

Governments, Unions, Civic Organizations, Academics Weigh In to Protect Fair Share

The United States government, twenty-one states, scores of cities, counties and school districts, together with over seventy civil rights organizations, leading economists, constitutional law professors, labor law professors and more filed in support of California's statute permitting fair share fees for California teachers and other educational employees. California's fair share fee law allows for strong collective bargaining by providing for fair share fees for representation if employees in a workplace elect a collective bargaining representative. But no employee may be required to pay for politics. Rather every employee who declines to join the union can simply opt-out of paying for any union political activity.

The Supreme Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that such fair share fee arrangements are permissible. Almost half of the states have adopted laws permitting such arrangements. In *Friedrichs v. California Teachers Association*, the Supreme Court is being asked to overturn *Abood* and override all of those state laws. The Court is also being asked to rule that non-members may not be required to check a box to opt-out of union political activity.

The following describes the 24 amicus briefs that have been filed in support of California's fair share fee statute.

Governmental amici

The United States Government has weighed in to explain that Petitioners' attack on *Abood* mistakenly rests on the premise that conditions on public employment are subject to "exacting scrutiny," but the "Court has never so held." "Petitioners' attempt to demolish this Court's settled framework for analyzing conditions of public employment would astonish the Founding generation and would stamp out the State-by-State variation in public employment structures that has been the hallmark of this Court's First Amendment jurisprudence for decades." "*Abood* correctly held that public employers may reasonably conclude that, by eliminating the moral hazard inherent in exclusive representation, agency-shop agreements significantly promote their vital interest in productive collective bargaining relationships, ameliorate the workplace resentments that could arise if union members are required to shoulder the costs of attaining benefits for other employees, and foster a productive and effective public workforce." The brief for the U.S. also argues that California's opt-out procedure is constitutional given that "an individual must often interpose an objection to invoke a constitutional right." "The First Amendment protects those who truly object to subsidizing the union's political activity; it is not designed for public employees who are so indifferent that they do not make the effort to check a box and mail in a form." The U.S. Solicitor General Donald B. Verrilli was the lead author of this brief.

Twenty-one states, including Alaska, Iowa, Kentucky, Virginia, as well as the District of Columbia have filed to voice their common view that *Abood* rightly recognized "that States have a significant and valid interest in being able to employ the models of collective

bargaining that have proved successful for achieving labor peace and avoiding strikes” and for improving government efficiency and public services. These 21 States argue that *Abood*, in line with the Court’s other public employment precedents, gives appropriate deference to state judgments about what type of labor relations system will work best in their states. And the brief explains that overruling *Abood* would upset substantial reliance interests by overriding the laws of twenty-three states and place in jeopardy “thousands of contracts involving millions of public employees.” New York Solicitor General Barbara Underwood was the lead author of this brief.

Montana Governor Steve Bullock has filed to explain to the Court that modern labor relations in Montana were built in response to deadly violence in a labor dispute - the 1920 massacre of 14 striking mine workers in Butte. The brief argues that under our federalist system Montana has the sovereign authority to structure its relationship with its employees, including by choosing a collective bargaining system under which fair share fees are permitted. Regulating labor relations is a core state function and the Supreme Court has recognized States’ freedom to regulate their employees, including employee speech. The brief also discusses how fair share fees benefit Montana by promoting labor peace and ensuring effective government services, for example, by allowing the state to work with public employee unions to reduce employee health care costs. Deepak Gupta of Gupta Wessler was the lead author of this brief.

48 Republican State Legislators, joined by the President of the Republican Main Street Partnership former Republican Congressman Steve LaTourette, filed a brief explaining their “belief that nothing in the Constitution prohibits the agency fee arrangements at issue in this case and that whether these arrangements are good policy is a decision that belongs to the relevant state and local governments.” Amici “know well the complicated calculus involved in determining how to structure public sector labor relations, and they know how much of that decision-making is based on local interests and values. Overturning *Abood* and imposing one uniform rule on the entire country would not only cause significant disruption in the many States that use agency fee arrangements, it would also take decision-making on this important issue away from the state officials who are best positioned to engage in it. Nothing in the First Amendment” requires that result. Rather under our federal system, the decision to adopt collective bargaining as a labor management system, and to support that system with agency fees, is one that *Abood* properly left to states to decide in accordance with their local conditions and circumstances. “*Abood* is no outlier, but simply reflects basic well-recognized First Amendment principles – applicable to government regulation of its own employees – that give the government “wide discretion and control over the management of its personnel and internal affairs.” Finally, the brief argues that states have relied on *Abood* to create fair share arrangements, and overturning *Abood* now would disrupt their labor relations and lead to disruptive litigation. Elizabeth Wydra of the Constitutional Accountability Center was the lead author of this brief.

27 Cities and Counties, from Honolulu to Boston, and Fairbanks to Los Angeles, joined by 28 Mayors and other municipal officials, filed a brief arguing that “overruling *Abood* would pull the rug out from under these municipalities. It could undermine the stability of

their operations and budgets by forcing them immediately to renegotiate collective bargaining agreements. It would unsettle key conceptual underpinnings of First amendment doctrine that have ensured that governments can manage their operations without facing lawsuits from employees who object to being told what to say on the job. And it would put at risk the significant efficiency benefits that municipal employers have reaped by working with the stable union partners that agency-fee arrangements make possible.” In this last regard, the brief details both research and the *amici’s* experiences to show how strong labor management collaboration saves taxpayers money and improves government services. And the brief explains that such collaboration requires unions to have sufficient resources and stability to fulfill their role, which they would lack if fair share fees were eliminated. Professor Sam Bagenstos of the University of Michigan Law School authored the brief.

14 School Districts in 5 different states that collectively employ more than 55,000 employees responsible for educating more than 460,000 students filed to explain why, in their experience, “agency fee arrangements make collective bargaining more effective by giving unions the stability to make difficult agreements that may be unpopular but are in the long-term interests of employees, students, and the entire community.” For example, the brief explains that the stability provided by fee arrangements allowed San Diego Unified School District in California to make a hard but necessary concessionary agreement with their teachers, under which the teachers took furlough days and deferred raises in exchange for reduced layoffs. Fee arrangements also promote close collaborative workplace relations by avoiding workplace resentment of free-riders, the disruption of ongoing union organizing, and by providing a structured and well-resourced process for problem-solving and conflict resolution. And such fees improve labor management relations by ensuring that the union has the resources to represent the entire unit. These benefits, in turn, allow for the type of innovative labor management initiatives that have been shown to improve schools. *Amici* write that in their experience “providing high quality educational services to students often entails significant commitment from their unions and their members, which are made possible by the fidelity, flexibility, and resources that agency fee arrangements allow.” *Amici* also point out that overruling *Abood* would disrupt school labor relations by raising questions as to the legality of existing labor agreements with fair share fee provisions. The lead author of the brief was former U.S. Solicitor General Seth Waxman of Wilmer Hale.

The City of New York filed a brief to educate the Court about the tumultuous labor strife that led to the adoption of agency fees in New York City and to explain that such fees have been critical to securing and maintaining labor peace. The City argues that it should not be deprived of “a tool that has for years helped foster productive relationships between governments and their public workforces, without providing any substitute solution or reassurance for the millions of everyday New Yorkers, including the City’s public employees, who would ultimately bear the cost of any resulting public strikes” particularly given the devastating consequences of even a minor labor disruption in the densely populated city. The City argues that given its history, it has a compelling interest in continuing to use fees. More broadly, the City urges that the Court should continue to allow jurisdictions to make their own decisions about fair share fees in accordance with “their

overall labor relations strategy and risk tolerance for public sector strikes.” The City also points out that in its experience bargaining and contract administration “are time- and resource-intensive and require extensive expertise from both the government and union sides,” fees “allow the city’s public-sector unions to effectively pursue bargaining strategies that benefit all members broadly, rather than short-term or confrontational strategies that may only advance the factions of employees most willing to pay fees.” New York City Corporation Counsel Zachary Carter was the lead author of this brief.

The Los Angeles County Department of Health Services and NYC Health +Hospitals are the first and second largest municipal health care systems in the country collectively serving almost two million patients a year. Joined by the **Service Employees International Union** these large public health employers argue that “petitioners’ claims fail because paying fair share fees is not citizen speech on matters of public concern and because public employer’s interests in using strong, stable collective-bargaining relationships to foster labor-management partnerships fully justifies employer’s fair-share-fee arrangements.” The brief details the history and successes of labor management partnerships particularly in the health care sector such as the labor-management collaborations that Kaiser Permanente has used to improve care and reduced inefficiencies. Similarly, the Los Angeles County’s Department of Health Services and New York City’s Health and Hospitals Corporation have worked with labor unions to achieve significant quality and efficiency improvements by, for example, improving hospital cleanliness (an important public health issue), reducing needle errors, allowing hospitals to manage staff resources more efficiently, reducing wait times, and improving attendance at post-discharge appointments.

Fair share fees, the brief points out, make such labor-management collaboration more likely to succeed by providing stable funding for the costly activities that unions undertake in support of the efforts. Additionally, labor-collaboration can only work by embracing a collaborative and not confrontational model of labor management, but the latter model is far more likely when a union must constantly campaign to secure and retain members.

Labor unions

The AFL-CIO and AFSCME filed to explain why *Abood* is sound law, decided in line with existing First Amendment precedents at the time, and still consistent to this day with First Amendment precedents in the public employment context. In particular, the brief explains that under current law such fees must be evaluated under the *Pickering* balance, which weighs the government’s reasonable understanding of the employment interests served by such fees against the First Amendment impingement those fees impose on non-members. The brief argues that the balance favors such fees given the strength of the government’s interest in exclusive representation and in allocating the costs of exclusive representation among all represented employees so as to prevent free-riders. In contrast, the First Amendment interest of individuals in declining to pay such fees is quite limited. Such individuals may still speak out against the union, decline to join the union altogether and/or to associate with its activities. The fees only require that the individual

pay for collective negotiation and representation over workplace terms and conditions of employment.

The brief also argues that opt-out arrangements are squarely in line with the Court's compelled speech cases, which require only that the government allow the individual to refrain from making the government-prescribed statement.

The American Federation of Teachers and American Association of University Professors weighed in to demonstrate that 1) fair share fees fund a wide array of union activities that improve the quality of public education; 2) overruling *Abood* would seriously disrupt the management of thousands of school districts and undermine quality public education; and 3) to show why petitioners' "facial, all-or-nothing challenge to all aspects of every agency fee ever charged anywhere, on the basis of no record at all, is itself facially defective."

The brief details the contributions that unions make to educational quality and posits that with fewer resources available those contributions will necessarily decline. For example, unions spend substantial resources to flesh out and operationalize through bargaining many education reforms. In addition, the brief argues that providing non-members with "a constitutional right to a free ride will be far more disruptive to state educational systems than petitioners acknowledge," as it will decrease union resources for innovative initiatives, require unions to shift to more confrontational approaches, and diminish the type of strong labor management collaboration that has been linked to student success.

A Public Safety Employee Coalition including the National Association of Police Organizations and eleven California state-wide and local unions and related organizations filed a brief emphasizing that petitioners' facial challenge to any and all public sector fee arrangements ignores the variety of contexts in which those arrangements arise. The brief demonstrates with numerous concrete examples the kinds of important training, safety, and other programs that public safety unions have negotiated with the support of agency fees. It also details several other important benefits of robust, fee-supported unions – including the promotion of cohesion in public-safety workforces, and the recruitment and retention of quality candidates. And, it explains how unions are not as well equipped to deliver these benefits when faced with the free rider problem that fair share fees address.

The brief also demonstrates why alternatives to agency fee are inadequate. In particular, it argues that a "command and control" model of unilateral decision making by management deprives the public of the valuable input of front-line public safety personnel. And it argues that having the government fund the representation directly would lead to conflicts of interest and distortions of the bargaining process—the very kinds of problems that concerned Congress when it prohibited direct payments to unions by employers in the private sector. Finally, the brief emphasizes the diminished First Amendment concerns at stake with respect to public employee workplace speech and highlights several cases where the Court has accepted impingements on employee speech and association that are far greater than those imposed by an agency fee. This brief was authored by the Stanford

Law School Supreme Court Litigation Clinic under the direction of Professor Pamela Karlan and others.

The International Association of Firefighters' brief argues that the petitioners' broadside against all agency fee arrangements in the public sector fails to account for role such arrangements play in public-safety workplaces, particularly those of firefighters. The brief provides a detailed examination of various working conditions — including staffing, training, protective equipment, and health benefits — that are essential to protecting both firefighters and, by extension, the public. As the brief explains, these issues are often addressed through collective bargaining by a union that is financially supported by fees. The brief also argues that *Abood* was well reasoned and consistent with the First Amendment and, further, that the reliance interests of unions and employers strongly support reaffirming *Abood* on *stare decisis* grounds. The lead author of this brief was Tom Woodley of Woodley & McGillivray.

National Fraternal Order of the Police filed a brief arguing that fair share fees are a central element of collective bargaining frameworks for addressing and settling labor disputes. The brief recounts destructive strikes that led to the enactment of Ohio's public employee collective bargaining framework. The brief argues that the stabilizing effects of collective bargaining more than justify any marginal infringement on union non-members' speech, especially in light of public employers' broad authority of employment relationships and principles of federalism. The brief additionally argues that the "actual nitty gritty of bargaining," such as ensuring that officers have bulletproof vests, is not political, and the union's duty to represent all officials fairly requires that all officers pay for that representation.

California School Employees Association, a union representing non-teaching personnel in California schools, submitted a brief arguing that *Abood* correctly accounts for the needs of government employers in ordering their labor relations and therefore should not be overruled. The brief rebuts the petitioners' characterization of all collective bargaining as "political" and emphasizes, with numerous examples, the non-ideological, work-a-day functions of a union representing employees.

The New York City Municipal Labor Committee (an association of New York City municipal labor organizations, representing over 300,000 workers) weighed in making two principal arguments: (1) that the government's interests in stable labor relations and preventing free-riding are real and substantial and outweigh any First Amendment interest of objectors; and (2) overruling *Abood* would upset First Amendment public employer jurisprudence in two ways: (a) it would require the Court to disregard the well-established notion that the government as an employer has much greater leeway over speech objections than does the government as sovereign; and (b) it would require the Court to treat employment-related grievances and similar speech concerning employment matters as matters of "public concern."

The brief also notes that New York created its current system of labor relations, which includes fair-share fees, in reliance on *Abood*. But before New York's current public sector

labor relations framework, New York went through an era of widespread public-sector labor unrest and paralyzing strikes. Since the adoption of the current system, labor relations have stabilized and labor unrest has become rare in New York. The brief also notes that the petitioners' challenge rest on a series of factual assumptions, many of which are not true for New York: for example, public pensions are not bargained for in New York. Petitioners similarly assert that only a small percentage of workers invoke the unions' grievance procedures; not so for all New York unions. Instead, the brief argues, fees are used for non-political activities such as bargaining over bread and butter employment issues, and objectors are free to speak out against their union, to speak out on public matters, and to even try to decertify the union.

Academic Experts

Constitutional Law Professors led by Walter Dellinger submitted a brief detailing why the considerations in support of *stare decisis* strongly support reaffirming *Abood*. The brief explains the purpose *stare decisis* serves in maintaining "public faith in the judiciary," and in ensuring that people can know the rule of law with which they must comply. The brief makes the case that the considerations for overruling a precedent are demanding and that, in fact, the Court rarely overrules itself and even more rarely does so in a closely divided (5-to-4) opinion.

The brief explains why the *stare decisis* considerations strongly support reaffirming *Abood*. In particular, the brief argues that *Abood* is consistent with the Court's First Amendment jurisprudence and that its overruling would cast "substantial doubt" on the *Pickering* line of cases. For the Court to overrule *Abood* the Court must conclude either that the government's interest in fair share fees is insufficient or inadequately demonstrated, either of which would be at odds with *Pickering* precedents. On the employee speech side of the equation the brief argues that if the Court concludes that the limited impingement on speech caused by fair share fees is unconstitutional than *a fortiori* the much more substantial restrictions on employee speech under the *Pickering* line should fall. And the brief makes the point that any conclusion that bargaining over terms and conditions of employment amounts to speech on a matter of public concern is at odds with the *Pickering* line (citing *NTEU*, *City of San Diego*, *Guarnieri*, and *Connick*) and explains why it is unworkable to conclude, as Petitioners urge, that bargaining should be treated as political because it impacts the public fisc.

Nineteen Corporate Law Professors, led by John Coates of Harvard Law School, weighed in to contrast the political "opt-out" rights of public employees in union security arrangements with those of corporate investors. The brief first explains that *Abood* allows public employees to decline union membership and to opt-out of funding any political or ideological issues they oppose. In contrast, the brief details the many ways in which corporate law prevents investors from exercising similar options with respect to corporate political spending. In particular, the brief explains that corporate investors often have limited "exit" rights to sell their shares, that they have little ability influence corporate political spending, and that they often have little influence over how funds in many

investment and retirement vehicles are invested. The brief closes by explaining a ruling in the Plaintiffs favor would only increase the asymmetry between limits on union political activity and the lack thereof for corporate political activity.

48 Labor and Employment Law Professors filed to explain the economic and historical role that collective bargaining supported by fees has played. The brief argues that state and local governments provide critical government services, particularly public education, through public employees managed by public officials and “control over how manage this critical relationship is at the heart of this case. Petitioners ask this Court to remove from public employers one proven method of managing their workforces: collective bargaining with an elected union, whose core functions are funded through mandatory agency fees.” The brief reviews the benefits that public employers derive from collective bargaining including the efficient and uninterrupted provision of government services, improved resolution of workplace disputes, improved productivity, and recruitment and retention of employees. In schools, in particular, the brief explains that collective bargaining has been linked to stronger student performance; as such bargaining provides a method for involving all school employees in collective efforts to improve student performance and teacher quality. The brief also notes that these benefits often come at little or no increase in budgets as any pay increases are offset by other efficiencies.

Having established the strong governmental interests in maintaining robust collective bargaining arrangements, the brief goes on to argue that agency fees are a fair and reasonable means of ensuring that unions have the resources to hold up their end of a productive bargaining relationship. In particular, the brief points out the free-rider problem that comes from an absence of fair share fee provisions and explains how the free-rider problem, if not effectively countered through a required fee, endangers many of the public benefits of collective bargaining.

Finally, the brief explains how overruling *Abood* would not only be at odds with the Court’s cases permitting public employers to restrict the constitutional rights of public employees to promote workplace efficiency, but would also call into question common governmental employer practices like using private companies to manage pension investments.

Economist Richard Freeman of Harvard, joined by Eunice Han of Wellesley and Joel Rogers of University of Wisconsin (also the author), weighed in to educate the Court on the free rider problems that would result if fair share fees are eliminated. Using a quantitative analysis of U.S. Department of Education data, the brief rebuts the arguments made by the Mackinac Center’s amicus brief suggesting that the loss of agency fees would not result in significant free-ridership or diminish the unions’ ability to carry out their collective bargaining functions. Using data comparisons between states with agency fees and those without, the brief explains that free riders are a significant problem for unions that cannot rely on agency fees and that those unions are, in turn, less effective in securing improved working conditions for their members. The brief also explains that higher levels of union density result in significant benefits for the employer, including better recruiting and retention of quality employees and faster dismissal of failing employees. The brief also

notes the many collateral benefits of higher levels of union density—including increased purchasing power, better economic growth, and higher tax revenues.

Labor Law Professors led by NYU’s Prof. Samuel Estreicher filed a brief arguing that any relatively large employer must create common (although not necessarily identical) employment terms and conditions for similarly situated employees. There are two ways to set such terms and conditions: the employer either does so unilaterally (perhaps by consulting with employees or perhaps not) or through collective bargaining. Collective bargaining is preferable to some employers because it provides an employer the advantage of having an independent employee voice that management may not be able to elicit on its own. And this channeling of employees’ voices also serves First Amendment interests by allowing employees to speak internally (and with protection) rather than taking their grievances public. But if the employee voice is to be truly independent, the brief argues, the union must be self-funded (hence, the public employer cannot fund the union itself) and the union can maintain financial viability only through a fair share system that prevents free riding. And this sharing of union expense is analogous to taxes that promote the common good. Finally, the brief argues that an opt-out system is sufficient to register objections because the burden on objectors is so minimal (and there is no record here establishing the contrary), and indeed the petitioners here exercised their right to object.

Civic Organizations and Others

Over 70 Civil Rights Organizations, led by the Leadership Conference on Civil Rights, the National Women’s Law Center and the Human Rights Campaign, filed an amicus brief explaining that “*Abood*’s fair share rule has yielded critical economic opportunities for all workers,” by providing “a critical path to the middle class,” and countering longstanding discrimination against people of color, women, and LGBT workers. Women, racial minorities, and LGBT workers still make less than their male, white, and straight counterparts, respectively. Unions help overcome these disparities by improving wages, narrowing these wage gaps, and providing a critical path to the middle class for people of color, women, and LGBT workers. Unionized workers are also more likely to have healthcare, retirement, and access to parental and family leave, and to provide same sex partner benefits, transgender health care, and protection from LGBT discrimination.

The ability of unions to achieve these important gains depends on fair-share provisions. Without such provisions, more workers would free ride on their co-workers, weakening unions, and weakening their ability to obtain the aforementioned benefits. In light of these benefits, *stare decisis* counsels against overruling *Abood*. Contracts have been bargained based on these gains and fair-share provisions; workers have chosen their careers based on expected compensation and benefits; overruling *Abood* would disrupt these arrangements and upend these expectations.

Former DC Bar Presidents filed a brief making four principal arguments: (1) that *Abood* lies at the heart of a well-developed body of law; (2) that that body of law supports the constitutionality of mandated bar dues, and overruling *Abood* in the union context would at the very least create uncertainty in the bar dues context; (3) that *Abood* and *Keller* (the case

in which the Supreme Court held that compulsory bar dues are constitutional) form the foundation for addressing fees in other contexts, specifically student fees and agricultural marketing programs; and (4) that *stare decisis* counsels against overruling *Aboud* because doing so would inject uncertainty into the *Keller* line of cases. Indeed, one *amicus* supporting the petitioners specifically argues that *Keller* should be overruled. All this would lead, at the very least, to a new era of litigation over the viability of compulsory bar dues.

The National Council on Teacher Retirement (“NCTR”) and the National Conference on Public Employee Retirement Systems (“NCPERS”), which represent over 500 pension systems and funds serving tens of millions of public employees and retirees including firefighters, law enforcement officers, teachers, and other public servants, have filed to explain why Petitioners and their amici err in linking public employee pension-fund shortfalls to collective bargaining. The brief explains that public pensions are legislatively created often predating by decades public sector bargaining, provide modest benefits for public sector employees that serve as the major source of retirement support for most public employees and as the sole retirement support for most public sector employees in 15 states who are not covered by Social Security, and that the funding (or under-funding) of public pensions are the result of governmental decision-making that often ignores unionized workers and seldom, if ever, is the result of collective bargaining involving public unions. In most instances, pension-fund shortfalls are the result of poor funding discipline exacerbated by outside economic forces that create funding crises like those cited by Petitioners *amici*.

Sixteen Individual Teachers filed a brief arguing that strong collective bargaining agreements allow teachers to effectively advocate for, and address, students’ needs.