No. 14-915

In The Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE*, THE NATIONAL FRATERNAL ORDER OF POLICE[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities.

The FOP perspective on the issues presented in this case is unique and particularly appropriate to the substantive issues presented. Law enforcement personnel nationwide work every day to promote and ensure the safety of citizens. As public servants, the members of the FOP have always recognized that the first and foremost duty of their profession is to serve society. The FOP has accomplished this through strong partnership with its members' governmental employers, including state and local governments. If states do not have the ability to legislate the scheme for settling disputes between governmental employers and their public safety employees, including the framework for the terms of collective bargaining, it is the public that suffers.

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[1] The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief.

It is with these interests in mind that the FOP and its membership respectfully request this Honorable Court to affirm the decision of the Ninth Circuit and find that the states are empowered to enact collective bargaining legislation with public employees, including provisions for agency shop agreements and fair share union fees.

SUMMARY OF ARGUMENT

In the words of Benjamin Franklin, "Disputes are apt to sour one's temper and disturb one's quiet." Such is the motivation to devise ways to settle disputes. In baseball we have umpires. In basketball we have referees. In courts we have judges, and so on. At issue in this case is nothing more than a statutory framework instituted by the State of California to settle disputes. California, like many of its sister states, has passed legislation which provides for the settlement of labor disputes with its own employees through the collective bargaining process. The United States Constitution surely does not prohibit California, or any other state, from doing so. In fact, the constitutional restrictions imposed on the government in its interactions with the general public do not mirror the constitutional restrictions imposed on the government acting as an employer. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973).

The careful consideration of representatives voted into office by the electorate in devising a method by which public employees may settle disputes with their public employers – collective bargaining and the accouterments around it – does not lend itself to, nor does it call for, strict scrutiny under the First Amendment. State-enacted collective bargaining statutes may not be " . . . *necessarily* desirable; nor even . . . *arguably* desirable; but merely . . . [they] may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 (1990) (Scalia, J., dissenting) (Emphasis in original).

In addition, because many state statutes impose mandatory duties on unions regarding fair and equal representation of the nonunion members of the bargaining unit, collective bargaining by unions is not political speech, "[such as] lobbying and political advocacy," as urged by Petitioners. Pet. Br. at 23. The affirmative duties imposed upon unions to represent nonmembers, sometimes even to the detriment of members, tip the constitutional scales in favor of avoiding free-riding and promoting labor peace.

ARGUMENT

A. The Public Benefits When States Enact Laws to Orderly Address and Settle Labor Disputes With Their Own Employees and Such Laws Should not be Subject to Strict Scrutiny.

On July 2, 1979, the city of Toledo, Ohio, was set ablaze. There was no one to put out the fires.[2] The day before, 3,700 city employees had walked off their jobs. Among the workers were 700 police officers and 500 firefighters – the majority of the City's safety forces. There were no police officers to respond to desperate calls from citizens, no firefighters to respond to fire alarms, no sanitation crews or welfare personnel to address the needs of the citizens in a city of over a third of a million people.

For the next three days, and before the work stoppage was settled, homes and businesses burned, stores were looted by armed gangs and city services ground to a halt. The action had been called by the leaders of the city employees' unions because negotiations with the City had reached an impasse. The Ohio

[2] The account of the Toledo workers' strike of 1979 was provided by a drafter of this brief, former Ohio Supreme Court Justice Andrew Douglas, who was a member of the Toledo City Council at the time. His account is more fully set forth in Andrew Douglas, *Public Sector Employee Bargaining: Contract Negotiations and Case Law*, 55 CLEVELAND ST. L. REV. 1 (2007). *See also*, *Toledo Workers Strike*, WASH. POST, July 2, 1979, at A5.

"concerted action" law in effect at the time, the Ferguson Act,[3] required the city to terminate all of the employees withholding their services. But to what end? Where would the city find 1,200 trained policemen and firefighters to protect its citizens? Under threat of order being restored through use of the National Guard, the Lucas County Common Pleas Court ordered the workers to return to their jobs.

The end of this stalemate did not mark the first nor the last public employee unrest in the State of Ohio. An equally destructive action took place in Dayton, Ohio, in 1977. *See* CLEVELAND PLAIN DEALER, August 10, 1977 at A-1 and A-13. Between 1973 and 1980, there were 428 public employee labor actions in the State of Ohio. James O'Reilly & Neil Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891, 894 (1983). In the face of such labor unrest and in the interests of serving the public at large, Ohio lawmakers recognized the wisdom that the state's public employees should be granted the right to bargain collectively with their employers. The comprehensive Public Employees Collective Bargaining Act was passed into law in Ohio in 1983.[4] The law recognized that governmental employers most effectively manage their workforces when they recognize the needs of

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[3] Ohio Rev. Code Ann. § 4117.01-05 (repealed 1983).

[4] Ohio Rev. Code Ann. §§ 4117.01 et seq.

employees to have their just grievances heard and decided. While the path leading from the passage of this law has not been without obstacles, the normalization of relations between public employer and employee has undoubtedly benefitted the public, the ultimate recipients of public services. Here it is pertinent to note that since the passage of the Collective Bargaining Law, there have been no work stoppages by police or fire units. Prior to the passage of the Law, Ohio in a number of years had led the country in safety forces work stoppages.

With this background we arrive at the issue before the Court today – the numerous states with well-settled and longstanding laws regarding collective bargaining for public employees – and the Petitioners' desire to upset the delicate but effective balance that today exists. Given past history, the Petitioners should be careful what they ask for and this Honorable Court should resist the temptation offered by the Petitioners to revert back to the "good old days."

There exist statutes addressing collective bargaining for public employees in a number of states. Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, CENTER FOR ECONOMIC AND POLICY RESEARCH, March 2014, *available at:* http://www.cepr.net/documents/state-public-cb-2014-03.pdf. Many of these statutes contain detailed blueprints for the process of resolving labor

disputes as well as provisions regarding agency shop arrangements and fair share fees for non-members.[5] Some, like Ohio, permit, but do not require, fair share provisions. The issue is one left to the bargaining process. Every employer has the right to say "no" if it does not believe a fair share system will help it manage its workforce given the unique context in which it operates.

In this case, however, the Petitioners seek to upend nearly 40 years of procedure and settled precedent emanating from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and the state statutes referenced above. There exist no constitutional grounds to do so.

First, the context of this analysis must be set. The challenged California statute addresses the relationship between public employees and their governmental employer. This Court has long held that "[t]he restrictions that the Constitution places upon the government in its capacity as lawmaker, i.e., as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer." *Rutan*, 497 U.S. at 94

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[5] *See, e.g.*, Alaska Stat. §§ 23.40.070 et seq.; Conn. Gen. Stat. §§ 5-270 et seq.; Ky. Rev. Stat. Ann. §§ 345.010 et seq.; Me. Rev. Stat. Ann., Title 26, §§ 979-979-Q; Minn. Stat. §§ 179A.01-179A.25; Mont. Code Ann. §§ 39-31-101 to 39-31-409; N.H. Rev. Stat. Ann. §§ 273-A.1 to 273-A.17; N.M. Stat. Ann. §§ 10-7E-1 to 10-7E-26; Ohio Rev. Code Ann. §§ 4117.01 et seq.; Pa. Cons. Stat. Ann. §§ 1101.101-1101.2301; R.I. Gen. Laws §§ 36-11-1 et seq.; Wash. Rev. Code Ann. §§ 41.56.010 et seq.

(Scalia, J., dissenting); *see also*, *Connick*, 461 U.S. at 147; *Broadrick*, 413 U.S. at 616-17. This Court has repeatedly held that " . . . restrictions on speech by public employees are not judged by the test applicable to similar restrictions on speech by nonemployees." *Rutan*, 497 U.S. at 97 (Scalia, J., dissenting, citing *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (When a government deals with its own employees it may not act in a "patently arbitrary or discriminatory" manner and its regulations are valid if there exists a "rational connection" to the government goal.)); *Brown v. Glines*, 444 U.S. 348, 356, n. 13 (1980) ("[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government."); *Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947); *CSC v. Letter Carriers*, 413 U.S. 548, 556 (1973); *Broadrick*, 413 U.S. at 616; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

Because the restriction on speech is more attenuated when the government conditions employment . . . government employment decisions taken on the basis of an employee's speech do not "abridg[e] the freedom of speech . . . merely because they fail the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. [S]uch decisions [are not subject] to strict scrutiny, but [are] accorded 'a wide degree of deference. . . .'" *Rutan*, 497 U.S. at 99-100 (Scalia, J., dissenting) (citations omitted).

The challenged provisions of the California statute at issue here meet the definition of having a

minimal and reasonable impact on the speech and association rights of the small sphere of public employees to which they apply – nonmembers of unions in agency shops. Even if the free riders are compelled to pay certain fees to a union with which they do not share a philosophical affiliation and even if this activity influences or redirects expression and association, that fact, in and of itself, is not a significant impairment of those employees' First Amendment rights. The collective bargaining speech for which nonmembers may be charged is speech attendant to the public employment relationship, which public employees have broad authority to regulate. Absent a significant impairment of citizen speech on a matter of public concern, in the context of public employment, there exist no constitutional grounds to strike the statute. To the contrary, the maintenance of an orderly workplace is of utmost importance to not only the governmental employer, but also to the public it serves.

Further, the stabilizing effects of state collective bargaining statutes are matters best left to the legislatures of the respective states. As outlined above, the states have enacted highly detailed statutes which regulate and administer the system of collective bargaining for public employees. Even if those detailed regulations, such as the statute at issue here, lead to objection from some public employees based upon their political beliefs, that is no reason to invalidate the statute or any provisions thereof. As previously recognized by Justice Scalia:

> [I]t is utterly impossible to erect, and enforce through litigation, a system in which *no* citizen is intentionally disadvantaged by the government because of his political beliefs. . . . But these laws and regulations have brought to the field a degree of discrimination, discernment, and predictability that cannot be achieved by the blunt instrument of a constitutional prohibition.

Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 694-95 (1996) (Scalia, J., dissenting) (emphasis in original).

State legislatures are in the best position to evaluate the collective bargaining climate in their states and set laws to address those issues as they relate to public employment. As outlined above, the State of Ohio, after weighing the interests of all parties – labor, government and the public – and to address labor unrest, enacted a legal framework to settle labor disputes. Other states have passed collective bargaining legislation for public employees for reasons unrelated to labor unrest. Of course, potential or threatened labor unrest is no reason to burden First Amendment rights and this brief is not designed to say differently. The point we make is that if there is any burden on such rights, and we argue there is not, then that slight burden coupled with the sound public policy of promoting harmonious relationships between employers and their employees tips the scales in favor of a meaningful collective bargaining process that includes fair share provisions. State legislatures and public employers in individual

jurisdictions are better equipped than courts to deal with issues in various jurisdictions regarding public employees and are more knowledgeable about the issues facing their communities.

States can and do differ on these decisions; this is not a bug in the system, but a feature of federalism and vibrant democracy. For instance, following the 2010 elections, a sweep of legislation across the country sought to end or limit the collective bargaining rights of public sector employees. Wisconsin passed legislation forbidding collective bargaining on anything other than "base wages," which, by its terms, excludes overtime, supplemental pay and wages' progressions/steps. 2011 Wis. Act. 10 § 314. Oklahoma now forbids collective bargaining for any employees of mid-sized municipalities. H.B. 1593, 53d Leg., 1st Sess. (Okla. 2011). Idaho passed a law limiting collective bargaining agreements to one fiscal year. S.B. 1108 § 22, 61st Leg. (Idaho 2011). An Ohio statute forbids collective bargaining on certain topics such as health insurance benefits, granting more than 6 weeks of vacation and minimum staffing provisions. S.B. 5, 29th Gen. Assemb. (Ohio 2011).

B. Collective Bargaining Is Not Political Speech or Lobbying and There Exist Compelling State Interests Justifying a Shared Cost to Those Benefitting From the Bargaining.

Petitioners urge this Court to find that collective bargaining between public employees and their

governmental employers is nothing more than political speech, "[such as] lobbying and political advocacy." Pet. Br. at 23. The Petitioners' position is that there exists no compelling state interest to support the statutory creation of agency shops that require payment of fair share fees. As such, they claim that the statutory provision for an agency shop and fair share fees is a supposedly impermissible burden on the objecting employees' constitutional right to freedom of speech and association. Pet. Br. at 29. However, this position analyzes only one aspect of the at-issue statute and those like it in other states. The missing pieces in the analysis are the facts that the state statute(s) and/or common law also impose on the *union* a duty to "go out of its way to benefit, even at the expense of other interests" the nonmembers who object to the agency shop statutory framework or other ideological values of the union. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In addition, Petitioners fail to make the case, because they cannot, that collective bargaining is "political speech." In fact, the collective bargaining process is neither political speech nor lobbying. *Abood*'s carefully crafted framework ensures that dissenting nonmembers pay only for matters germane to collective bargaining and not for political speech or lobbying.

The Petitioners urge this Court to overrule *Abood*. In so requesting they argue that collective bargaining involves issues, both policy and political,

that in effect are no different than those involved in lobbying and advocacy of political positions. Petitioners, had they ever been involved in the collective bargaining process would never, we believe, espouse this position. The actual nitty-gritty of bargaining involves many issues that have nothing to do with lobbying public officials or the establishment of policy for the affected political subdivision.

In bargaining for bulletproof vests for police officers, and yes the need to do so is more prevalent, unfortunately, than many persons would realize or suspect, is clearly not an attempt to influence governmental policymaking or about lobbying public officials. The FOP raises this issue in the collective bargaining setting to secure this very basic need of law enforcement officers. Likewise this is true of establishing and administering a grievance procedure. This emanates strictly from the collective bargaining sessions and clearly does not involve establishing any governmental policy or the lobbying of public officials.

These examples and many more do not involve political speech and for Petitioners to say otherwise defies credibility. Fair share fees and the allowance thereof do not, in any way, constitute any burden on speech – political or otherwise. Benefits gained through arms-length negotiations inure to the benefit of nonmembers as well as members of the exclusive bargaining representative and satisfies the duty of fair representation – which leads to our second point.

The well-known duty of fair representation is intended to ensure fair treatment to all employees in a bargaining unit who are represented by an exclusive bargaining agent. It seeks to ensure that unions and employers are sensitive to individual rights and interests of those not in the majority. While the guarantee of fair representation found its genesis in the National Labor Relations Act, which does not apply to public employers, many state public employee bargaining statutes impose an affirmative duty on the union to provide fair treatment to all employees it represents in the bargaining unit, whether that employee is a member of the union or not. *See*, *e.g.*, Ohio Rev. Code Ann. § 4117.11(B)(6); D.C. Code §§ 1-605.02(3), 1-617.04(b)(1); 5 Ill. Comp. Stat. 315/10. In addition, the common law of other states imposes a duty of fair representation on public employee unions. *Duncan v. City of Alameda*, 2009 WL 2392141, *1 (N.D. Cal. 2009) (citing California common law); *Rigby v. Coughlin*, 730 F.Supp. 1196, 1198 (N.D.N.Y. 1990) (citing New York common law); *Forbes v. Rhode Island Bhd. of Corr'tl Officers*, 923 F.Supp. 315, 327 (D.R.I. 1996) (citing Rhode Island common law).

Because of the responsibility imposed by the states upon the public employee unions to represent the interests of even those members of the bargaining unit who are not also members of the union, there exists a compelling state interest in requiring the non-members of the union to pay for those mandatory services. As Justice Scalia persuasively explained:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interest 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 non union 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.

Lehnert, 500 U.S. at 556 (Scalia, J., concurring in judgment in part and dissenting in part).

California law imposes a duty of fair representation on the Respondent, California Teachers Association, and requires that it represent all employees equally, whether they are members of the union or not. *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1038 (9th Cir. 2004). This includes the duty to represent non-member employees in disciplinary and/or grievance proceedings – a point conceded by Petitioners. Pet. Br. pgs. 44-47. As outlined in the

quoted passage from *Lehnert*, above, to require a union to spend the dues of its members representing nonmembers for free is no different than requiring nonmembers to pay their fair share of the union's costs.

CONCLUSION

The National Fraternal Order of Police urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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