13-57095

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REBECCA FRIEDRICHS, et al.,

Plaintiffs-Appellants,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Defendants-Appellees,

KAMALA D. HARRIS, Attorney General of California,

Defendant-Intervenor-Appellee.

On Appeal from the United States District Court
for the Central District of California, Santa Ana

No. 8:13-cv-00676-JLS-CW
The Honorable Josephine L. Staton, Judge

ANSWERING BRIEF OF DEFENDANT-INTERVENOR APPELLEE KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Defendant-Intervenor Attorney General Kamala D. Harris (the Attorney General) requests oral argument and respectfully submits that argument is warranted in this case.

INTRODUCTION

Although plaintiffs have alleged a First Amendment challenge to provisions of California's Educational Employment Relations Act (EERA), Cal. Government Code sections 3540 et seq., they acknowledge, as they must, that controlling Supreme Court and Ninth Circuit authority establish the constitutionality of the practices they are challenging. Because the relief they seek is foreclosed, plaintiffs took the unusual step of asking the district court to enter judgment on the pleadings against them so that they could appeal and seek review and reconsideration of these authorities from this Court, and ultimately the Supreme Court. In this appeal, plaintiffs continue to acknowledge the constitutional validity of exclusive representation, agency fees, and "opt-out" requirements, but spend twenty-plus pages arguing that these practices are "at war" with the First Amendment and predicting that they will be invalidated by the Supreme Court. In fact, and as more than sixty years of jurisprudence has established, California law is consistent with the First Amendment and must be upheld. Thus, while the

outcome in this appeal, as plaintiffs have noted, is inevitable and the district court's order granting judgment for defendants must be affirmed, the Attorney General offers the following limited submission in order to briefly address plaintiffs' arguments and clarify the nature and scope of the State's compelling interest in the challenged statutory scheme.

JURISDICTIONAL STATEMENT

The Attorney General agrees with plaintiffs' Jurisdictional Statement.

STATEMENT OF ISSUES

1. Did the district court properly determine that plaintiffs' claim that California's agency fee requirement is unconstitutional is foreclosed by United States Supreme Court precedent holding that exclusive representation and compelling agency fees by public employees does not violate the First Amendment?

2. Did the district court properly determine that plaintiffs' claim that California's "opt-out" requirement is unconstitutional is foreclosed by this Court's holding in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), that the First Amendment does not require public employees' affirmative consent to collect union fees unrelated to collective bargaining?

STATEMENT OF THE CASE

I. THE STATUTORY SCHEME

California's Educational Employment Relations Act (EERA), Cal. Government Code sections 3540 et seq., was enacted in 1975 "to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy." *Anaheim Elementary Educ. Ass'n v. Bd. of Educ., Anaheim City Sch. Dist.*, 179 Cal. App. 3d 1153, 1156 (1986) (quoting Cal. Gov't Code § 3540). Pursuant to EERA, if a majority of the employees in an appropriate bargaining unit choose to be represented by a union, the district will deal with that union as the exclusive bargaining representative for all employees in the unit. *See* Cal. Gov't Code §§ 3543-3544. The statute conferring that authority expressly provides for exclusive representation and collective bargaining: "Employee organizations shall have the right to represent their

members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate [bargaining] unit … only that employee organization may represent that unit in their employment relations with the public school employer." *Id.* § 3543.1(a). The statute further provides that "[t]he employee organization recognized or certified as exclusive representative … shall fairly represent each and every employee in the appropriate unit." *Id*. § 3544.9.

Under EERA, employees represented by the union remain free not to become members of the union, *id.* § 3546(a), but such "non-members" are still bound by its negotiating decisions, and they still have a claim on its services.[1] Because "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones [that] often entail expenditure of much time and money," *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 221 (1977), an agency shop arrangement,

[1] In addition to the wage benefits and gains associated with union representation, *see* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 811 & n.47 (2012), non-members are also entitled to other services from the union, including legal assistance in enforcing their rights against an employer. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271 (2012).

under which all employees in the unit must contribute to the financial support of their exclusive bargaining representative, "has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222. Consequently, California, like many states, has made the legislative judgment that unions should be allowed to charge bargaining unit employees who do not choose to become members of the union an agency fee to cover their share of "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). The amount of this fee "shall not exceed the dues that are payable by members [of the union]," and, in practice, is generally the same amount as the union dues. *Id.*; Appellants' Excerpts of Record (ER) 2.

Although all workers represented by a public employee union may be required to pay their fair share of the cost of collective bargaining representation, public-sector unions are constitutionally prohibited from using the fees of objecting non-members for ideological purposes that are not germane to the union's collective-bargaining duties ("non-chargeable"

activities). In order to "devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto," the Supreme Court has set forth various procedural requirements that public-sector unions collecting agency fees must observe to ensure that an objecting non-member can prevent the use of his fees for impermissible purposes. *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292, 302, 304-10 (1986).[2] In keeping with these requirements, California has provided that objecting non-members are entitled "to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." Cal. Gov't Code § 3546(a). Each year, unions must estimate the portion of expenses that are non-chargeable for the coming year. *See* Cal. Regs. of Cal. Pub. Emp't Relations Bd. § 32992(b)(1). After the union has made this determination, it must send a "*Hudson* notice" to all non-members setting forth both the agency fee and the non-chargeable

[2] These procedural requirements include, "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

portions of the fee (that fund activities that are not germane to collective bargaining) . Cal. Gov't Code § 3546(a); Cal. Regs. of Cal. Pub. Emp't Relations Bd. § 32992(a).

Because "dissent is not presumed" and "must affirmatively be made known to the union by the dissenting employee," a non-member teacher who wishes to pay only the "chargeable" portion of the fee (an "objector") must make that intention known. *Machinists v. Street*, 376 U.S. 740, 744 (1961); *Hudson*, 475 U.S. at 309 ("the nonunion employee has the burden of objection"). Under the Unions' procedures, this can be done by annually filling out and returning a simple one-page form that is sent to all non-members. *See* ER 8-9. The objector need not state the reason for his or her objection, but need only check the box next to the statement on the form that reads: "I request a rebate of the nonchargeable portion of my fees." *See* ER 42.[3] Non-members who provide this notification receive a rebate or fee reduction for that year. Cal. Gov't Code § 3546(a).

[3] Alternatively, non-members may communicate objections in other ways. If an objecting non-member wishes to challenge the Unions' determination of the chargeable percentage of the fee, he or she need only check another box on the same form. *See* ER 9, 42. This will trigger a proceeding before an impartial decision maker in which the Unions will bear the entire cost of the proceeding, objecting fee payers are not required to adduce evidence, to lodge particular objections, or even to be present, and (continued…)

II. PROCEDURAL HISTORY

Plaintiffs are ten public school teachers who have resigned their union membership and the Christian Educators Association International, a non-profit organization that serves Christians working in public schools. ER 44-48.[4] Plaintiffs sued their local unions,[5] the National Education Association, the California Teachers Association and the superintendents of the districts in which they teach, seeking a declaratory judgment that EERA is unconstitutional and an injunction against its enforcement. ER 40-66. In August 2013, the district court, pursuant to Federal Rule of Civil Procedure 5.1, served the Attorney General with the required certification that "in this case there is drawn into question the constitutionality of the California

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(…continued)
the Unions have the burden to establish affirmatively the validity of the expenditures they classified as chargeable. ER 9, 18-19, 20.

[4] The Union Defendants denied the allegations of the complaint regarding the Christian Educators Association International. *Compare* ER 14 with ER 51-52. Accordingly, those allegations are presumed to be false and should not be considered by this Court. *See Hal Roach Studios v. Michael Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

[5] The local unions that are joined as defendants are the Savanna District Teachers Association, Saddleback Valley Educators Association, Orange United Education Association, Inc., Kern High School Teachers Association, National Education Association–Jurupa, Santa Ana Educators Association, Inc., Teachers Association of Norwalk-LaMirada Area, Associated Chino Teachers, and San Luis Obispo County Education Association.

Educational Employment Relations Act, Cal. Gov't Code § 3540 et seq." Minute Order, No. 13-cv-00676, Dkt. No. 94 (E.D. Cal. Aug. 28, 2013). The Attorney General then intervened under Federal Rules of Civil Procedure 5.1(c) and 24, and 28 U.S.C. section 2403(b), to defend the constitutionality of the state law. Order Granting Stipulation Regarding Intervention, No. 13-cv-00676, Dkt. No. 102 (E.D. Cal. Sept. 25, 2013).

The Complaint alleges that EERA's agency shop provision and the requirement to opt out of paying non-chargeable expenses violate the First Amendment. ER 41-65. However, plaintiffs acknowledged that controlling Supreme Court and Ninth Circuit authority establish the constitutionality of the practices they are challenging, and thus that their claims are foreclosed. ER 64. Accordingly, plaintiffs filed a motion for judgment on the pleadings in favor of defendants. *See* ER 1, 3-4. In that motion, plaintiffs stated that they believed that the controlling authority "should be and will be overturned on appeal," and thus they requested judgment on the pleadings in order to "take their claims to a fora with the authority to vindicate them." Notice of Motion and Motion for Judgment on the Pleadings, No. 13-cv-00676, Dkt. No. 81 (E.D. Cal. July 9, 2013). All parties agreed that judgment against plaintiffs was appropriate. ER 3.

By order dated December 6, 2013, the district court granted plaintiffs' motion, entering judgment against them. ER 1-4. In so doing, the court found that plaintiffs' claims were foreclosed by *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, and *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258. ER 3-4. Specifically, the district court stated that in "*Abood*, the Supreme Court upheld the constitutional validity of compelling employees to support a particular collective bargaining representative and rejected the notion that the only funds from nonunion members that a union constitutionally could use for political or ideological causes were those funds that the nonunion members affirmatively consented to pay." ER 4 (citing *Abood*, 431 U.S. at 222, 225, 235-36). The district court further noted that in *Mitchell*, this Court held that requiring non-members to opt out of paying the non-chargeable share of dues does not violate the First Amendment. ER 4 (citing *Mitchell*, 963 F.2d at 260-62).

Plaintiffs timely appealed. ER 5-6.

SUMMARY OF ARGUMENT

Distinct from their roles as sovereigns, state, local, and federal governments act as managers of large public workforces that carry out vital public functions. Governments have adopted a range of strategies for meeting the inevitable management challenges that arise, and the Supreme

Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 599 (2008).

California, like many other states, has determined that a system of collective bargaining with an exclusive representative chosen by a majority of public sector employees is the optimal way to manage its own workforce. In order to ensure that the exclusive representative is sufficiently well-funded to perform its various and essential functions, the State allows unions to charge bargaining unit employees who do not choose to become members of the union an agency fee to cover their share of "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). It also requires that non-members who object to the political and ideological expenditures of the union, "opt-out" of paying them by filling out a simple form. California's system of exclusive representation, agency fees, and "opt-out" requirements serves important state interests and is consistent with the well-established jurisprudence of this Court and the Supreme Court.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews judgment on the pleadings under Federal Rule of Civil Procedure 12(c) de novo. *Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012). Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998).

II. PUBLIC EMPLOYEE EXCLUSIVE REPRESENTATION SYSTEMS, AGENCY FEES AND "OPT-OUT" REQUIREMENTS ARE CONSTITUTIONAL AND SERVE IMPORTANT STATE INTERESTS

Although the Attorney General agrees with plaintiffs that agency fees and the opt-out regime are constitutional under binding precedent, and thus that the district court's grant of judgment in favor of defendants must be affirmed, she does not agree with plaintiffs' assessment of the merits of these claims. Contrary to plaintiffs' characterization, exclusive representation, agency fees, and opt-out requirements are entirely consistent with the First Amendment and serve important state interests.

A. Public Employee Exclusive Representation Systems, Agency Fees, and "Opt-Out" Requirements Are Consistent with the First Amendment.

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 dues violates the First Amendment by compelling financial support for (political and ideological) speech and activities and by placing the "onus of the action on the party whose constitutional rights are at stake." Brief of Appellants (AOB) at 13-23. These contentions are baseless and counter to long-standing and established First Amendment jurisprudence. *See*, *e.g.*, *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956); *Abood*, 431 U.S. at 220-21; *Hudson*, 475 U.S. at 301, 306 n.16; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516-17 (1991); *cf. Street*, 367 U.S. at 774; *Mitchell*, 963 F.2d at 261. Thus, with respect to the constitutionality of the challenged provisions of EERA, the Attorney General agrees with and adopts the arguments made by the Union Defendants in their Answering Brief and will not repeat them here. *See* Brief of Defendants-Appellees California Teachers Association, et al. Rather, in the interest of efficiency and avoiding duplication, she will touch only briefly on a few of plaintiffs' erroneous arguments and mischaracterizations.

First, to the extent that plaintiffs assert that exclusive representation in the public sector is itself unconstitutional, *see* AOB 19, this is groundless. In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court rejected the argument that the government violates the First Amendment by establishing a process for exclusive dealings in a private forum with an exclusive representative. *Knight* concerned a First Amendment challenge to Minnesota's exclusive representation rule under which the state would either bargain or "meet and confer" over terms and conditions of employment only with the elected exclusive bargaining representative. *Id.* at 274-75. In upholding the state law, the Court stated that plaintiffs "have no constitutional right to force the government to listen to their views. They have no such right as members of the public [or] as government employees …" *Id.* at 283; *see also Smith v. Ark. State Hwy. Emps.*, 441 U.S. 463, 465 (1979). The state was thus free to "[restrict] the class of persons to whom it will listen in its making of policy." *Knight*, 465 U.S. at 282. Accordingly, plaintiffs' First Amendment rights are not implicated by California's system of exclusive representation, let alone violated by it.

Second, although plaintiffs spend a good portion of their brief citing to *Harris v. Quinn*, 134 S. Ct. 2618 (2014) and dicta in *Knox v. Service*

Employees International Union, Local 1000, 132 S. Ct. 2277 (2012) as harbingers of the imminent constitutional demise of agency fees (and "opt-out" regimes), *Abood* and its progeny are and should remain the law. *See Harris*, 134 S. Ct. at 2645, 2658 (Kagan, J., dissenting) (noting that despite a very clear invitation to do so, the Court in *Harris* did not overrule *Abood*: "the majority did not, as petitioners wanted, deprive every state and local government in the management of their employees and programs, of the tool that many have thought necessary and appropriate to make collective bargaining work"). Not only is *Abood* long established, rightly decided, and entirely consistent with Supreme Court First Amendment jurisprudence,[6] but *stare decisis* precludes overruling it. *See id.* at 2651-53. Although, as plaintiffs highlight, at least some of the justices of the Supreme Court might not reach the same conclusion today as reached in *Abood*, departure from precedent "always require[s] … 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citation omitted). Reluctance to overturn precedent should be especially strong where, as here, a "long and unbroken series of precedents reaffirm[] th[e] [settled] principle." *Welch v. Tex. Dep't*

[6] *See, e.g., Locke v. Karass*, 555 U.S. 207, 210, 213 (2009); *Davenport*, 551 U.S. at 181; *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S 217, 231 (2000); *Lehnert*, 500 U.S. at 516-18; *id.* at 556 (Scalia, J., concurring and dissenting); *Hanson*, 351 U.S. at 238.

of Hwys. & Pub. Transp., 483 U.S. 468, 494 (1987) (plurality opinion of Powell, J.). The burden of justifying such a precedent is higher still where, also as here, there has been substantial institutional reliance on well-settled law. *See Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S. 298, 320 (1992) (Scalia, J, concurring) ("demands" of stare decisis are "at their acme … where reliance interests are involved"); *see also Randall v. Sorrell*, 548 U.S. 230, 244 (2006). State and local governments have for decades structured their basic public employment systems around exclusive representation supported by agency fees, and workers have relied on the vitality of those systems and the validity of the resulting contracts.[7] Plaintiffs have not identified, and there is not, "anything close to the special

[7] Twenty-two states and the District of Columbia authorize agency fees to provide a mechanism for ensuring that represented employees contribute to the costs of collective bargaining. The majority of these statutes make agency fee requirements a permissible subject of bargaining and authorize agency fee provisions as part of public-sector collective bargaining agreements. See Alaska Stat. § 23.40.110(b); Cal. Gov't Code §§ 3502.5, 3513(k), 3515, 3515.7; 3546, 3583.5; Conn. Gen. Stat. § 5-280; Del. Code § 1319; D.C. Code § 1-617.07, Haw. Rev. Stat. § 89-4; 5 Ill. Comp. Stat. 315/6(e), 115 Ill. Comp. Stat. 5/11; Me. Rev. Stat. Ann. tit. 26, § 629; Md. Code, State Pers. & Pens. § 3-502; Mass. Gen. Laws ch. 150E, § 2; Minn. Stat. § 179A.06; Mo. Rev. Stat. § 105.520; Mont. Code Ann. § 39-31-204; N.H. Rev. Stat. Ann. § 273-A.11; N.J. Stat. § 34:13A-5.5; N.M. Stat. § 10-7E-4; N.Y. Civ. Serv. Law § 208(3); Ohio Rev. Code § 4417.09(C); Or. Rev. Stat. § 243.672(c); 43 Pa. Stat. Ann. § 1102.3; R.I. Gen. Laws § 36-11-2; Vt. Stat. Ann., tit. 3, § 962 & tit. 16, § 1982; Wash. Rev. Code §§ 41.80.100, 41.59.100, 47.64.160, 288.52.045.

justification necessary to overturn *Abood*." *Harris*, 134 S. Ct. at 2651 (Kagan, J., dissenting). Accordingly, it is and must remain the case that agency fees are constitutional.

Finally, although they acknowledge that this Court's decision upholding the use of opt-out requirements in *Mitchell v. Los Angeles Unified School District* is controlling, plaintiffs assert that an opt-out regime "wrongfully places the burden on the party whose constitutional rights are at stake" and thus "opt in" is required instead. *See* AOB 21. However, this argument fails for lack of any constitutional or empirical basis. In order to "prevent[] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities," *Abood*, 431 U.S. at 237, and consistent with the procedural requirements set forth by the Supreme Court, California has provided that members who object to non-chargeable expenses, may opt out of paying them. *See* Regs. of Cal. Pub. Emp't Relations Bd. § 32992; *see also id; Hudson*, 475 U.S. at 303; *Mitchell*, 963 F.2d at 261. As noted above, exercising this opt-out requires little effort; it amounts to checking a box on a one-page form that the Union mails to non-members annually. *See* ER 8-9, 42. It is highly likely that requiring employees to opt in to union political spending would

reduce the number of employees who contribute and the total amount of contributions to non-chargeable expenditures. However, this does not necessarily reflect the "probable preferences" or "political and ideological" views of non-members. *See Knox*, 132 S. Ct. at 2290. It more likely reflects their economic interest in avoiding the costs of collective bargaining.[8] And even if a non-member teacher does oppose some political or ideological position taken by the union, this would not necessarily mean that she opposes all or even most of the non-chargeable expenditures or indicate which of the union's political activities she does oppose. Accordingly, the Supreme Court has consistently held that dissent from the union's political activities must be voiced by the employee. *See, e.g.*, *Hudson*, 475 U.S. at 309; *Street*, 367 U.S. at 774.

[8] Plaintiffs' contention that the State has no interest in "shifting the advantage of … inertia," is, at best, puzzling. AOB 22. "Inertia" does not suggest a disagreement with chargeable expenditures, and certainly not one of constitutional dimension. Rather, it implies that a member would, like most rational actors, prefer to do nothing, especially where doing nothing does not preclude sharing in benefits. *See, e.g.*, Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 88 (1971).

B. A Collective Bargaining System That Includes Exclusive Representation and Agency Fees Serves Important State Interests.

1. The State has a strong interest in maintaining a system of exclusive representation.

California has a strong interest in the continued viability of exclusive representation based upon majority rule. Indeed, EERA is based in part on the recognition that these arrangements provide many benefits and serve critical interests of both the public employees and the government employer. *See, e.g.*, Cal. Gov't Code § 3540.[9] These include the macroeconomic benefits of allowing employees to bargain from a position of collective strength to improve wages and working conditions; the desirability of

[9] California's judgment in adopting a system of exclusive representation is firmly grounded in Supreme Court precedent. The Court long ago held that the government has important interests in granting employees in both the private sector and government service the right to bargain collectively on the basis of majority rule and exclusivity. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937). It has since reiterated this holding numerous times. *See Abood*, 431 U.S. at 220-21; *see also Davenport v. Washington Ed. Assn*, 551 U.S. 177, 181 (2007); *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees*, 466 U.S. 435, 448 (1984); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975). Its determination is also supported by the experience of the federal government, numerous state and local governments, and private employers. *See Abood*, 431 U.S. at 220-21; *Emporium Capwell*, 420 U.S. at 62-64; Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 50-53, 55-56, 60-61, 65-67 (1998).

fostering workplace democracy; and the benefits to employees, employers, and the public of allowing bargaining by one union instead of many representatives claiming authority as a bargaining agent.[10] *See, e.g.*, *id.*; *see also Harris*, 134 S. Ct. at 2657 (Kagan, J., dissenting) (noting that "the majority does not deny the State's legitimate interest in choosing to negotiate with an exclusive bargaining agent, in service of administering an effective program, citing 134 S. Ct. at 2640-41); *Abood*, 431 U.S. at 224 (discussing the "confusion and conflict that could arise if rival … unions, holding quite different views as to [terms and conditions of employment], each sought to obtain the employer's agreement"); *Jones & Laughlin Steel Corp.*, 301 U.S. at 33-34 (upholding the constitutionality of the National

[10] Although plaintiffs contend that the promotion of "labor peace" is not a valid interest, AOB 17, 19, their position is unfounded and unnecessarily trivializes the State's interest, as an employer, in crafting a fair and effective system of labor relations and ensuring that relations that will allow for the "effective and efficient fulfillment of [the State's] responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). Moreover, and as indicated above, the benefits to the State from exclusive representation are not confined to avoiding the strife or dissension that may result from employees' competing demands. As the Union Defendants have explained, "a school district employer may need to resolve any number of issues as to which management may benefit from obtaining the views and recommendations of its teachers as a group, conveyed by an exclusive representative that is authorized to speak for the group." *See* Defendants' Memorandum in Opposition to Motion for Judgment on the Pleadings, No. 13-cv-00676, Dkt. No. 90 at 8-9 (E.D. Cal. Aug. 9, 2013).

Labor Relations Act on the basis of the government's interests in promoting economic growth by facilitating equality of bargaining power between employers and employees); Clyde W. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265, 269 (1987) ("The principle of exclusive representation is considered fundamental in our labor law. It approaches being the First Commandment with the deification of the majority union … . But it is not written on stone from Sinai; it has more practical origins. The historical purpose of exclusive representation was to prevent an employer from playing one union against another to divide and conquer, and its practical purpose was to establish a single contract with standardized terms."). The exclusive representation system set forth in EERA also allows the government to work with a highly experienced and knowledgeable negotiating partner, and consequently to develop mutually agreeable terms and solutions that are most likely to gain "buy in" from all the parties.

2. The State has a strong interest in ensuring that exclusive representatives are properly funded.

Given the important governmental interests that are served by exclusive representation, the State has a concomitant interest in making sure that union bargaining representatives have sufficient financial resources to perform

their duties optimally. *See, e.g.*, *Abood*, 431 U.S. at 221; *Street*, 367 U.S. at 761 ("Performance of these functions entails the expenditure of considerable funds."). For this reason, California has made the legislative judgment that unions should be allowed to charge bargaining unit employees who do not choose to become members of the union an agency fee to cover their share of "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). Agency fees prevent unfairness to union members, incentives to "free ride" on member-employees' efforts, and resulting conflicts. Without them, dues-paying members bear the burden of paying for all costs of representing the unit, thereby subsidizing the services provided to non-members. *See, e.g.*, *Street*, 367 U.S. at 760-64. These payments thus prevent members' voluntary contributions from being "depleted to cover the costs incurred in the representation of free riders." *Robinson v. New Jersey*, 741 F.2d 598, 610 (3d Cir. 1984). Agency fees also address the risk that employees as a whole would fail to adequately support the union's collective-bargaining activities if there were no secure mechanism for charging employees a share of the cost of those activities. *See* Mancur Olson, Jr., *The Logic of Collective Action* 11, 14-16, 67, 75-76, 85-87 (1965) (discussing collective action

problems unions face without fair-share fees, including that even union supporters then have rational economic incentives to avoid paying because they can receive the same benefits for nothing, know that their payments will be used to benefit non-payers, and risk bearing an increasingly disproportionate share of overall costs); Eric A. Posner, *The Regulation of Groups*, 63 U. Chi. L. Rev. 133, 137-38 (1996) (in such a system, "each [individual] actor finds it rational to cheat"); *see also* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. Rev. 319, 354 & n.187 (2012) ("[s]everal studies show that the level of free riding is higher in right-to-work states.") (citing studies).

Plaintiffs' contention that the State does not have a valid interest in avoiding free riding and thereby ensuring that exclusive bargaining representatives are adequately funded, *see* AOB 19-20, is contrary to law, logic, and fact. In reality, the State's interest is at its greatest because the State has *created* the potential for free riding by obligating the unions by law to represent and secure benefits for members and non-members alike. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting). As Justice Scalia explained in *Lehnert*:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the

> nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry-indeed, requires the union to go out of its way to benefit, even at the expense of its other interests.

Id. Accordingly, even if a desire to prevent "free riding" is not normally sufficient to justify compulsory payments, *cf. Knox*, 132 S.Ct. at 2289, agency fees in this context reflect the exclusive representative's legally-mandated, official role within a government-established system. They also reflect the State's critical interest in supporting its exclusive representation system by ensuring an adequately funded representative that can represent the unit in a manner that promotes an effective and credible system by, for example, hiring staff, drawing on expertise, and creating arrangements to involve the unit in formulating its goals.[11]

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[11] Plaintiffs assert that "California itself has acknowledged the absence of any "compelling interest" in mandating that agency fees be paid to the Unions by creating an ad hoc exception from this requirement for religious objectors." AOB 18 n.11 (citing Cal. Gov't Code § 3546.3). However, the exception for religious objectors contained in section 3546.3 does not mean that the State does not have a compelling interest in agency

(continued…)

CONCLUSION

For the foregoing reasons, this Court should uphold the constitutionality of the challenged statutory provisions and affirm the district court.

Dated: September 2, 2014

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(…continued)
fees; it simply reflects that the State's interest is cabined by the religion clauses of the United States and California Constitutions.

13-57095

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REBECCA FRIEDRICHS, et al.,

Plaintiffs-Appellants,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Defendants-Appellees,

KAMALA D. HARRIS, Attorney General of California,

Defendant-Intervenor-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: September 2, 2014

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CERTIFICATE OF COMPLIANCE
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FOR «Matter Primary Court Case #»

I certify that: (check (x) appropriate option(s))

[x] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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September 2, 2014
Dated

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APPENDIX