No. 13-57095

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.

On Appeal from the United States District Court
for the Central District of California, Santa Ana
No. 8:13-cv-00676-JLS-CW
Judge Josephine L. Staton

BRIEF OF DEFENDANTS-APPELLEES CALIFORNIA TEACHERS ASSOCIATION, et al.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

None of the Defendants-Appellees is a nongovernmental corporate party that has a parent corporation or has stock that is held by any publicly held corporation.

s/ Jeremiah A. Collins
JEREMIAH A. COLLINS

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Defendants-Appellees request oral argument and respectfully submit that argument is warranted in this case.

All parties recognize that affirmance of the District Court's decision is required by controlling precedents which hold (i) that public employees who do not choose to become members of the union that is their exclusive bargaining representative may constitutionally be required to pay their share of the expenses incurred by the union for collective bargaining and other "chargeable" activities, and (ii) that, although nonmembers cannot be required to pay their fair share of the expenses incurred by the union for political activities and other "nonchargeable" activities, the First Amendment is not violated merely because nonmembers must affirmatively "opt out" if they do not wish to pay their share of those expenses.

However, the Supreme Court has recently criticized – but has not overruled – decisions upholding opt-out systems, stating that those decisions did not explicitly address the "constitutional implications of an affirmative opt-out requirement." *Knox v. Serv. Emps. Int'l Union, Local 1000,* 132 S. Ct. 2277, 2290 (2012). Defendants-Appellees maintain that in *this* case, the challenged opt-out procedure has no meaningful impact on any cognizable First Amendment interests, and therefore the procedure would be constitutional even if the precedents that have upheld opt-out procedures generally were not controlling. It would be

appropriate for the panel to address that contention as an alternative ground for affirmance on this issue, especially since Plaintiffs-Appellants have indicated their intention to seek Supreme Court review of this Court's ruling. Oral argument likely would be of assistance to the Court in considering the important constitutional question thus presented.

JURISDICTIONAL STATEMENT

Defendants-Appellees agree with Plaintiffs-Appellants' Jurisdictional Statement.

ISSUES PRESENTED

1. Where a public-sector union is required by law to represent fairly all employees in the bargaining unit, do employees who do not choose to become members of the union have a First Amendment right to pay nothing for the representation they receive?

2. Where, pursuant to state law, a public sector union provides all nonmembers the opportunity to opt out of paying their share of the union's political and other "nonchargeable" activities by checking a box on a form sent to them annually, does a nonmember who has thus opted out and who does not allege that the "opt-out" system is burdensome in any respect state a First Amendment claim merely by alleging that the union should have adopted a system under which

only those nonmembers who affirmatively "opt in" will be required to pay a share of the union's nonchargeable expenses?

STATEMENT OF THE CASE

Defendants-Appellees California Teachers Association ("CTA"), National Education Association ("NEA") and their affiliated local unions (collectively "the Unions") represent public school teachers and other educational employees throughout California, including the ten individual Plaintiffs-Appellants ("Plaintiffs"). ER 11-14, 56.[1]

[1] The local unions that are joined as defendants are the Savanna District Teachers Association, Saddleback Valley Educators Association, Orange Unified 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.

An organization known as the Christian Educators Association International also is a Plaintiff-Appellant in this case. However, in their answer Defendants denied the allegations of the complaint concerning that organization. *Compare* ER 14 with ER 51-52. In evaluating a motion for judgment on the pleadings, the general rule is that "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Consistent with that rule, even though Plaintiffs acknowledged in the court below that judgment should be entered against themselves, they recognized that they were the moving parties and that the court should consider only allegations the Defendants had admitted. *See* Plaintiffs' Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points and Authorities in Support (Doc. 81) at 3-5 (Supp. ER 2-4). In their brief on appeal, Plaintiffs nevertheless cite allegations in the complaint that have been denied by the Defendants. Those allegations should not be taken as true.

1. The California Legislature, like the legislatures of many states, has adopted a system of labor relations applicable to public school employers and their employees under which, if a majority of the employees in an appropriate bargaining unit choose to be represented by a union, the employer will deal with that union as the exclusive bargaining representative for all employees in the unit. *See* Cal. Gov't Code §§ 3542-44. The statute providing for that authority provides as well 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, even though employees are free not to become members of the union if that is their preference, *id.* § 3546(a). California thus "expressly incorporate[s]," *Anaheim Elementary Educ. Ass'n v. Bd. of Educ., Anaheim City Sch. Dist.*, 179 Cal. App. 3d 1153, 1158 (1986), the duty of fair representation recognized by federal law, under which "the union is obliged 'fairly and equitably to represent all employees …, union and nonunion,' within the relevant unit," *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977) (quoting *Machinists v. Street*, 367 U.S. 740, 761 (1961)).

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," *id.*, an agency shop arrangement,

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 fair 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).

At the same time, California has provided that objecting agency fee payers are entitled, upon making their objection known, "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." *Id.* And, even as to activities that are chargeable to objectors under the terms of the California statute, the Unions do not treat as chargeable any activities that objectors cannot be required to support under the First Amendment

standards of *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and its progeny ("nonchargeable" activities or expenditures). *See* ER 22-30, 33-34. For example, the fee charged to objecting nonmembers by the Unions does not include a share of the costs of any union lobbying, even for improvements in compensation for the bargaining unit, except where the lobbying is specifically related to ratification or implementation of a collective bargaining agreement. ER 17-18.[2]

2. Because "'[t]he objective [of a public sector agency fee procedure] must be to devise a way of preventing *compulsory* subsidization of ideological activity by employees *who object thereto,*'" *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 (1986) (emphasis added) (quoting *Abood*, 431 U.S. at 237), a nonmember teacher who wishes to pay only the "chargeable" portion of the

[2] Plaintiffs' brief suggests that the Unions require objecting nonmembers to pay for some activities that are not constitutionally chargeable to them, but those suggestions are refuted by the facts averred in the Unions' answer. *Compare* ER 22-29 with ER 61-65. For example, Plaintiffs emphasize that "California law expressly states" that the activities for which all employees may be charged include a broad range of lobbying, *see* Plf. Br. at 6; but as noted, the Unions do *not* include expenditures for such activities in the fee that is charged to objectors. Plaintiffs also suggest that because CTA and NEA generally do not engage in collective bargaining with local school districts, it cannot be that 65 percent of CTA's expenditures and 40 percent of NEA's expenditures are chargeable. *See* Plf. Br. at 16. There is no basis for that assertion, as CTA and NEA provide substantial assistance to the local unions in connection with such local school board collective bargaining, *see* ER 34, 35, and they incur many other chargeable expenses as well. Plaintiffs take CTA and NEA to task for setting their affiliation fees on a statewide basis, *see* Plf. Br. at 16, but the Supreme Court unanimously approved such an approach in *Locke v. Karass*, 555 U.S. 207 (2009).

fee (an "objector") must make that intention known. *Id.* at 306 ("the nonunion employee has the burden of raising an objection"). Under the Unions' procedures, this can be done by merely returning a simple one-page form that is provided annually to all nonmembers. *See* ER 8-9, ER 42. The nonmember need not state the reason for his or her objection; all that is required is the placing of a checkmark next to the statement on the form that reads: "I request a rebate of the nonchargeable portion of my fees." ER 42.[3]

A nonmember who checks that box receives a rebate that exceeds the portion of the agency fee that represents nonchargeable expenses. For the 2012-13 fee year, NEA determined that 45.89% of its expenditures were chargeable, but the reduced fee paid by objectors was set at only 40.0%; for CTA, 68.4% was chargeable but the fee was set at only 65.4%; and the Defendant local unions also

[3] If an objecting nonmember wishes to challenge the Unions' determination of the chargeable percentage of the fee, the nonmember need only check another box on the same form. *See* ER 9, 42. This will trigger a proceeding before an impartial decisionmaker in which the Unions will bear the entire cost of the proceeding; objecting feepayers are not required to adduce evidence, to lodge particular objections or even to be present; and the unions have the burden to establish affirmatively the validity of the expenditures they classified as chargeable. ER 9, 18-19, 20. Plaintiffs do not raise any issue concerning that procedure. But it bears noting that, whatever may have been the case in *Knox* and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), where the Court stated that a nonmember who disagrees with a union's chargeability determinations "must bear a heavy burden" of "mount[ing a] legal challenge" entailing "expensive" costs of "litigating," *see Harris*, 134 S. Ct. at 2633; *Knox*, 132 S. Ct. at 2294, such a characterization does not fit the burden-free challenge procedure administered by the Defendant Unions.

set their fees at 65.4% despite the fact that in every case their chargeable percentage was much higher, ranging from 84.36% to 100%. ER 33-34. As a result of those reductions, made for administrative reasons and in the interest of avoiding unnecessary disputes, a nonmember who submits an objection is charged less than the individual's fair share of the Unions' chargeable expenses.

3. Each of the individual Plaintiffs has been a public school teacher in California for a number of years. *See* ER 48-50. None is a member of the Unions, and their periods of nonmembership extend back to 2000. *Id.* In every year that they have been nonmembers, the Plaintiffs have opted out of paying the full agency fee. *Id.* None of them asserts that the process of opting out has been burdensome in any way. *Id.* Nor does any Plaintiff allege that he or she may fail to opt out in any future year in which he or she does not wish to pay a full fee, or that any other nonmember teacher who has not wished to pay a full fee has failed to opt out and has been charged a full fee as a result.[4]

With the possible exception of Plaintiff Irene Zavala, who alleges that she falls within the California statute applicable to members of a religious body whose teachings "include objections to joining or financially supporting employee

[4] In their answer, the Unions aver on information and belief that no nonmember who wishes not to contribute to the Unions' nonchargeable activities has been deterred by the Unions' procedure from opting out of contributing to those activities. ER 37. Those averments must be taken as true given the procedural posture of this case. *See* note 1 *supra*.

organizations," ER 50, none of the Plaintiffs alleges that he or she objects to unions as such. Rather, each Plaintiff alleges, in identical conclusory boilerplate, that he or she "objects to many of the unions' public policy positions, including positions taken in collective bargaining." ER 48-50.

The Complaint does not identify, even in general terms, the Union "public policy positions" to which the Plaintiffs object. Thus, although Plaintiffs assert in their brief that "teachers unions" bargain over "basic matters of education policy" with which "many teachers" disagree, Plf. Br. at 18, the complaint does not identify any matters of education policy as to which *these* Unions have bargained and to which *these* Plaintiffs object. In this connection, it is not the case, as Plaintiffs assert, that the Unions bargain over "the *very same* policy choices" as are embodied in California statutes governing such matters as tenure and procedures for dismissal with cause. Plf. Br. at 14 (emphasis in original). California Government Code § 3540 precludes the Unions from bargaining over such statutorily-determined matters. *See, e.g., Bd. of Educ. of the Round Valley Unified Sch. Dist. v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269, 283-86 (1996).[5]

[5] In addition, the assertion in Plaintiffs' brief that "unions regularly bargain for compensation based on seniority and tenure rather than merit, and therefore privilege long-time employees over newer employees who may be more talented," Plf. Br. at 18, does not correspond to any allegations in the complaint. It bears noting that the Plaintiffs are themselves long-term employees; the allegations in the complaint indicate that they have taught in California for an average of more than eighteen years each. *See* ER 48-50.

Nor does the complaint identify the *non*chargeable activities of the Unions to which the Plaintiffs claim to be opposed.[6] Many of the Union's nonchargeable activities, such as CTA's efforts in 2012 to achieve passage of Proposition 30, a tax measure which greatly increased public school funding, *see* ER 17, and efforts to improve teachers' wages and benefits, are supported by nonmembers as well as members. *See* ER 38. Although it may be the case that a handful of teachers oppose such efforts to improve their own wages and benefits or to increase funding for public education, the complaint does not allege that the Plaintiffs hold such views. [7]

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[6] Plaintiffs allege that the Unions make extensive "political expenditures," ER 61-65, but they simply list a number of these – including such matters as expenditures in support of a "petition to keep students safe from gun violence," ER 63 – without indicating whether they disagree with them. The bulk of the political expenditures cited by Plaintiffs are not expenditures of the Unions in the first place, but of separate legal entities. *See* ER 22-24.

[7] As is explained in the Unions' answer:

> That a teacher has not become a member of the Unions does not suggest that he or she is generally opposed to the Unions' nonchargeable activities; there are numerous considerations that might lead a teacher not to become a member even though he or she has no objection to those activities. Some individuals simply are reluctant to join any organization. Some may refuse to join the Unions because they do not feel that they have a complete understanding of the Unions' activities, or because they wish to receive the annual notice that is sent to nonmembers so that they will be apprised of the Unions'

Putting to one side the religious objection of Plaintiff Zavala, which is not at issue in this case and as to which a different procedure applies, the complaint does not allege that any of the Plaintiffs communicated with the Unions other than by

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> expenditures in case they might wish to object at some future time. Some may choose not to become members of the Unions because members are required to comply with internal union rules and are subject to discipline if they violate them. Some may choose not to become members because they fear that doing so might subject them to adverse consequences if their present or future employer were to harbor anti-union sentiments. Some may choose not to be members because they do not support the incumbent leadership of the union, either because they support rival unsuccessful candidates for union office or for other reasons. And some may choose not to join the Unions because they believe that the Unions have not done a good job at the bargaining table, or in dealing with a particular grievance or other matter. In each of these cases, such nonmembers may have no objection to the Unions' nonchargeable activities and may have no desire to opt out and thus to reduce the funds available to the Unions for those or other activities. To the contrary, notwithstanding their individual reasons for refraining from union membership, they may wish to be represented by a strong union that has sufficient financial resources to promote effectively the employment interests of the bargaining unit through collective bargaining, legislative activity and other efforts.

ER 37-38.

checking the box on the annual rebate form stating: "I request a rebate of the nonchargeable portion of my fees." ER 42. [8]

SUMMARY OF THE ARGUMENT

1. The constitutionality of the agency shop was established by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and has been reaffirmed in numerous subsequent decisions. In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the petitioners urged that *Abood* be overruled, and the Plaintiffs here filed an *amicus* brief advancing the same position, but the Court did not overrule *Abood*. Plaintiffs therefore acknowledge, as they must, that this Court is bound by *Abood*. They argue nonetheless that *Abood* has been discredited and ultimately will be overruled; but this attack on *Abood* is meritless.

Plaintiffs' attack rests on the proposition that exclusive representation itself is unconstitutional in the public sector. That contention is contrary to decades of settled law. Indeed, the contention was directly urged in *Harris* by the petitioners in that case and by the Plaintiffs as *amici*, but it was not embraced by a single Justice.

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[8] Each Plaintiff makes the boilerplate assertion that, "[b]ut for California's 'agency shop' arrangement, [he or she] would not pay fees to or otherwise subsidize the teachers' union." ER 48-51. The Unions have denied those allegations, *see* ER 11-20, but Plaintiffs nevertheless cite them as fact. *See* Plf. Br. at 10. Those disputed allegations should not be taken as true. *See supra* note 1.

Because exclusive representation is constitutional, so is the agency shop. As the Court reasoned in *Abood*, having placed on a union the duty to represent fairly all employees in the bargaining unit, a public employer may require all employees to pay their fair share of the union's expenses incurred in collective bargaining and other chargeable activities, lest employees otherwise have an incentive to become "free riders," denying the union the funds it needs for activities it undertakes by virtue of its state-conferred status and duty.

That justification for agency fees is unimpeachable. It has been reaffirmed in numerous cases, and *Harris* left this law undisturbed.

2. Plaintiffs concede that their challenge to the Unions' "opt-out" procedure is foreclosed by this Court's decision in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992). The Unions agree. But the Court nevertheless should address this issue, because Plaintiffs have made clear that they intend to seek review of this case by the Supreme Court and that they will argue in that Court that *Mitchell* relies on precedent that, in Plaintiffs' view, did not adequately address the burdens and risks to First Amendment interests that an opt-out system can present.

In this case there is no burden and no such risk, so the Unions' procedure would pass muster even if *Mitchell* were not controlling. Under the Unions' procedure, the "burden" of opting out consists of checking a box on a form and

returning it to the Unions – which each Plaintiff has done each year, and which the Plaintiffs do not allege has been burdensome. No decision of the Supreme Court has found a "compelled speech" or "compelled association" violation to arise from such an innocuous requirement.

Nor do the Plaintiffs allege that anything about the Unions' opt-out system creates a risk that they will fail to object in some future year and will be required against their will to pay an unreduced fee. Indeed, the complaint does not allege that *any* nonmembers who have wished to pay a reduced fee have been dissuaded from opting out; and Plaintiffs cannot assert the rights of other nonmembers in any event.

Finally, the agency fee procedure, including the opt-out requirement, is not viewpoint-discriminatory. The state authorizes this system because of a union's legal status as exclusive representative, not because the state agrees with a union's views.

As the Unions' opt-out procedure does not burden any First Amendment interests and is viewpoint-neutral, the judgment for the Unions on this issue should be affirmed even if *Mitchell* were not controlling.

ARGUMENT

I. THE AGENCY SHOP IS CONSTITUTIONAL

In *Abood*, the Supreme Court held that a public employer may require all employees in a bargaining unit to pay a fee to the union that is their exclusive bargaining representative, "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," 431 U.S at 225-26, so as "to distribute fairly the cost of these activities among those who benefit, and [to] counteract[ ] the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees," *id.* at 222. At the same time, *Abood* held that objecting nonunion employees cannot be required to provide financial support "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.

In its numerous subsequent decisions involving exclusive representation for collective bargaining, the Supreme Court has adhered to *Abood*'s holding.[9] Most

[9] *See Locke*, 555 U.S. at 210, 213; *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 873 (1998); *Lehnert*, 500 U.S. at 516-21, 524-25; *id.* at 552-53, 556-57 (Scalia, J., concurring in the judgment in part and dissenting in part); *Hudson*, 475 U.S. at 301-02; *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 456-59 (1984); *Minn. State Bd. v. Knight*,

recently, in *Harris v. Quinn*, the Court was urged by the petitioners in that case, and by several *amici* including the Plaintiffs here, to overrule *Abood*, but the Court declined to do so.

Plaintiffs therefore acknowledge, as they must, that this Court is bound by *Abood*. However, based on what Justice Kagan aptly characterized as some "potshots" the *Harris* majority directed at *Abood*, *see Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting), and some arguments of their own that none of the Justices in *Harris* embraced, petitioners maintain that *Harris* signals the eventual demise of *Abood*.

Although all parties recognize that the validity of *Abood* is not a matter presented to this Court for decision, Defendants' arguments should not go unanswered. As we will show, *Abood* is a sound precedent that easily withstands Defendants' arguments and is not undermined by the decision in *Harris*.

A. Exclusive Representation is Constitutional and Serves Vital State Interests.

Plaintiffs argue that public sector exclusive representation "is *itself* a stark deprivation of a nonmember's associational freedom," and that agency fees "*exacerbate* the already-acute subjugation of each nonmember's associational freedom and individual interests." Plf. Br. at 19 (emphasis in original). By that

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465 U.S. 271, 278, 290-92 (1984); *id.* at 299-300 (Brennan J., dissenting); *id.* at 315-16 (Stevens J., dissenting); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50 (1983).

assertion Plaintiffs reveal how drastically their arguments depart from settled First Amendment principles: the constitutionality of exclusive representation in the public sector has been settled for decades, and was not called into question by any member of the Court in *Harris*.

1. In an exclusive representation system, employees remain free "to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public." *City of Madison v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 & n. 10 (1976). "A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint . . . in public or private orally or in writing," *Abood*, 431 U.S. at 230, even "to the very decisionmaking body charged by law with making the choices raised by [a union's] contract . . . demands," *City of Madison*, 429 U.S. at 176 n.10.

That being the case, no First Amendment problem is presented by a public employer's decision that, as to certain matters and in certain non-public forums, the employer will deal only with an entity that speaks for a majority of the employees and with which the employer may enter into agreements of general application. The First Amendment protects employees' rights to publicly or privately express their views and to associate with each other for such purposes,

but it does not compel their public employer to recognize or deal with them, nor does it bar the employer from choosing to recognize or deal with others instead.

Thus, in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court held that no First Amendment problem was presented by a state statute that excluded faculty of a community college from "meet and confer" sessions with their employer and permitted only the exclusive bargaining representative to participate in such sessions. The Court held that where a public employer chooses to deal only with an exclusive representative, individuals "have no constitutional right to force the government to listen to their views … as members of the public, as government employees, or as instructors …." *Id.* at 283. And that was true in *Minnesota State Board* even though the "meet and confer" sessions were devoted entirely to "questions of policy." *Id.* at 276. *See also id.* at 298 (Brennan, J., dissenting) (noting "the broad catalogue of issues that are commonly addressed during meet and confer sessions – curriculum proposals, academic standards, budgetary matters, and so forth").[10]

[10] As the Court recognized, if individual public employees had a First Amendment right to confer with their employer, it would follow that, in addition to protecting the right of employees to associate in unions – as the First Amendment surely does, *see State Emps. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 132-36 (2d Cir. 2013) (citing Supreme Court precedent), *cert. denied*, 134 S. Ct. 1002 (2014) – the First Amendment also would give a union the right to require that a public employer deal with the union – which it does *not*. *See Minn. State Bd.*, 465 U.S. at 286; *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464-66 (1979).

Even the dissenters in *Minnesota State Board* noted that the Court has "often recognized [that] the use of an exclusive union representative is permissible in the collective-bargaining context because of the state's compelling interest in reaching an enforceable agreement, an interest that is best served when the state is free to reserve closed bargaining sessions to the designated representative of a union selected by public employees." 465 U.S. at 299 (Brennan, J., dissenting). Indeed, in the litigation that led to the *Minnesota State Board* decision, the Supreme Court directly rejected the very arguments Plaintiffs make here when it summarily affirmed the ruling of a three-judge court upholding an exclusive bargaining system that governed terms and conditions of employment. *See Knight v. Minn. Cmty. Coll. Faculty Ass'n*, 460 U.S. 1048 (1983), discussed in *Minnesota State Board*, 465 U.S. at 279. In *Minnesota State Board*, the Supreme Court went further, upholding the extension of exclusive representation to "[t]he portion of the statute under challenge … [that] ha[d] nothing to do with the process of negotiating labor contracts," *id.* at 302 (Stevens, J., dissenting), and which required the college to meet and confer exclusively with the union over "questions of policy" outside the area of terms and conditions of employment.

Thus, in *Knight* and *Minnesota State Board*, the adoption of an exclusive representation system for terms and conditions of employment was seen by the Court as so free from constitutional doubt that no written opinion was warranted as

to that question, and the extension of exclusive representation to matters of policy that were not subjects of collective bargaining also was held to present no First Amendment problem.

2. *Minnesota State Board* and *Abood* establish not only that California's decision to allow for majority-rule exclusive representation works no First Amendment infringement, but also that it promotes vital state interests.

A state may properly choose to set terms and conditions of employment through agreement; and even as to employment-related matters that may not constitute terms and conditions of employment as such, a state may properly determine that its public employers should pursue "the goal of basing policy decisions on consideration of the majority view of its employees." *Minn. State Bd.*, 465 U.S. at 291-92. A public employer therefore has every right to set employment terms and policies through agreement with "the exclusive representative, which has its unique status by virtue of majority support within the bargaining unit." *Id.* at 291; *see also id.* at 299 (Brennan J., dissenting) (exclusive representation "best serve[s]" the state's "compelling interest" in resolving employment matters through "enforceable agreement").[11]

[11] What Congress said of private employment in passing the Wagner Act in 1935 is true of public employment as well: for an employer, "the making of agreements is impracticable in the absence of majority rule," and "where majority rule has been given a trial of reasonable duration, [employers] have found it more conducive to harmonious labor relations to negotiate with representatives chosen

In the context of this case, those holdings reflect that 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. For example, a district that seeks to spend its compensation dollars most efficiently will want to know the employees' preferences as between the various pieces of a compensation package so that the district does not put money into one piece that would be better spent on another. So too, teachers' collective views regarding the fairness and effectiveness of various potential employment rules and policies, and regarding practices that may contribute to improving the quality of education, promotes informed decision making by school districts. As to these and many other matters, a state may properly conclude that school administrators should proceed not by fiat but by engaging with the teachers as a group through their authorized representative. *See* ER 35-36.

In that connection, it is significant that unions like CTA and NEA have highly experienced staffs, with personnel who have expertise in dealing with issues that often arise in bargaining and who are uniquely qualified to develop solutions that are beneficial to a district as well as to its employees. In addition to possessing expertise with respect to financial analysis, benefit program design, and

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by the majority than with numerous warring factions." S. Rep. No. 573, 74th Cong., 1st Sess. (1935) at 13.

other technical matters, union staff members, having dealt with a multitude of school districts, typically have a broad knowledge base regarding options and approaches that have proved successful or unsuccessful in resolving issues and improving education in other districts, which can be of great value to a district in its own understanding of issues the parties are addressing.

The exclusive representative system also provides a two-way communication mechanism whereby union negotiators can listen to management, gain an informed understanding of management's proposals, and then explain them to the rank-and-file teachers, enabling those teachers to understand management's proposals in a way that would not be possible without the involvement, resources and expertise of the union. *Id.* In these ways, the system of exclusive representation serves the state's interests by enabling management to adopt arrangements informed by the collective knowledge and wishes of the employees, and by fostering greater employee understanding, acceptance of and confidence in the arrangements thus forged by the collective bargaining process.

A system of exclusive representation also makes possible the adoption of a grievance and arbitration system through which the exclusive bargaining representative may resolve or pursue an individual teacher's case on the basis of the union's considered judgment, acting consistent with its duty of fair representation "on which the employer with whom it bargains may rely."

Bowen v. United States Postal Serv., 459 U.S. 212, 226 (1983). This process "by which meaning and content are given to the collective bargaining agreement," *Steelworkers v. Warrior & Gulf Navigation* Co., 363 U.S. 574, 581 (1960), provides "the means of solving the unforeseeable . . . in a way which will generally accord with the variant needs and desires of the parties," *id.* *See also City of Los Angeles v. Superior Court*, 56 Cal. 4th 1086, 1097 (2013) (applying the teaching of *Warrior & Gulf* in a public sector case). The government certainly may view such a system, unique to exclusive representation, as offering advantages over other forms of dispute resolution. *See* ER 36.

Finally, as the Court recognized in *Abood*, an exclusive representation system serves the government's interest in labor peace:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Abood, 431 U.S. at 220-21.

3. In *Harris*, the constitutionality of exclusive representation was challenged by the Petitioners, and also by the Plaintiffs herein, who filed an *amicus*

brief making the same arguments as they assert here. *See Harris v. Quinn*, U.S. S. Ct. No. 11-681, Brief for Petitioners at 24-31, 37-38; *id.*, Brief of California Public-School Teachers [*et al*.] as *Amici Curiae* at 17-18. Yet the Supreme Court's decision in *Harris* contains not a word questioning the constitutionality of exclusive representation. Rather, the opinion plainly proceeds on the long-settled understanding that exclusive representation is constitutional. *See Harris*, 134 S. Ct. at 2636-37, 2640.

B. Agency Fees Are Justified by the Government Interests Served By Exclusive Representation and by the Duty Placed on an Exclusive Representative to Represent Fairly All Employees in the Bargaining Unit, Members and Nonmembers Alike.

1. Having adopted a system under which an exclusive bargaining representative performs functions that promote important state interests, and having placed on such a representative the duty to represent all employees in the unit, requiring the expenditure of "much time and money," *Abood*, 431 U.S. at 221, it is entirely proper for California to provide that employees who do not choose to become union members, but who share in "benefits of union representation that necessarily accrue to all employees," *id.* at 222, do not have a right to receive the benefits of representation for free, but may be required to pay their *pro rata* share of the expenses thus incurred by their representative.

That is the central holding of *Abood*, to which the Supreme Court has adhered in numerous subsequent cases. *See supra* at 15-16. In *Lehnert*, *Abood*'s

central holding was reaffirmed both in the opinion of the Court, 500 U.S. at 516-18, and in Justice Scalia's separate opinion, *id.* at 556. Agreeing that "th[e] constitutional rule" permitting mandatory financial support for an exclusive bargaining representative is "justifie[d]" by the union's "distinctive" duty as the statutory representative of all members of a bargaining unit, Justice Scalia explained that justification in these words:

> 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. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental, but calculated, not imposed by circumstances, but mandated by governmental decree.[12]

[12] *Id.* (emphasis in original). As Justice Kagen has pointed out, such mandated free ridership would create a uniquely severe "collective action problem." *Harris*, 134 S. Ct. at 2656 (Kagan, J., dissenting). With the union prohibited from negotiating greater employment benefits for employees who pay dues than for those who do not, "not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty – as *against* financial self-interest – can explain their support." *Id.* (emphasis in original). Thus, a government employer's authorization of agency fees "ensures

2. In *Harris*, "the principal question … presented was whether to overrule *Abood*," *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting), and "the lion's share of the[ ] briefing" was devoted to that question, *id.* The Court declined to overrule *Abood*. And, although the majority opinion "t[ook] potshots at *Abood*," *id.* (citing *id.* at 2632-24) (opinion of the Court), nothing the majority said is contrary to the central rationale of *Abood* as just described.

Rather, the Court in *Harris* characterized "the fact that a union, in serving as the exclusive representative of all the employees in a bargaining unit, is required by law to engage in certain activities that benefit nonmembers that the union would not undertake if it did not have a legal obligation to do so" as "the best argument … in support of *Abood*," *id.* at 2637 n. 18; and the Court acknowledged that in *Lehnert*, Justice Scalia concluded that this "justifies the agency fee." *Id.* at 2636; *see also id.* at 2656 (Kagan, J., dissenting) ("As is often the case, Justice Scalia put the point best [in his *Lehnert* opinion]"). *Harris* does not take issue with that "best argument" (an argument that is never mentioned in Plaintiffs' brief).

To be sure, the *Harris* Court noted that some public employers have adopted exclusive representation without authorizing agency fees, *see id.* at 2640, and the majority criticized as "unsupported" the "empirical assumption" that exclusive

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that a union will receive adequate funding, notwithstanding its legally imposed disability – so that a government wishing to bargain with an exclusive representative will have a viable counterpart." *Id.*

representation is "dependent on" an agency shop, *id.* at 2634. But the justification for agency fees that underlies *Abood* and was articulated by Justice Scalia in *Lehnert* is not dependent on any mistaken assumption that exclusive representation cannot exist without agency fees.

Any suggestion that the agency shop cannot pass constitutional muster merely because some jurisdictions that authorize exclusive representation have not chosen to authorize agency fees would have no foundation. Exclusive representation for purposes of collective bargaining is itself authorized only in some jurisdictions. The same is true of the kinds of meet and confer sessions on matters of policy that were upheld in *Minnesota State Board.* No case, including *Harris*, suggests that this deprives those practices of constitutional validity.

On the contrary, many of the Supreme Court's leading First Amendment decisions have found a practice to be justified by adequate government interests even though numerous jurisdictions have not chosen to adopt the practice.[13] "Both

[13] To give only a few examples, the Court has rejected First Amendment challenges to practices that vary widely from state to state in such areas as nomination requirements for political parties, *see, e.g., N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974), prohibitions on various kinds of advertisements, *see, e.g., Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), and restrictions on various kinds of picketing, *see, e.g., Hill v. Colorado*, 530 U.S. 703 (2000); *Frisby v. Schultz*, 487 U.S. 474 (1988). Of particular relevance here, the Court has upheld the system of mandatory fees imposed on lawyers as a part of integrated bar arrangements, despite the fact that

federalism and separation-of-powers concerns would be implicated," *Minn. State Bd.*, 465 U.S. at 285, by any notion that a state cannot make its own judgment about whether to pursue a particular interest, especially where the government acts "as proprietor, to manage [its] internal operation," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)), exercising "[t]he extra power" that "comes from the nature of the government's mission as employer," *id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion)).

3. Noting that union lobbying (apart from lobbying for the ratification or implementation of a collective bargaining agreement) is not chargeable to objecting nonmembers, and asserting that collective bargaining may involve the same "policy choices" as lobbying, Plaintiffs argue it cannot be constitutional to require nonmembers to pay a share of their union's expenses for the one activity but not the other. Plf. Br. at 13-15, 17. That simplistic equation of lobbying and bargaining fails to recognize that the permissibility of a regulation affecting speech does not depend solely on the subject matter of the speech but also on the nature of the forum in which it is presented. *See Minn. State Bd.*, 465 U.S. at 280-82.

Thus, although a public employee has no First Amendment right to speak in a collective bargaining session, or even in a "meet and confer" session concerning

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many states have not adopted such arrangements. *See Keller v. State Bar of California*, 496 U.S. 1 (1990).

questions of policy, *see supra* at 18-20, the employee *does* have a First Amendment right to speak about such subjects in a meeting that is open to the public. *See City of Madison, supra*. The same distinction between public and private fora is a principal reason why, in *Lehnert*, every member of the Court agreed that all employees may be required to pay a *pro rata* share of their union's *bargaining* expenses, while a majority held that objecting nonmembers cannot generally be required to pay a share of the union's *lobbying* expenses. As the plurality explained, "unlike collective-bargaining negotiations between union and management… legislatures … are public fora open to all." *Lehnert*, 500 U.S. at 521 (plurality opinion).[14]

Plaintiffs therefore are simply wrong in asserting that, "in reality, there is no difference between lobbying and public-sector collective-bargaining." Plf. Br. at 13. That *Abood, Lehnert* and numerous other decisions have recognized fundamental distinctions between the two is no indictment of those decisions. Rather, in this as in their other arguments against the agency shop, Plaintiffs ignore well-established principles of First Amendment law on which *Abood* and its progeny are based and which *Harris* leaves intact.

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[14] In addition, the *Lehnert* plurality reasoned that "[t]he burden upon freedom of expression is particularly great" where an individual is required to contribute to efforts, such as lobbying, "to garner the support of the public," *id.* at 522, as distinguished from efforts to seek agreement from the employer itself.

II. THE UNIONS' OPT-OUT SYSTEM DOES NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHTS

Plaintiffs state that this Court should affirm the district court's rejection of their challenge to the Unions' opt-out procedure on the ground that the Court is bound by its decision in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), "allowing [an] opt-out regime." Plf. Br. at 3. Plaintiffs urge the Court not to "revisit" the question decided in *Mitchell*, although they predict, largely on the basis of the Supreme Court's decision in *Knox*, that all agency fee opt-out procedures ultimately will be held to be unconstitutional. *See* Plf. Br. at 2-3.

The Unions agree that this Court is bound by *Mitchell* to affirm the judgment. But the argument that follows will show that even if *Mitchell* were not controlling – indeed, even if Plaintiffs were correct that the analysis in *Mitchell* and other precedents warrants further consideration as suggested in *Knox* – Plaintiffs' claims regarding the Union's opt-out procedure still would fail. If the Court agrees, the Unions respectfully submit that the appropriate course is not simply to declare that the Court is bound by *Mitchell*, but to explain why the Court would affirm the judgment on this issue "[e]ven if [it] were not bound by [*Mitchell*]." *Porter v. Winter*, 603 F.3d 1113, 1117 (9th Cir. 2010).

A. *Mitchell* Requires Rejection of Plaintiffs' Challenge to the Unions' Opt-Out Procedure, But the Court Should Hold that on the Facts Here, Plaintiffs' Challenge Would Fail Even if *Mitchell* Were Not Controlling.

In *Mitchell* this Court relied on "a long line of Supreme Court cases beginning with *International Ass'n of Machinists v. Street*" for the proposition that, in administering an agency fee system, "'dissent is not presumed – it must affirmatively be made known to the union by the dissenting employee.'" *Mitchell*, 963 F.2d at 260 (quoting *Street*, 367 U.S. 740, 774 (1961)).

In *Knox*, the Court stated that *Street* did not explicitly discuss the procedures a union must implement in collecting agency fees, and did not address "the broader constitutional implications of an affirmative opt-out requirement." *Knox*, 132 S. Ct. at 2290. The *Knox* Court recognized, however, that subsequent Supreme Court decisions, particularly *Hudson*, have understood *Street* to have established the permissibility of agency fee opt-out systems. *Id.* Those decisions, which were not overruled in *Knox* or *Harris*, and on which this Court relied in *Mitchell*, are binding here, as is *Mitchell*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

But this Court should make clear that, even absent those binding precedents, the particular opt-out system at issue in this case would pass muster under an analysis of "the broader constitutional implications of an affirmative opt-out requirement," *Knox*, 132 S. Ct. at 2290, which would take into account such factors as the burden, if any, that a particular opt-out procedure places on the

plaintiffs and the risk, if any, that the procedure will dissuade nonmembers from objecting and opting out. If, as Plaintiffs suggest, *Knox* would support a contention that an opt-out system may violate the First Amendment if it significantly "burden[s] the freedom of speech or association," Plf. Br. at 22 (quoting *Knox*, 132 S. Ct. at 2291), and "significantly exacerbates the 'risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree,'" Plf. Br. at 23 (quoting *Knox*, 132 S. Ct. at 2290), the Unions' procedure here has no such impact on the Plaintiffs. Affirmance therefore would be required even if *Mitchell* were not controlling (as it is).

B. Because the Unions' Opt-Out Procedure Does Not Impinge on Any First Amendment Interests of the Plaintiffs and is Viewpoint Neutral, it Satisfies Constitutional Standards.

1. The Supreme Court has explained that the "objective" of a public sector agency fee procedure is "preventing *compulsory* subsidization of ideological activity by employees who *object thereto.*" *Hudson*, 475 U.S. at 302 (emphasis added). A fee system therefore presents a First Amendment problem only to the extent that individuals are "obliged by 'law or necessity'" to pay for messages with which they do not agree. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 558 (2005) (quoting *United States v. United Foods, Inc.* 533 U.S. 405, 413 (2001)); *see also Street*, 367 U.S. at 768-69 (impermissible to spend exacted funds on political activity "over the employee's objection"); *Railway Clerks v. Allen*, 373 U.S. 113,

118 (1963) (same); *Ellis v. Railway Clerks*, 466 U.S. 435, 438 (1984) (Railway Labor Act "does not authorize a union to spend an *objecting* employee's money to support political causes") (emphasis added); *Lehnert*, 500 U.S. at 516 (government may not "*force* employees to contribute" to nonchargeable activities) (emphasis added); *Communications Workers v. Beck*, 487 U.S. 735, 736 (1988) (*Street* prohibits political expenditures "over the objections of nonmembers"); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472, (1997) (*Abood* condemned "compelled contributions for political purposes" by which "beliefs [were] . . . coerced by the State").

Cases in other First Amendment contexts are to the same effect. In *Christian Legal Society Chapter v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971 (2010), the Court explained that "regulations that *compelled* a group to include unwanted members, with *no choice to opt out*," have been held unconstitutional, whereas less strict requirements have not. 130 S. Ct. at 2986 (emphasis added). In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943), the challenged flag salute was "not optional," and the fact that a dissenter could not be excused from the salute on request was what made the practice unconstitutional. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 n.4 (2004) (Rehnquist, C.J., concurring in the judgment) (in *Barnette*, "[t]here was no opportunity to opt out, as there is in the present case …. Compulsion, after

Barnette, is not permissible, and it is not an issue in this case"). In *Wooley v. Maynard*, 430 U.S. 705 (1977), the State "refused to permit [the plaintiff] to take any measures to cover up the motto" on the license plate he was required to affix to his car. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (explaining that this was essential to the decision in *Wooley*). And in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), the Court explained that a "compelled-speech violation" can be found only where "the complaining speaker's own message was affected by the speech it was forced to accommodate." *See also Christian Legal Society Chapter*, 130 S. Ct. at 3014 (Alito, J., dissenting) ("forced inclusion" requirements present a First Amendment concern insofar as they "affect[ ] in a significant way the group's ability to advocate public or private viewpoints") (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000)).

Thus, the constitutional principle involved here is that a public sector union's political activities and other nonchargeable activities must "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not *coerced* into doing so *against their will* by the threat of loss of government employment." *Abood*, 431 U.S. at 236 (emphasis added).

2. The Unions' opt-out procedure here is entirely noncoercive and nonburdensome. Plaintiffs have admitted as much. In their memorandum below in support of their motion for judgment on the pleadings, Plaintiffs argued that it was immaterial whether they could establish that the opt-out system "burdens nonmembers and creates a risk that individuals will accidentally fail to prevent the Defendant Unions from spending their money on … political activities those individuals do not support," because Plaintiffs' claims rest on the contention that "the entire concept of requiring Plaintiffs to opt out" violates the First Amendment "whether or not doing so is burdensome, and whether or not any nonmembers have erroneously failed to opt out in the past." Plaintiffs' Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points and Authorities (Doc. 81) at 8 (Supp. ER 5).

Plaintiffs thus disavowed any contention that the requirement of opting out subjects them to any real burden. And it would have been futile for Plaintiffs to have advanced such a contention, because no First Amendment decision has found an impermissible burden in a requirement as innocuous as merely having to check a box on a form. *See* cases cited *infra* at 36-37.[15] True, this requirement generally

[15] As for the cost of a postage stamp or other means of transmitting the form, this, too, is nonburdensome and is more than offset by the additional rebate an objector will receive beyond the nonchargeable portion of the fee. *See supra* at 7-8.

must be satisfied "every year." Plf. Br. at 22-23. But that does not turn such a simple procedure into a burden in any meaningful sense of the term. And in any event, none of the Plaintiffs has ever asked the Unions to treat their opt-out as permanent, *see* ER 38, so this case does not present the question of when, if ever, a union should be required to treat an objection as continuing from year to year.[16]

The contrast between this case and those in which the Supreme Court has found speech to have been impermissibly burdened is striking. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), cited in *Knox* as the leading case holding that "measures burdening the freedom of speech or association must serve a 'compelling interest,'" *Knox*, 132 S. Ct. at 2291, the challenged regulation "force[d] [a] group to accept members it [did] not desire," *Roberts*, 468 U.S. at 623, thus "impair[ing] the ability" of the group "to express [its] views, *id.* Indeed, the Court later explained that the First Amendment burden in *Roberts* arose from

[16] If the Plaintiffs are suggesting that the Union should have treated their objections as permanent because they had submitted an objection for some number of years, such an assumption would not have been warranted any more than it would be proper for the Unions to treat a nonmember as a permanent *non*objector after the nonmember has not objected for some number of years. In either case, a nonmember's decision as to whether or not to object may depend on factors that change from year to year, including the union's accomplishments, the particular policies the union pursues, the extent to which the nonmember approves of the current union leadership, and any number of other considerations. Particularly where, as here, a nonmember is not required to state the reason for his or her objection and does not choose to communicate the reason, a union is in no position to conclude that an individual's objection in one year should be treated as carrying over to a different year.

the fact that the association was given "no choice to opt out" of the forced-membership requirement. *Christian Legal Soc'y*, 130 S. Ct. at 2986. The other cases cited in *Knox* as exemplifying the standards to be applied to "measures burdening the freedom of speech or association," 132 S. Ct. at 2291 and n.3, involved restrictions that "constrained" and "diminished" an individual's "ability to act according to his beliefs," *Elrod v. Burns*, 427 U.S. 347, 356 (1976); "substantially restrict[ed] an Illinois voter's freedom to change his political party affiliation," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); or, "at least potentially, prohibit[ed] every cooperative activity that would make advocacy of litigation meaningful," *NAACP v. Button*, 371 U.S. 415, 437-38 (1963). It trivializes the First Amendment to compare such situations to this one, where an individual can avoid any alleged compulsion simply by checking a box on a form.

3. As for whether the opt-out system presents a "risk that the fees [the Plaintiffs] pa[y] … will be used to further political and ideological ends with which they do not agree," *Knox*, 132 S. Ct. at 2290, each of the Plaintiffs has opted out every year, and none of them has alleged that there is any risk that he or she will fail to do so in the future. For that matter, the complaint does not allege that *other* nonmembers who do not wish to pay a share of the Unions' nonchargeable expenditures have failed for some reason to check the opt-out box; and in any

event, this is not a class action, and Plaintiffs cannot assert the rights of third parties. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013).[17]

In their brief – but not in their complaint – Plaintiffs assert that an opt-out system allows a union to take "advantage of … inertia." Plf. Br. at 22. Plaintiffs do not describe the nature of this "inertia," or why it is of any First Amendment concern. If Plaintiffs are suggesting that nonmembers who do not wish to have their money used to support the Unions' nonchargeable activities are too inattentive or lazy to bother to check the opt-out box on the form they receive and to drop the form in the mail, such a suggestion is not supported by the pleadings and does a disservice to California teachers, who take their rights and obligations seriously and, as Plaintiffs' own conduct demonstrates, are fully capable of checking a box and mailing a form if they do not wish to pay a full agency fee. If, instead, Plaintiffs are suggesting that many teachers simply do not care whether they are or are not charged the full agency fee, then it is oxymoronic to assert that First Amendment interests of such *dis*interested individuals are infringed by an opt-out system – any more than they would be infringed by an opt-in system.

[17] As *Hollingsworth* explains, in the rare case where a litigant may be permitted to assert that rights of other individuals have been violated, the litigant is required to show that the violation causes "injury in fact" to himself. *Id.* The complaint here alleges no injury in fact to the Plaintiffs from any action or inaction on the part of other nonmembers with respect to the opt-out procedure.

4. Forced to argue that the opt-out requirement is unconstitutional even though it imposes no burden, Plaintiffs argue that there is no difference between this case and one in which the state transfers a percentage of each employee's paycheck to the Republican Party unless the employee opts out. *See* Plf. Br. at 22. Plaintiffs' equation again is faulty; there is a fundamental difference between the two situations.

In the Republican Party hypothetical, the state would be engaged in *viewpoint discrimination*, in an area unrelated to its legitimate administrative or managerial interests. Such viewpoint discrimination always presents a First Amendment problem. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232-33 (2000) (mandatory fees for public university students that "will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs" are generally permissible, but must satisfy "the requirement of viewpoint neutrality"); *Davenport*, 551 U.S. at 188 (First Amendment concerns are heightened where the circumstances indicate viewpoint discrimination).[18]

[18] *See also Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 361 n.3 (2009) (in upholding a statute prohibiting payroll deduction of political contributions, the Court notes that the prohibition was not alleged to be viewpoint-based); *United Foods*, 533 U.S. at 411 (a requirement that agricultural producers pay for generic advertising violated the First Amendment where the government adopted the requirement because it agreed with the ads' message and thus was imposing "special subsidies for speech on the side [of a disputed issue] that it favors").

Here, in contrast, Plaintiffs have not alleged that California's allowance of an opt-out procedure is based on viewpoint discrimination. And there would be no basis for such an allegation. In *Perry Education Association*, the Supreme Court held that, because a school district policy giving the exclusive bargaining representative access to the school mail system while denying such access to a rival organization was "based on the *status* of the … union[ ] rather than [its] views," the policy could not be considered viewpoint discriminatory. 460 U.S. at 49 (emphasis in original). So too here. There is nothing to suggest that California allows for opt-out systems because the legislature agrees with the positions unions espouse. On the contrary, "even granting the modification of views that may come from a realization of economic interdependence," *NLRB v. Ins. Agents Union*, 361 U.S. 477, 488 (1960), "the basic assumption … in both the public and private sector" is that unions and employers "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107-108 (1983) (quoting *Ins. Agents*, 361 U.S. at 488).

To the extent that "requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues – as opposed to exempting them from making such payments unless they opt in," may properly be characterized as a "boon for unions," *Knox*, 132 S. Ct. at 2290 (dictum), that does not change the First

Amendment analysis. In *Perry*, access to the school mail system obviously was a "boon" for the union. And in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643-46, 657-58, 662 (1994), the federal requirement that cable providers must carry local broadcast stations was of enormous benefit to those stations, but the Court held that this compelled-speech requirement was permissible – and did not even trigger strict scrutiny – because Congress had not adopted the "must carry" rule out of a preference for the *content* of local broadcasts.

Agency fee procedures, including the opt-out feature, are authorized because of a union's status, not because of its views. This presents no First Amendment problem.

C. The Opt-Out System Does Not Incorporate Any "Presumption" that the Plaintiffs Have "Acquiesced in the Loss of Fundamental Rights."

1. Unable to allege that the opt-out requirement has had or will have any actual impact on their First Amendment interests, Plaintiffs resort to a confused abstraction, asserting that the Unions have applied an unwarranted "presumption" that the Plaintiffs have "acquiesce[ed] in the loss of fundamental rights." Plf. Br. at 20-21. Plaintiffs base that argument on statements in *Knox*, but those statements were *dicta*, regarding a matter neither raised nor briefed, *see Knox*, 132 S. Ct. at 2297-98 (Sotomayor, J., concurring in the judgment), and they referred to nonmembers who do *not* opt out, whereas here the Plaintiffs all have opted out.

In any event, the Unions' procedures do not involve any presumption regarding nonmembers who do not opt out. That a nonmember who does not avail himself or herself of a completely nonburdensome procedure for opting out of a payment has no First Amendment claim with respect to that payment does not rest on any presumption regarding the nonmembers' unstated beliefs, any more than the constitutionality of a school pledge exercise from which students are free to excuse themselves (as in *Newdow*, *supra*) depends on a presumption that all students who do not excuse themselves hold views that are consistent with every word in the Pledge of Allegiance. When the Unions charge an unreduced agency fee to a nonmember who has not opted out despite having been afforded a simple and nonburdensome way to do so, they are not "presum[ing]" that the nonmember has "acquiesce[d] in the loss of fundamental rights." Plf. Br. at 21 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999).[19]

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[19] Furthermore, if an individual remains silent after having been informed that he must say something in order to preserve a right, no notion of "presumed acquiescence" is required to conclude that the right has been waived or forfeited. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2261-62 (2010) (waiver of *Miranda* rights); *Gonzales v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in the judgment) (waiver where criminal defendant did not state an objection to his counsel's relinquishment of a right). *College Savings Bank* is not to the contrary. In that case the Court merely rejected a legal fiction that, by engaging in certain conduct in the face of a statutory admonition as to the

2. All of this would hold true even if there were a basis for concern that nonmember teachers who oppose the Unions' nonchargeable activities fail to opt out for some mysterious and unknown reason. The First Amendment does not require the government to attempt to ascertain the unexpressed policy preferences of employees and to avoid any procedure through which employees might provide financial support for activities with which they may not agree but as to which they have registered no objection. In any event, Plaintiffs have not asked this Court to engage in speculation or assumptions as to the likely views of nonmembers who have not chosen to opt out of paying a share of the Unions' nonchargeable activities. That is because, in the circumstances presented here, the most reasonable inference is that a nonmember who does not opt out does *not* disapprove of the Unions' activities. *See supra* at 10-11; ER 38.

* * *

In sum, the Unions' opt-out procedure works no infringement of any First Amendment interests of the Plaintiffs.

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consequences of that conduct with regard to sovereign immunity, the State had accepted those consequences and thereby had waived sovereign immunity.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

s/ Jeremiah A. Collins

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees state there are no related cases.

s/ Jeremiah A. Collins
JEREMIAH A. COLLINS

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