, 2009 WL 3757398 (C.D. Cal. Nov. 6, 2009) (granting judgment on the pleadings *sua sponte* in favor of a defendant that had answered but was in default; defendant did not oppose the judgment and, indeed, was not actively participating in the case).

plaintiffs' request to have the case dismissed on the pleadings, while making clear that they preferred to litigate the case based on a record,[4] the facts alleged in the *Friedrichs* complaint would not be accepted as true on appeal. But the *Friedrichs* plaintiffs argued otherwise once they had obtained the judgment they sought.

The Friedrichs plaintiffs told the Supreme Court that, "[b]ecause Respondents prevailed on the pleadings below, the Complaint is, of course, *taken as true*." Petitioners' Reply to Brief in Opposition to the petition for certiorari at 11 n.6, *Friedrichs v. CTA*, 136 S. Ct. 1083 (2016) (emphasis added) (RJN, Exh. D); *see also* Petitioners' Reply to Brief for the Attorney General of California in Opposition to the petition for certiorari at 4-5 n.1, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. E) ("It is hornbook law that in appeals from judgment on the pleadings—just like appeals from 12(b)(6) dismissals—the reviewing court *takes the losing party's allegations as true*." (emphasis added)). The *Friedrichs* plaintiffs and their *amici* then relied heavily upon those untested allegations to urge the Supreme Court that existing precedent was creating terrible abuses and injustices that justified overturning that precedent.

Moreover, during oral argument in *Friedrichs*, plaintiffs' counsel, who is also representing Plaintiffs in the present case, brushed aside arguments about the lack of record evidence, suggesting both that the *Friedrichs* defendants were to blame for that circumstance and that the defendants had failed to make such a record because there were no facts to be developed in support of their position: "As to the absence of a factual record here . . . . [A]t page 4 of their so-called opposition, it said, to quote, 'The unions do not oppose the entry of a judgment on the pleadings.'" Oral Argument Transcript at 79, *Friedrichs*, 136 S. Ct. 1083 (RJN,

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[4] *See* Union Defendants' Opposition to Plaintiffs' Motion for Judgment on the Pleadings at 4, *Friedrichs*, No. 8:13-cv-00676, Dkt. No. 90 (RJN, Exh. G) ("The Unions have not moved for judgment on the pleadings, as they would prefer to ground the judgment in a factual record.").

Exh. F); *see also infra* at 17-18 (examples of Supreme Court Justices demonstrating interest in important factual matters during the *Friedrichs* oral argument).

It is impossible to know whether a presumption that the facts alleged in the *Friedrichs* complaint were true influenced any of the Justices, who split 4-4 in affirming the Ninth Circuit and upholding longstanding precedent regarding fair share fees. *See Friedrichs*, 136 S. Ct. 1083. But in light of the closeness of the decision, the Defendants here should not be forced to defend this case on appeal under the erroneous presumption that Plaintiffs' carefully curated factual allegations are true and provide a complete picture of the operation of the fair share fee system.

Plaintiffs will no doubt protest that it does not matter whether the factual allegations of their complaint are true or provide the complete picture because Plaintiffs contend that *all* fair share fee systems and *all* opt-out procedures are unconstitutional. But cases are not decided in a vacuum. The reason why Plaintiffs filed such a detailed complaint is so they can prejudice the Defendants by using the presumed truth of their slanted allegations to influence the appellate courts. That is precisely what occurred in *Friedrichs*.

For example, the *Friedrichs* plaintiffs piously asserted in the lower courts that they were not claiming that the opt-out procedure is burdensome, only to tell the Supreme Court that the opt-out procedure *is* burdensome. *Compare* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings at 8, *Friedrichs*, No. 8:13-cv-00676, Dkt. No. 81 (RJN, Exh. H) ("requiring Plaintiffs to opt out—*whether or not doing so is burdensome, and whether or not any nonmembers have erroneously failed to opt out in the past*—violates the First Amendment" (emphasis added)) *with* Petition for a Writ of Certiorari at 34-35, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. I) (complaining that the annual opt-out system "enables public-sector unions to capitalize on confusion about the mechanics of opting out in order to maximize their collection of nonchargeable fees," and that "requiring dissenting employees to annually re-

register their dissent" is unnecessarily "burdensome"). Similarly, the *Friedrichs* plaintiffs argued that *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), and its extensive progeny should be overruled because "the line *Abood* drew between collective bargaining and other forms of lobbying has proven to be entirely unworkable." Brief for Petitioners at 56, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. J) (internal quotation marks omitted).

The factual allegations in Plaintiffs' complaint here are intentionally crafted to support the very same arguments, yet an evidentiary record would prove those arguments to be meritless. Moreover, Plaintiffs have carefully crafted their complaint to make it very difficult to separate legal arguments from factual allegations and, therefore, to determine precisely what they will contend that the appellate courts must accept as true. Without the opportunity to develop an evidentiary record, the Union Defendants would be seriously prejudiced on appeal.[5]

B. Judgment on the pleadings would be legally erroneous because the complaint contains allegations that state viable claims for relief.

In *Friedrichs*, the union defendants asserted in their answer that the complaint failed to state a claim for relief, Union Defendants' Amended Answer ¶113, *Friedrichs*, No. 8:13-cv-00676, Dkt. No. 89 (RJN, Exh. K), and the Court's Order granting judgment on the pleadings explained that all parties to that case

[5] Preventing the Unions from choosing what type of defense to pursue, and instead forcing them to defend an unwanted judgment on the pleadings through potentially lengthy and expensive appellate proceedings, would also impair the Unions' due process rights. "The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000). Federal Rule of Civil Procedure 12(c) gives the defendant a choice: it can move for judgment on the pleadings and thereby litigate the case on the presumption the factual allegations of the complaint are true, or it can refrain from doing so and litigate the case on the basis of an evidentiary record. That choice should be entitled to particular respect when, as discussed more fully below, the defendant's position is that the factual allegations of the complaint, if true, would state claims for relief.

agreed that the allegations failed to state a claim, *see* Order Granting Motion for Judgment on the Pleadings (Doc. 81) and Vacating Motion for Preliminary Injunction (Doc. 71) at 4, *Friedrichs*, No. 8:13-cv-00676, Dkt. No. 106 (RJN, Exh. C). Here, the Union Defendants do not make such a contention in their answer (Dkt. No. 110) and the factual allegations, taken in the light most favorable to Plaintiffs, do state potentially viable claims under *current* precedent. Dismissing the complaint on the pleadings would therefore be legally erroneous, and it would also allow Plaintiffs to suggest problems with current precedent that do not exist.

The standard for granting a Rule 12(c) motion for judgment on the pleadings is "functionally identical" to the standard for a Rule 12(b)(6) motion to dismiss. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989). Thus, the Court must "accept the factual allegations in the complaint as true, and view them in a light most favorable to the plaintiff." *LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448 (2016). A suit may not be dismissed on the pleadings if the complaint pleads "enough facts to state a claim to relief that is plausible on its face." *Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Moreover, "a complaint should not be dismissed if it states a claim under *any* legal theory, even if the plaintiff erroneously relies on a different legal theory." *Haddock v. Bd. of Dental Examiners of Cal.*, 777 F.2d 462, 464 (9th Cir. 1985) (emphasis added); *see also Hotel Emps. & Rest. Emps. Local 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 986 (N.D. Cal. 2005) ("[T]he test for granting a motion to dismiss is whether the facts support *any* valid claim entitling plaintiff to relief." (emphasis added)).[6]

[6] The same standard applies to Plaintiffs' suggestion that the Court grant judgment on the pleadings *sua sponte*. *See, e.g.*, *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980).

Under these standards, Plaintiffs have stated several viable claims for relief that preclude judgment on the pleadings. While Union Defendants deny many of Plaintiffs' factual allegations and assert that the claims will ultimately fail on the merits, Plaintiffs state claims under current law:

- *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), holds that non-members who object to paying for union expenditures unrelated to collective bargaining (so-called "objectors") can be required to pay their fair share of the union's costs that are "germane to collective bargaining," but not for its other costs. *Id.* at 219; *see also id.* at 235-36. Plaintiffs' complaint alleges that, as objectors, they are unlawfully being charged for "expenditures that have little to do with collective bargaining," Dkt. No. 1 at ¶82, and also for "numerous activities unrelated to bargaining," *id.* ¶80. These allegations alone, taken in the light most favorable to Plaintiffs, state claims under *Abood*.

The complaint also selectively and misleadingly quotes or summarizes documents to create the inference that objectors are being charged for costs not germane to collective bargaining, i.e., for what the complaint repeatedly describes, ominously, as "*so-called* chargeable union expenditures." Dkt. No. 1 ¶¶ 4, 86 (emphasis added). For example, Plaintiffs first complain that they are "forc[ed] to contribute to so-called chargeable union expenditures," *id.* ¶4, and that the Unions "classif[y] expenditures as being chargeable—and thus germane to collective bargaining—even when those expenditures appear to have little to do with collective bargaining," *id.* ¶79; *see also id.* ¶¶80-85. Plaintiffs next allege that California law permits the Unions to charge objectors for "the cost of lobbying activities designed ... to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer." *Id.* ¶85 (quoting Cal. Gov't Code § 3546(b)); *see also id.* ¶46. Drawing reasonable inferences in Plaintiffs' favor, as the Court must, these allegations suggest that the Unions are unlawfully charging

objectors for "lobbying activities [that] relate not to the ratification or implementation of a ... collective-bargaining agreement, but to financial support of the ... profession ... generally" or to other purposes entirely. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991).

Plaintiffs similarly imply that the Unions charge objectors for non-germane expenses by determining the amount of the agency fee "based on an estimate of its expenditures in the coming year," such that Plaintiffs are in actuality charged for political activities, despite their stated objection thereto. Dkt. No. 1 ¶49; *see also id.* ¶47. Construed in the light most favorable to Plaintiffs, these allegations also state potentially viable claims under extant law. *See Abood*, 431 U.S. at 235-36; *Lehnert*, 500 U.S. at 520.

- *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992), holds that agency fees may be collected under a system in which non-members can opt out of paying non-chargeable expenditures, because "nonunion members' rights are adequately protected when they are given the opportunity to object." *Id.* at 261. *Mitchell* does *not* hold, however, that the union is entitled to make this process unduly burdensome or to mislead bargaining unit workers in their choice whether to opt out. *Cf. Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2291 (2012) (discussing potential burden of an opt-out system and also stating that nonmembers must have "'a fair opportunity' to assess the impact of paying for nonchargeable union activities." (quoting *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986)).

The complaint alleges that the "opt-out process is unnecessarily burdensome." Dkt. No. 1 ¶2, *see also id.* ¶40 (alleging that the Unions are "forcing Plaintiffs to bear a substantial burden in order to opt out of supporting union activities"). And the complaint alleges that the Unions are unlawfully misleading workers by using a form that "creates the mistaken impression that checking the box means a teacher has opted out of subsidizing political activities altogether." *Id.* ¶64.

These allegations thus state potentially viable legal claims under *Mitchell*, *Knox*, and *Hudson*. *See Mitchell*, 963 F.2d at 261; *Knox*, 132 S. Ct. at 2291; *Hudson*, 475 U.S. at 303.[7]

Similarly, the complaint, read in the light most favorable to Plaintiffs, alleges that the Unions are setting deadlines for opt-outs that cause Plaintiffs to miss their opportunity to opt out. *See* Dkt. No. 1 ¶63 ("If a teacher misses the deadline, he or she is obligated to pay the full agency fee for that year."); *id.* ¶90 ("CTA must receive this written notification by a hard deadline or the request to opt out will be denied."). And, they appear to allege that Plaintiffs must be permitted to opt-out permanently, rather than every year, which is not the same thing as alleging that all opt-out systems are unconstitutional. *See* Dkt. No. 1 ¶63 ("[n]o matter how many consecutive years a nonmember opts out, that nonmember still must send an opt-out letter to CTA each year"); *id.* ¶90 ("[n]o matter how many years in a row a nonmember has opted out of paying the political portion of agency fees, that nonmember must still send written notification each year").

- *Abood* and its progeny do not permit the government to compel payments to a union over a worker's religious objection. *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 168 (9th Cir. 1987) (Title VII, 42 U.S.C. § 2000e(j), requires unions to make reasonable accommodations for religious objectors); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (same); Cal. Gov't Code § 12940(*l*) (California

[7] Indeed, in a recent case in the Eastern District of California, non-member plaintiffs challenged aspects of a union's opt-out process as unconstitutionally burdensome. In granting summary judgment for the union, the district court did *not* reject that claim as *per se* precluded by *Mitchell*, but instead analyzed the plaintiffs' contentions regarding the opt-out procedures on their merits, *e.g.*, the requirement to provide the objector's Social Security Number, and held those procedures constitutional. *See Hamidi v. SEIU Local 1000*, 2017 WL 531861 *7-*8 (E.D. Cal. Feb. 8, 2017).

Fair Employment and Housing Act requires unions to make reasonable accommodations of religion). Indeed, California law expressly provides that "any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment." Cal. Gov't Code § 3546.3. Instead, religious objectors "may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation ... chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee." *Id.*; *see also Boeing Co.*, 833 F.2d at 168 (a substitute charitable contribution is a reasonable accommodation under Title VII).

The complaint, however, alleges that the Unions' agreements with the school districts "include provisions requiring all teachers in these districts to either join the unions or pay agency fees to the unions," with no accommodation for religious objectors. Dkt. No. 1 ¶55. The complaint further alleges that, although Plaintiff George Meilahn is "a religious objector under California Government Code section 3546.3," nevertheless, "each year Mr. Meilahn is required to donate the full amount of the agency fee—not merely the chargeable portion" to one of the charities "chosen by the union." Dkt. No. 1 ¶17; *see also id.* ¶53 (asserting that the approved charities are "selected by the union," in violation of § 3546.3). Further, the complaint alleges that, "[d]espite having made known his objection to paying any amount to a union, Mr. Meilahn recently learned that *his district is automatically deducting $1 from each of his paychecks and giving that amount to Defendant Pittsburg Education Association*. Mr. Meilahn was never informed of this change, and objects to this redirection of his earnings to a union." *Id.* ¶17 (emphasis added).

These allegations potentially state claims not only for violations of § 3546.3, but also of the state and federal civil rights laws that prohibit unions from collecting fees in the face of a non-member's religious objection. *See Boeing Co*., 833 F.2d at 168 (while a substitute charitable contribution is a reasonable accommodation under Title VII, simply taking a smaller amount of money impliedly is not); *see also* Cal. Gov't Code § 12940(*l*). These allegations, which, in context, also imply the Unions and the state of California are unlawfully "substantial[ly] burden[ing]" Mr. Meilahn's exercise of religion, Dkt. No. 1 ¶40, may state further claims under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.*, and the First Amendment (via 42 U.S.C. § 1983), again under existing precedent. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

- The complaint also alleges that the Unions are collecting fair share fees but "do not assist nonmembers on matters that would tangibly benefit them." Dkt. No. 1 ¶67. Read in the light most favorable to Plaintiffs, this allegation states a potential claim for violation of the duty of fair representation. *See* Cal. Gov't Code § 3544.9 ("The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."); *id.* § 3543.6 (it is unlawful for an exclusive organization to discriminate against any employee it represents).

* * *

Granting judgment on the pleadings on the theory that none of these allegations, taken in the light most favorable to Plaintiffs, state a viable claim under current precedent would not only be erroneous as a matter of law but also highly prejudicial to the Unions. Such a judgment would allow Plaintiffs on appeal to wrongly suggest problems with current precedent and the Unions' procedures that do not exist. Extant law already protects Plaintiffs from having to support a union's activities that are not germane to collective bargaining, from enduring unnecessarily burdensome opt-out procedures, from having their religious objections either

ignored or not reasonably accommodated, and from being denied fair representation. And, for the reasons discussed above with regard to the *Friedrichs* plaintiffs' "bait and switch" tactics, *see supra* at 5-9, Plaintiffs here should not be permitted to rush to judgment on their purportedly "pure" challenges to *Abood* and *Mitchell* merely by disclaiming any intent to pursue the potentially-viable legal theories described in this section.

C. Granting judgment on the pleadings would be prejudicial to the interests of justice because it would deny the appellate courts a proper record.

Finally, Plaintiffs' stated plan to take this case to the Supreme Court makes it even more important that the Defendants be permitted to litigate the case like an ordinary lawsuit, in which Defendants can contest the factual allegations of the complaint and seek judgment based on record evidence, not false allegations and allegations that lack context.[8]

Plaintiffs want to create the impression that existing precedent leads to a situation in which workers are charged for expenses not germane to collective bargaining—or, at minimum, expenses that have such an attenuated connection to collective bargaining that workers should not be charged for those expenses.

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[8] The ordinary litigation process may also reveal that there are threshold problems with Plaintiffs' claims that make this case the wrong vehicle for seeking to overturn existing precedent. For example, the discovery process may show that at least some plaintiffs do not have standing to bring the asserted claims. It is not uncommon that factual allegations drafted by counsel turn out to be incorrect when actually tested through the crucible of litigation. That is also why the Unions should not be forced to defend on appeal potentially unlawful practices that do not exist in reality, and must instead be given opportunity to contest Plaintiffs' allegations in the course of litigation. *Cf., e.g., In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1234 (9th Cir. 2006) (recognizing a defendant's need to access to "information necessary to defend the case against it"); *Cornaglia v. Ricciardi*, 63 F.R.D. 416, 419 (E.D. Pa. 1974) ("It is beyond question that defendant is entitled to discovery of the facts upon which plaintiff's claim[s] … [are] founded.").

Plaintiffs also want to create the impression that unions cannot be trusted to allocate expenses correctly, and that "the line *Abood* drew between collective bargaining and other forms of lobbying has proven to be entirely unworkable." Brief for Petitioners at 56, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. J). In considering these issues, the Ninth Circuit and Supreme Court would benefit from a record that shows how the "chargeability" process actually works in the real world, which is very different from what Plaintiffs allege. Indeed, at oral argument in *Friedrichs*, several Justices specifically asked about chargeability, demonstrating their interest in these facts. *See* Oral Argument Transcript at 14-15, 44-45, 46-48, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. F).

Similarly, Plaintiffs allege that the opt-out process is unnecessarily burdensome. *See* Dkt. No. 1 ¶¶2, 15, 40. Even if those allegations did not otherwise state a potentially viable claim under *Mitchell* (which, as previously explained, they do), they would be highly relevant to this Court's and any appellate court's consideration of opt-out systems. Plaintiffs want to create the impression that opt-out systems are unfairly administered by unions to obtain payments from workers who do not want to make those payments. The appellate courts would benefit from a record that shows how the opt-out process actually works in the real world, which is very different from what Plaintiffs allege. At oral argument in *Friedrichs*, several Justices asked about the opt-out process, indicating their interest in these facts as well. *See* Oral Argument Transcript at 37-38, 66-69, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. F).

Because there was no factual record in *Friedrichs*, plaintiffs and their *amici* in that case were able to simply make up whatever "facts" they pleased. They relied on allegations in a complaint that the defendants never had the chance to contest. They refused to treat various allegations in the defendants' answer as true. They relied on "facts" asserted in declarations filed in support of a preliminary injunction motion that plaintiffs quickly withdrew when the defendants sought to take

discovery.[9] They relied on "facts" supported by citations to the internet or that lacked any support at all. *See, e.g.*, Petition for a Writ of Certiorari at 18, 26, *Friedrichs*, 136 S. Ct. 1083 (RJN, Exh. I).

As previously stated, courts do not decide legal issues in a vacuum: facts drive the law. Moreover, Supreme Court Justices do not face the binary choice of either affirming or overruling existing precedent; they may decide to clarify or limit that precedent in light of record evidence about how that precedent is applied in the real world. The interests of justice would thus be served by the development of a factual record sufficient "for deciding issues of far-flung import, on which [the courts] should draw inferences with caution from complicated courses of legislation, contracting, and practice." *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948). "If [this] is to be a test case … there is all the more reason why a complete record should be made [in the district court], for the benefit of … any appellate court that may be asked to review the questions involved." *Columbia Broad. Sys., Inc. v. Teleprompter Corp.*, 251 F. Supp. 302, 305 (S.D.N.Y. 1965). Unless the normal litigation process is followed, the record will be "simply insufficient to allow [the] court[s] to consider fully the grave, far-reaching constitutional questions presented." *Brown v. Chote*, 411 U.S. 452, 457 (1973). It also bears emphasis that no emergency requires dispensing with the normal

[9] *See* Petition for a Writ of Certiorari at 4, 7, 24, *Friedrichs*, 136 S. Ct. 1083 (citing plaintiffs' declarations); *id.* Appendices E-I, at 76a-112a (plaintiffs' declarations) (RJN, Exh. I); *see also* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 3, 4, 6, 21, *Friedrichs*, No. 8:13-cv-00676, Dkt. No. 71 (RJN, Exh L); Union Defendants' Application for Ex Parte Order Continuing Hearing and Briefing Schedule for Plaintiffs' Motion for Preliminary Injunction and Supporting Memorandum of Points and Authorities, *id.* Dkt. No. 78 (RJN, Exh. M); Order Granting Union Defendants' Application to Continue Hearing and Briefing Schedule for Plaintiffs' Motion for Preliminary Injunction, *id.* Dkt. No. 79 (RJN, Exh. N); Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings, *id.* Dkt. No. 81 (RJN, Exh. H).

litigation process over Defendants' objection. *Abood* has been the law for forty years and, if the Supreme Court wishes to revisit *Abood*, there are other cases in the pipeline that were filed long before this one. *See, e.g.*, *Janus v. AFSCME*, No. 16-3638, – F.3d – , 2017 WL 1055582 (7th Cir. March 21, 2017).

CONCLUSION

The Court should deny Plaintiffs' motion for judgment on the pleadings and decline to grant judgment on the pleadings *sua sponte*.

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Respectfully submitted,

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