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

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Appellants respectfully submit that oral argument is not warranted. The dispositive issues in this case are currently resolved by binding decisions of the Supreme Court and a prior panel of this Court, and so the proper result is—at this stage in the proceedings—clear. Oral argument therefore will not assist the Court in addressing the issues presented, and judicial economy is best served by deciding the case without oral argument.

INTRODUCTION

California law empowers school districts and public-teachers unions to form "agency shop" arrangements under which teachers, as a condition of employment, must fund all union expenditures supposedly germane to collective-bargaining. Under this law, it does not matter that public-sector collective-bargaining—which involves negotiating with public officials over often-controversial education policies and the expenditure of limited tax dollars—is core political expression, nor does it matter that many non-union teachers disagree with the unions' political expression. California law also allows unions to take an additional amount from nonmembers to fund union political activities that are entirely *unrelated* to collective-bargaining, unless each nonmember affirmatively registers his dissent every year—no matter how many times that nonmember has previously exercised his established First Amendment right to *not* fund such activities.

Although both of these practices—the agency shop and the opt-out regime—have previously been upheld by this Court and the Supreme Court, they are at war with basic First Amendment values. The Supreme Court recognized as much in *Knox v. Service Employees International Union, Local 1000*, explaining that "[b]y authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." -- U.S. --, 132 S. Ct. 2277, 2291 (2012). And the Court cast even more doubt onto the constitutionality of the public-sector agency shop just yesterday in *Harris v. Quinn*, explaining that its past precedent allowing such

arrangements "is questionable on several grounds," and relies on a number of "evident and troubling" errors. No. 11-681, slip op. at 17 (S. Ct. June 30, 2014).

Appellants, non-union California teachers who are subject to the agency shop and the opt-out regime, filed this suit to vindicate the First Amendment principles addressed in *Harris* and *Knox*. Appellants recognize, however, that despite casting a great deal of doubt onto the constitutional validity of both practices, those decisions did not actually reach the question whether either practice can survive constitutional scrutiny. Accordingly, the agency shop and the opt-out regime both currently remain permissible under precedent that is binding on this panel. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 232 (1977) (allowing public-sector agency shop); *Mitchell v. L.A. Unified Sch. Dist.*, 963 F.2d 258, 263 (9th Cir. 1992) (allowing opt-out regime). Though there is good reason to believe that the Supreme Court will revisit these issues, this Court cannot do so on its own. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

It is thus Appellants' intention to pursue their claims before the Supreme Court. Because *this* Court's authority to grant that relief is foreclosed by binding precedent, Appellants respectfully request that the Court affirm the district court's entry of judgment on the pleadings in favor of Appellees (public-teachers unions and public-school superintendents) as quickly as practicable and without argument, so that Appellants can expeditiously take their claims to the Supreme Court. In

order to preserve Appellants' arguments for further review, however, this Brief explains why *Abood* and *Mitchell* "rest on reasons rejected in some other lines of decisions." *Id.*

JURISDICTIONAL STATEMENT

This case raises claims under the United States Constitution, and so the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court granted judgment on the pleadings in favor of Appellees, thereby disposing of all parties' claims, on December 5, 2013. ER4. Judgment was entered on December 6, and Appellants filed a timely notice of appeal on December 12. ER5, ER261; FED. R. APP. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Under the authority of California law, Appellees (public-employee unions and public-school superintendents) require Appellants (non-union teachers) to pay an "agency fee" to their respective unions that funds all expenses the unions deem germane to their function as exclusive collective-bargaining representative, even though Appellants have declined to join the unions and object to the policies they bargain for. Does this agency-fee requirement violate the First Amendment?

2. Also under California law, there is a presumption that Appellants intend to pay an increased fee supporting union expenditures that are *unrelated* to collective-bargaining, unless Appellants affirmatively renew their opposition to doing so every year. Does this opt-out requirement violate the First Amendment?

PERTINENT AUTHORITIES

Pertinent statutes and regulations are set forth in an Addendum to this brief.

STATEMENT OF THE CASE

I. Factual Background

A. *California's Agency-Shop Law for Public-School Teachers*

The Agency Shop. Under California law, a union becomes the exclusive bargaining representative for "public school employees" in a bargaining unit (typically a school district) by submitting proof that it has the support of a majority of employees in the unit. CAL. GOV'T CODE §§ 3544, 3544.1 (hereinafter "GOV'T"). A "public school employee" is anyone "employed by a public school employer," except for elected or appointed officials and certain employees in management. *Id.* § 3540.1(j). Once a union becomes the exclusive representative, it represents *all* public-school employees in the unit for purposes of bargaining with the district. *Id.* § 3543.1(a). And the union is authorized to bargain over a wide range of "terms and conditions of employment" that go to the heart of education policy, including wages, hours, health and welfare benefits, leave, transfer and reassignment policies, class size, and procedures to be used for evaluating employees and processing grievances. *Id.* § 3543.2(a).

California law also authorizes districts and unions to negotiate arrangements under which *all* teachers—"as a condition of continued employment"—must "either [] join the recognized [union] or pay the fair share service fee" (or "agency fee") to that union. *Id.* § 3546(a).[1] The amount of this fee is determined by the

[1] Consistent with the pertinent California regulations, this brief refers to the fee as an "agency fee," and to the underlying arrangement as an "agency shop." REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(a) (hereinafter "REGS."); *see also, e.g.*, *Knox*, 132 S. Ct. at 2284-85 (using "agency shop" and "agency fee").

union, and "shall not exceed the dues that are payable by members" of the union. *Id.* (In practice, the fee typically equals the amount of union dues. ER17-18.) The agency fee's stated purpose is to support union activities that are "germane to [the union's] functions as the exclusive bargaining representative." GOV'T § 3546(a). And California law expressly states that these functions include lobbying the government "to foster collective-bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer." *Id.* § 3546(b).

Although non-union employees are required to pay fees to support union activities that are "germane" to collective-bargaining, the First Amendment has long forbade compelling them to support union activities that are "*not* devoted to the costs of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." *Id.* § 3546(a) (emphasis added); *see generally Abood*, 431 U.S. at 235-36. It is the union's responsibility to annually determine the "non-chargeable" portion of its expenses. The union makes this determination by first calculating the total agency fee based on its expenses for the coming year, and then calculating the non-chargeable portion of the fee based on an audited financial report of a recent year's expenses. REGS. § 32992(b)(1).

***Hudson* Notices and the Opt-Out Requirement.** Each fall, after a union makes the requisite determinations, it must send a "*Hudson* notice" to all nonmembers that sets forth the total agency fee, the percentage that is chargeable,

and "the basis for this calculation." *Id.* § 32992(a).[2] The *Hudson* notice must also include either the union's audited financial report for the year or an auditor's certification that the union has correctly reproduced the summary of chargeable and non-chargeable expenses. *Id.* § 32992(b)(1). The auditor does not, however, confirm that the union has properly classified expenses as chargeable or non-chargeable. *Harris*, slip op. at 19 (explaining as much).

After receiving the *Hudson* notice, a nonmember who does not want to support the union's non-chargeable expenditures is required to affirmatively opt out by notifying the union of his objection. REGS. § 32993(a). Unions must allow at least 30 days for lodging objections (*id.* § 32993(b)), and typically provide no more than six weeks (ER20). A nonmember must renew his objection annually, no matter how many times he has opted out previously. Teachers who successfully opt out are then entitled to a "rebate" or "fee reduction" for that year. GOV'T § 3546(a). But if a nonmember fails to opt out by the deadline, he must pay the full agency fee, including the non-chargeable portion.[3]

California school districts are permitted to automatically deduct union dues and agency fees from employees' paychecks, and to transfer those funds to the appropriate union. GOV'T §§ 3546(a), 3543.1(d); CAL. EDUC. CODE §§ 45060,

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[2] *See generally Chi. Teachers Union v. Hudson*, 475 U.S. 292, 304-07 (1986) (explaining the information unions must provide regarding their expenses).

[3] Each union must also allow nonmembers to challenge its determination of the chargeable portion of the agency fee. When such a challenge is filed, the union must request a prompt hearing before an impartial decision-maker. REGS. § 32994.

45061, 45061.5, 45168 (hereinafter "EDUC."). Alternatively, employees can pay their dues or agency fees directly to the union. *Id.* § 45061.

Religious Objectors. California law provides a limited exception to the agency-fee requirement for "religious objectors"—that is, "any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations." GOV'T § 3546.3. Collective-bargaining agreements cannot require religious objectors to join a union or pay agency fees to a union. *Id.* But the agreements can—and typically do—require religious objectors to pay the equivalent of the full agency fee (including the non-chargeable portion) to a "nonreligious, nonlabor organization, charitable fund," to be chosen by the objector from a list of approved charities. *Id.* Thus, a teacher who opposes unionism on religious grounds is forced to take a larger paycheck deduction than an employee who merely opts out of subsidizing a union's non-chargeable expenses.

B. *The Agency-Shop Arrangements Enforced by Appellees*

In accordance with the California laws discussed above, the Appellee Local Unions[4] have entered into agency-shop arrangements with the districts in which

[4] The Local Unions are: Savanna District Teachers Association, CTA/NEA; Saddleback Valley Educators Association; Orange Unified Education Association, Inc.; National Education Association-Jurupa; Santa Ana Educators Association, Inc.; Teachers Association of Norwalk-La Mirada Area; Sanger Unified Teachers Association; Associated Chino Teachers; San Luis Obispo County Education Association; and Kern High School Teachers Association.

they operate (which are headed by the Appellee Superintendents[5]). ER8, ER19. Accordingly, each Local Union is responsible for determining both the total amount of the agency fee and the portion thereof that it will deem non-chargeable. ER19, ER54. The Local Unions often make this determination in collaboration with Appellee California Teachers Association, the largest teachers' union in California. ER19, ER54. CTA, in turn, is an affiliate of Appellee National Education Association, the largest union of any sort in the United States.[6]

The mandatory agency fees support not only the Local Unions themselves, but also include an "affiliate fee" that goes to CTA and NEA. ER19, ER55. These affiliate fees are determined by CTA and NEA, and are constant across all local unions in California. ER19, ER55. As with each Local Union's fees, affiliate fees are treated as partially chargeable, based on CTA's and NEA's determinations of the chargeable portions of their expenditures within California. ER20, ER55. In other words, the chargeable portion of the affiliate fees does not correspond to actual collective-bargaining expenditures made by CTA and NEA within a particular district, but is instead based on the overall breakdown of their chargeable expenditures in California.

Annual dues or agency fees typically consume roughly two percent of a new teacher's salary, and sometimes increase regardless of whether teacher pay has

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[5] The Superintendents are: Sue Johnson, Clint Harwick, Michael L. Christensen, Elliot Duchon, Thelma Melèndez de Santa Ana, Ruth Pèrez, Marcus P. Johnson, Wayne Joseph, Julian D. Crocker, and Donald E. Carter.

[6] This brief refers to the Local Unions, CTA, and NEA collectively as "the Unions," and to the Unions and Superintendents collectively as "Appellees."

similarly increased. ER20, ER56. Nonmembers who successfully opt out of paying for non-chargeable expenses reduce their annual fee by approximately $350 to $400. ER20, ER56.

C. *The Non-Union Teachers*

The Appellant Non-Union Teachers are California public-school teachers who object to many of the positions advocated by public-teachers unions, and who have thus resigned their union membership.[7] ER11-14, ER44-47. Every year, the Non-Union Teachers opt out of subsidizing the Unions' non-chargeable expenditures.[8] The Non-Union Teachers' objections, however, are not limited to positions that the Unions take outside the context of collective-bargaining. Rather, they fundamentally disagree with many of the policy positions the Unions advance in the collective-bargaining process. ER44-47. And the Unions "admit that, in the course of collective bargaining, they sometimes take positions that may be viewed as politically controversial or may be inconsistent with the beliefs of some teachers." ER10. Were the Non-Union Teachers not forced to do so under color of California law, they would not pay *any* fee to the Local Unions. ER44-47.

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[7] The Non-Union Teachers are Rebecca Friedrichs, Scott Wilford, Jelena Figueroa, Kevin Roughton, Peggy Searcy, Jose Manso, Harlan Elrich, Karen Cuen, Irene Zavala, and George W. White, Jr. The non-profit organization Christian Educators Association International is also an Appellant in this case. This brief refers to the Non-Union Teachers and CEAI collectively as "Appellants."

[8] One Non-Union Teacher, Irene Zavala, is a "religious objector" under section 3546.3. Ms. Zavala must renew this objection every year, and is required to pay the full amount of dues to a charity of her choosing. ER13-14, ER46-47.

II. Procedural Background

Appellants filed their complaint on April 30, 2013, alleging that both the agency shop and the opt-out regime violate their First Amendment rights. Appellants' complaint sought a declaratory judgment that California's agency-shop law violates the First Amendment, and an injunction against that law's enforcement. Appellants also acknowledged, however, that both of their claims are currently foreclosed by binding precedent. ER64.

Consistent with this fact, Appellants subsequently filed a motion for judgment on the pleadings in which they preserved their challenges to the agency shop and opt-out regime, but conceded that the current state of the law required the district court to enter judgment in Appellees' favor. *Friedrichs v. Cal. Teachers Ass'n*, No. 13-cv-676, Dkt. No. 81 (C.D. Cal. July 9, 2013). In their response, Appellees acknowledged that this was the correct result. Dkt. No. 90 at 4 (Aug. 9, 2013). California's Attorney General intervened in the case while the motion was pending, and also agreed that the court should enter judgment for Appellees. Dkt. No. 104 (Nov. 25, 2013). The court did so on December 6, 2013.[9] ER4.

[9] Appellants had originally moved for a preliminary injunction, but that motion was mooted by the district court's order entering judgment for Appellees. *Friedrichs*, No. 13-cv-676, Dkt. No. 71 (C.D. Cal. June 25, 2013).

SUMMARY OF THE ARGUMENT

Appellees violate Appellants' First Amendment rights in two ways. *First*, they force Appellants to subsidize the Unions' bargaining-related activities, notwithstanding Appellants' deeply held opposition to the positions the Unions advance in collective-bargaining. The Supreme Court in *Knox* recognized that this practice imposes a "significant impingement on First Amendment rights," to a degree that is "an anomaly" in First Amendment jurisprudence. 132 S. Ct. at 2289-90 (internal quotation marks and citation omitted); *see also Harris*, slip op. at 27 (criticizing the "questionable foundations" of the public-sector agency shop). *Second*, Appellees impose upon Appellants the burden of opting out of funding the Unions' concededly political activities every year, even though Appellants have an established First Amendment right *not* to subsidize such activities. As the *Knox* Court observed, this "remarkable boon for unions … appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.* at 2290.

Both of these practices are fundamentally irreconcilable with Appellants' First Amendment rights. Indeed, the Supreme Court's decision in *Harris* catalogs the various ways in which the public-sector agency shop contradicts core First Amendment principles. *See* slip op. at 17-20. But because neither *Harris* nor *Knox* overruled the decisions allowing the public-sector agency shop and the opt-out regime, this Court is obliged to affirm the district court's entry of judgment on the pleadings in Appellees' favor.

ARGUMENT

This Court reviews judgments on the pleadings de novo. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011). Judgment on the pleadings is "properly granted when, taking all the allegations in the pleadings as true, a party is entitled to judgment as a matter of law." *Id.* (internal quotation marks and citation omitted).

I. The Agency Shop Violates Appellants' First Amendment Rights.

1. By any standard, the agency shop violates the First Amendment. The agency shop's permissibility depends on the notion that collective-bargaining by public-sector unions does not involve political expression, and thus can be distinguished from the overtly political lobbying that everyone agrees non-union employees cannot be forced to support. But in reality, there is no difference between lobbying and public-sector collective-bargaining, given that "in the public sector, both … are directed at the government." *Harris*, slip op. at 18. In fact, *Abood* itself recognized as much: "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political." 431 U.S. at 231; *see also, e.g.*, *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 571 (1968) (school-district funding "is a matter of legitimate public concern").

Whether lobbying state legislators or negotiating with district officials, the *raison d'être* of a *public-sector* union is to promote and influence debatable *public-policy* decisions by *public* officials regarding issues of *public* concern. When a

public-sector union engages in collective-bargaining, it negotiates with government officials for expenditures that will necessarily come out of the same public fisc that funds all other governmental activities—thus draining the public treasury of funds in a way that many public employees oppose. As the Supreme Court explained just yesterday, "[i]n the public sector, core issues such as wages, pensions, and benefits"—i.e., the very bread and butter of collective-bargaining—"are important political issues." *Harris*, slip op. at 17. It thus "flies in the face of reality" to argue that the topic of "state spending for employee benefits in general[] is not a matter of great public concern." *Id.* at 36; *see also Knox*, 132 S. Ct. at 2289 ("[A] public-sector union takes many positions during collective bargaining that have powerful political and civic consequences ….").

Even more starkly, the Unions consistently "bargain" for contractual provisions that embody the *very same* policy choices to which they devote political spending that is concededly non-chargeable. Potential topics of collective-bargaining in California include, for example, health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, and employee-evaluation procedures. GOV'T § 3543.2(a). But many of these topics are already the subjects of California statutes that the Unions have successfully lobbied for. For example:

- California Education Code § 44929.21(b) provides that district employees become "permanent employees"—that is, receive tenure—"after having been employed by the district for two complete consecutive school years."
- California Education Code §§ 44934, 44938(b), and 44944 require districts to follow complex procedures before terminating an employee.
- California Education Code § 44955 requires that the teachers terminated first must always be the teachers hired last ("last in, first out").

Despite the fact that these statutes cover core topics of collective-bargaining, money spent on lobbying public officials to pass or protect them would be nonchargeable under *Abood*. *See, e.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (lobbying for "financial support of the employee's profession or of public employees generally" is non-chargeable). Yet bargaining with school districts for the *same* policies would be chargeable under *Abood*.[10] There is no reason why expenditures made to obtain *identical terms* from public officials should receive different First Amendment treatment when the money is spent on "lobbying" to obtain them, as opposed to "bargaining" to obtain them. In both instances, the Unions are pressuring government officials to take official action in service of public policies favored by the Union. *See, e.g.*, ER245 (CTA, *Collective Bargaining*) (CBA "must be ratified . . . by the school board"); ER249 (NEA, *Collective Bargaining: What It Is and How It Works*) ("The [district's] management team generally seeks approval from the school board."); *see also* EDUC. § 35160 (district's "governing board" has authority for each district).

Moreover, many policies advocated by the Unions do not benefit teachers, especially competent teachers. Indeed, just last month a California state court held that all of the above-listed statutes create a situation in which a "number of underqualified, inexperienced, out-of-field, and ineffective teachers and

[10] And indeed, many of the collective-bargaining agreements in the Non-Union Teachers' districts provide benefits similar to those codified in these statutes. *See, e.g.*, ER96, § 4.233 (Orange Unified CBA, providing seniority preference in school-transfers); ER134, § 15.330 (Orange Unified CBA, specifying dismissal procedures for non-tenured teachers); ER212, § 12.8 (Sanger Unified CBA, providing seniority preference).

administrators" will teach students—especially "poor and/or minority students." *Vergara v. California*, No. BC 484642, slip op. at 15 (Cal. Sup. Ct. June 10, 2014) (internal quotation marks and citation omitted); *see also id.* at 8 (finding "no dispute that there are a significant number of grossly ineffective teachers currently active in California classrooms"). Nonmembers have a strong First Amendment interest in not subsidizing policies that reward incompetence and are unconstitutionally discriminatory.

Finally, even if Local Unions focus narrowly on collective-bargaining activities, that assumption cannot credibly be applied to CTA or NEA. Those entities do not engage in collective-bargaining with local districts; that task is left to the Local Unions. Nevertheless, the Unions admit that CTA "has determined approximately *65 percent* of its expenditures to be 'chargeable'"—i.e., "germane to its duties as collective-bargaining agent"—and that NEA generally deems 40 percent of its expenditures chargeable. ER22 (emphasis added); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 447 (1984). And because CTA and NEA's chargeability calculations are based only on their expenditures within California (ER20, ER55), the mandatory portion of their affiliate fees does not even correspond to actual collective-bargaining expenditures made by CTA and NEA within a particular district. Thus, there is no basis for allowing these statewide and national entities to take funds from the Non-Union Teachers.

2. It is also readily apparent that both of *Abood*'s justifications for allowing the agency shop—the prevention of so-called "free riding" by nonmembers and the promotion of "labor peace"—are untenable.

a. The Supreme Court reasoned in *Abood* that although the agency shop "has an impact upon [public employees'] First Amendment interests," this impact is "constitutionally justified" by the need to prevent nonmembers from "free-riding" on the benefits of the unions' collective-bargaining efforts without contributing to the cost of those efforts. 431 U.S. at 222. But this interest cannot justify the serious First Amendment burdens the agency shop permits.

First, even the *Abood* line of decisions flatly rejects the notion that "free-riding" could justify compelled subsidization of "legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Lehnert*, 500 U.S. at 522. The Supreme Court has thus prohibited "lobbying" subsidies even though the potential for "free-riding" is the same as it is for bargaining. *Id.*

This rejection of a free-riding justification in the lobbying context makes perfect sense, for, as the Court has more recently explained, "free-rider arguments … are generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. Indeed, the "general rule" is that "individuals should not be compelled to subsidize private groups or private speech." *Id.* at 2295. As the *Knox* Court explained:

> If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school

> library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.

132 S. Ct. at 2289-90 (internal quotation marks and citation omitted). For the same reason, even if the Unions' collective-bargaining efforts benefitted nonmembers, that would not justify compelled subsidization of those efforts.[11]

Second, given that many nonmembers—including the Non-Union Teachers—sincerely disagree with the positions the Unions advocate, there is no basis for treating them as free-riders on the Unions' efforts. As even *Abood* recognized, employees "may find that a variety of union activities conflict with their beliefs." 431 U.S. at 231. Indeed, many nonmembers reasonably believe themselves to be *harmed* by union demands concerning core workplace issues. For example, 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. Also, teachers unions bargain over basic matters of education policy, such as class size, even though many teachers reasonably disagree with the unions' preferences concerning education policy.

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[11] California itself has acknowledged the absence of any "compelling interest" in mandating that agency fees be paid to the Unions by creating an ad hoc exception from this requirement for religious objectors like Appellant Zavala. *See* GOV'T § 3546.3. If mandatory payments to Unions truly were essential to collective bargaining, it would make no sense to exempt teachers from those mandatory payments whenever they have a religious objection to unionism.

Third, the free-rider justification is further undermined in the union context by the fact that the very power that purportedly *justifies* coercing fees from nonmembers—the unprecedented State-bestowed power given to a union (previously selected by a bare majority of employees) to bind all employees in the bargaining unit to employment policies and conditions that the union believes best serve most employees' collective interests—is *itself* a stark deprivation of a nonmember's associational freedom, and one that could not be imposed by any other organization. Not only are nonmembers compelled to associate with the Unions via contract and to accept the (often disadvantageous) terms that the Unions negotiate; they must *also* devote a portion of their wages to *support* these unwanted collective-bargaining efforts. Thus, contrary to *Abood*, compelled agency fees do not eliminate some non-existent free-rider problem; rather, they *exacerbate* the already-acute subjugation of each nonmember's associational freedom and individual interests.

b. *Abood* also suggested that the agency shop could be justified by the "desirability of labor peace," by which the Court meant the prevention of "[t]he confusion and conflict that could arise if rival teachers' unions holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." 431 U.S. at 224. But the validity of this supposed interest is in great doubt following the Court's decision in *Harris*. As the Court explained, a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." Slip op. at 31. Thus where, as here,

objecting nonmembers "do not contend that they have a First Amendment right to form a rival union" and do not "challenge the authority of the [designated union] to serve as the exclusive representative," the supposed interest in "'labor peace' … largely misses the point." *Id.*

In other words, the State's interest in bargaining with *one* union (rather than many) in no way justifies compelling *non*-union employees to support that one union's speech. The potential "conflict" between rival unions disappears once a union is designated, and so forcing nonmembers to contribute to that union does nothing to ameliorate the already-eliminated conflict. If anything, the designation of a single speaker—which precludes nonmembers from meaningfully conveying their own views about workplace terms and conditions—is a good reason *not* to require dissenters to subsidize that state-designated exclusive voice. Thus, the supposed interest in labor peace cannot justify the agency shop. The "unsupported empirical assumption … that the principle of exclusive representation in the public sector is dependent on a union or agency shop … is unwarranted." *Id.* at 20.

* * * * *

For all of these reasons, Appellees' agency-shop arrangements violate Appellants' First Amendment rights.

II. The Opt-Out Regime Violates Appellants' First Amendment Rights.

Even if *Abood* were correct and the agency shop does not violate the First Amendment, the Unions' opt-out regime for enforcing the agency shop clearly does. Under this system, the Unions assume that nonmembers intend to waive their rights and support the Unions' concededly political (and extremely

controversial) expression, unless and until each nonmember affirmatively registers his dissent with the Unions. This practice is invalid for at least three reasons.

First, the opt-out regime wrongfully places the burden on the party whose constitutional rights are at stake: the non-union employee. As even *Abood* recognized, nonmembers have a First Amendment right *not* to support a union's expenditure of "funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." 431 U.S. at 235. Unions, by contrast, "have no constitutional entitlement to the fees of nonmember-employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007). Thus, the constitutional calculus is simple: "[I]f unconsenting nonmembers pay too much, their First Amendment rights are infringed. On the other hand, if unconsenting nonmembers pay less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment from these employees." *Knox*, 132 S. Ct. at 2295.

The opt-out regime, however, reflects precisely the opposite presumption—that is, that unions somehow are entitled to "the 'extraordinary' benefit of … compel[ling] nonmembers to pay for services that they may not want and in any event have not agreed to fund." *Id.* This default rule contradicts the fundamental tenet that courts "do not presume acquiescence in the loss of fundamental rights." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (internal quotation marks and citation omitted).

Second, as the Court explained in *Knox*, "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." 132 S. Ct. at 2291. Appellees' annual opt-out system fails that standard because there is *no* state interest—let alone a compelling one—in "shift[ing] the advantage of . . . inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), away from employees who wish to exercise their First Amendment rights and onto unions that have no right to nonmembers' funds. *Davenport*, 551 U.S. at 185. California obviously could not automatically transfer a percentage of each state employee's paychecks to the Governor's re-election campaign or the Republican party unless the employee opted out, even though employees certainly may make such donations voluntarily. That is because *failing to object* is materially different from *affirmatively making* a voluntary donation. Given that the State could not force employees to affirmatively prevent automatic donations to politicians or political parties, it cannot do so for the concededly political spending of the Unions. This is particularly true for employees who have *repeatedly* opted out.

Finally, even if the Unions somehow had a legitimate interest in burdening nonmembers' First Amendment rights, the scheme they operate is "significantly broader than necessary to serve that interest." *Knox*, 132 S. Ct. at 2291. As it is, the agency shop itself "unquestionably imposes a heavy burden on the First Amendment interests of objecting employees." *Harris*, slip op. at 37. There is no justification for adding to this already-significant burden by requiring the Non-Union Teachers—and others like them—to renew their objection in writing every

year. That requirement 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." *Knox*, 132 S. Ct. at 2290. That risk could be fully avoided by simply requiring the Unions to obtain affirmative consent from all public employees before extracting payments that will be used for non-chargeable purposes.

CONCLUSION

Appellees violate Appellants' First Amendment rights every day by forcing them to subsidize the Unions' political efforts in collective-bargaining, and by requiring them to affirmatively renew their dissent every year or else forfeit their right not to subsidize activities that even the Unions admit are purely political. But because this Court lacks the authority to provide relief for these constitutional violations, Appellants respectfully ask that the Court enter its decision affirming the district court as quickly as is practicable so that Appellants may take their claims to the Supreme Court.

Dated: July 1, 2014

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STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending before this Court within the meaning of Ninth Circuit Rule 28-2.6.

Dated: July 1, 2014

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the page-volume limitation of Fed. R. App. P. 32(a)(7)(A) because it contains 24 pages, and also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,207 words, as determined by the word-count function of Microsoft Word 2007, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2014, on behalf of Plaintiff-Appellants, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days to the following non-CM/ECF participants:

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CALIFORNIA EDUCATION CODE

CAL. EDUC. CODE § 35160—Authority of Governing Boards Commencing January 1, 1976

On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

CAL. EDUC. CODE § 44929.21—Districts with Daily Attendance of 250 or More; Permanent Employee Classification; Notice of Reelection

(b) Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.

The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

This subdivision shall apply only to probationary employees whose probationary period commenced during the 1983-84 fiscal year or any fiscal year thereafter.

CAL. EDUC. CODE § 44934—Charges and Notice of Intention to Dismiss or Suspend; Additional Application of Section

Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause, as specified in Section 44932 or 44933, for the dismissal or suspension of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss or

suspend him or her at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article. Suspension proceedings may be initiated pursuant to this section only if the governing board has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Any written statement of charges of unprofessional conduct or unsatisfactory performance shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or unsatisfactory performance.

This section shall also apply to the suspension of probationary employees in a school district with an average daily attendance of less than 250 pupils which has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3542.2 of the Government Code.

CAL. EDUC. CODE § 44938—Unprofessional Conduct or Unsatisfactory Performance; Notice of Charges

(b) The governing board of any school district shall not act upon any charges of unsatisfactory performance unless it acts in accordance with the provisions of paragraph (1) or (2):

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(2) The governing board may act during the time period composed of the last one-fourth of the schooldays it has scheduled for purposes of computing apportionments in any fiscal year if, prior to the beginning of that time period, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and

overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

CAL. EDUC. CODE § 44944—Conduct of Hearing; Decision; Expenses and Costs

(a)(1) In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all of the power granted to an agency in that chapter, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. Notwithstanding any provision to the contrary, and except for the taking of oral depositions, no discovery shall occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to Section 11505 of the Government Code. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to the continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.

(2) If the right of discovery granted under paragraph (1) is denied by either the employee or the governing board, all of the remedies in Chapter 7 (commencing with Section 2023.010) of Title 4 of Part 4 of the Code of Civil Procedure shall be available to the party seeking discovery and the court of proper jurisdiction, to entertain his or her motion, shall be the superior court of the county in which the hearing will be held.

(3) The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Title 4 (commencing with Section

2016.010) of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

(4) The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

(5) No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b)(1) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. If the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent, who shall be reimbursed by the school district for all costs incident to the selection.

(2) The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c)(1) The decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a

written decision containing findings of fact, determinations of issues, and a disposition that shall be, solely, one of the following:

(A) That the employee should be dismissed.

(B) That the employee should be suspended for a specific period of time without pay.

(C) That the employee should not be dismissed or suspended.

(2) The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.

(3) The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of suspension pursuant to subparagraph (B) of paragraph (1) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

(4) The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

(5) The board may adopt from time to time rules and procedures not inconsistent with this section as may be necessary to effectuate this section.

(6) The governing board and the employee shall have the right to be represented by counsel.

(d)(1) If the member selected by the governing board or the member selected by the employee is employed by any school district in this state, the member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district, whichever amount is greater.

(e)(1) If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the administrative law judge. The state shall pay

any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of the claims. The employee and the governing board shall pay their own attorney's fees.

(2) If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee, and reasonable attorney's fees incurred by the employee.

(3) As used in this section, "reasonable expenses" shall not be deemed "compensation" within the meaning of subdivision (d).

(4) If either the governing board or the employee petitions a court of competent jurisdiction for review of the decision of the commission, the payment of expenses to members of the commission required by this subdivision shall not be stayed.

(5)(A) If the decision of the commission is finally reversed or vacated by a court of competent jurisdiction, either the state, having paid the commission members' expenses, shall be entitled to reimbursement from the governing board for those expenses, or the governing board, having paid the expenses, shall be entitled to reimbursement from the state.

(B) Additionally, either the employee, having paid a portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the governing board for the expenses, or the governing board, having paid its portion and the employee's portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the employee for that portion of the expenses.

(f) The hearing provided for in this section shall be conducted in a place selected by agreement among the members of the commission. In the absence of agreement, the place shall be selected by the administrative law judge.

CAL. EDUC. CODE § 44955—Reduction in Number of Employees

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of

termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

CAL. EDUC. CODE § 45060—Deductions for Organization Dues

Except as provided in Section 45061, the governing board of each school district, when drawing an order for the salary payment due to a certificated employee of the district, shall with or without charge reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for the purpose of paying the dues of the employee for membership in any local professional organization or in any statewide professional organization, or in any other professional organization affiliated or otherwise connected with a statewide professional organization which authorizes the statewide organization to receive membership dues on its behalf and for the purpose of paying his or her pro rata share of the costs incurred by the district in making the deduction. No charge shall exceed the actual cost to the district of the dues deduction. Any revocation of a written authorization shall be in writing and shall be effective commencing with the next pay period.

Unless otherwise provided in an agreement negotiated pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the governing board shall, no later than the 10th day of each pay period for certificated employees, draw its order upon the funds of the district in favor of the organization designated by the employee for an amount equal to the total of the dues deductions made with respect to that organization for the previous pay period and shall transmit the total amount to that organization no later than the 15th day of each pay period for certificated employees. When timely transmittal of dues payments by a county is necessary for a school district to comply with the provisions of this section, the county shall act in a timely manner. If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of dues, the board shall deduct from the amount transmitted to the organization on whose account the dues payments were deducted the actual costs of making the deduction.

The revocable written authorization shall remain in effect until expressly revoked in writing by the employee. Whenever there is a change in the amount required for the payment to the organization, the employee organization shall provide the employee with adequate and necessary data on the change at a time sufficiently prior to the effective date of the change to allow the employee an opportunity to revoke the written authorization, if desired. The employee organization shall provide the public school employer with notification of the change at a time sufficiently prior to the effective

date of the change to allow the employer an opportunity to make the necessary adjustments and with a copy of the notification of the change which has been sent to all concerned employees.

The governing board shall not require the completion of a new deduction authorization when a dues change has been effected or at any other time without the express approval of the concerned employee organization.

CAL. EDUC. CODE § 45061—Deductions for Organization Service Fees

The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.

If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certificated or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

CAL. EDUC. CODE § 45061.5—Transmittal to Employee Organization of Dues or Fees Collected or Deducted from Salary of Certificated Employee; Time Frame; Cause of Action for Failure to Transmit Dues or Fees; Attorney Fees; Waiver

(a) Notwithstanding any other law, the governing board of a school district that collects or deducts dues, agency fees, fair share fees, or any other fee or amount of money from the salary of a certificated employee for the purpose of transmitting the money to an employee organization shall transmit the money to the employee organization within 15 days of issuing the paycheck containing the deduction to the employee.

(b)(1) This section does not limit the right of an employee organization or affected employee to sue for a failure of the employer

to transmit dues or fees pursuant to this section.

(2) In an action brought for a violation of subdivision (a), the court may award reasonable attorney fees and costs to the prevailing party if any party to the action requests attorney fees and costs.

(c) A school district or county office of education may not request, and the State Board of Education may not grant, a waiver of compliance with this section.

CAL. EDUC. CODE § 45168—Deductions for Dues of Employee Organization; Direct Payment of Service Fees

(a) Except as provided in subdivision (b), the governing board of each school district when drawing an order for the salary or wage payment due to a classified employee of the district may, without charge, reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for the payment of dues in, or for any other service provided by, any bona fide organization, of which he is a member, whose membership consists, in whole or in part, of employees of such district, and which has as one of its objectives improvements in the terms or conditions of employment for the advancement of the welfare of such employees.

The revocable written authorization shall remain in effect until expressly revoked in writing by the employee. Whenever there is an increase in the amount required for such payment to the organization, the employee organization shall provide the employee with adequate and necessary data on such increase at a time sufficiently prior to the effective date of the increase to allow the employee an opportunity to revoke the written authorization, if desired. The employee organization shall provide the public school employer with notification of the increase at a time sufficiently prior to the effective date of the increase to allow the employer an opportunity to make the necessary changes and with a copy of the notification of the increase which has been sent to all concerned employees.

Upon receipt of a properly signed authorization for payroll deductions by a classified employee pursuant to this section, the governing board shall reduce such employee's pay warrant by the designated amount in the next pay period following the closing date for receipt of changes in pay warrants.

The governing board shall, on the same designated date of each month, draw its order upon the funds of the district in favor of the organization designated by the employee for an amount equal to the total of the respective deductions made with respect to such organization during the pay period.

The governing board shall not require the completion of a new deduction authorization when a dues increase has been effected or at any other time without the express approval of the concerned employee organization.

(b) The governing board of each school district when drawing an order for the salary or wage payment due to a classified employee of the district may, without charge, reduce the order for the payment of dues to, or for any other service provided by, the certified or recognized organization of which the classified employee is a member, or for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.

(c) This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter.

CALIFORNIA GOVERNMENT CODE

CAL. GOV'T CODE § 3540.1—Definitions

(j) "Public school employee" or "employee" means a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

CAL. GOV'T CODE § 3543.1—Rights of Employee Organizations

(a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

(b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

(c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

(d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 45060 and 45168 of the Education Code, until an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then the deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

CAL. GOV'T CODE § 3543.2—Scope of Representation; Requests to Meet and Negotiate

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

CAL. GOV'T CODE § 3544—Request for Recognition; Proof of Majority Support; Notice

(a) An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall be based upon majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees. Notice of any such request shall

immediately be posted conspicuously on all employee bulletin boards in each facility of the public school employer in which members of the unit claimed to be appropriate are employed.

(b) The employee organization shall submit proof of majority support to the board. The information submitted to the board shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organization and the public school employer as to whether the proof of majority support is adequate.

CAL. GOV'T CODE § 3544.1—Grant of Request for Recognition; Exceptions

The public school employer shall grant a request for recognition filed pursuant to Section 3544, unless any of the following apply:

(a) The public school employer doubts the appropriateness of a unit.

(b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. The evidence shall be submitted to the board, and shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organizations seeking recognition and to the public school employer as to the adequacy of the evidence. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation exists and the board shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) of this section applies.

(c) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

(d) The public school employer has, within the previous 12 months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition.

CAL. GOV'T CODE § 3546—Member of Recognized Employee Organization or Payment of Fair Share Service Fee; Condition of Employment

(a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, 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.

(b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.

CAL. GOV'T CODE § 3546.3—Religious Objections to Employee Organizations; Membership Exception; Alternative Fees

Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the

organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

REGULATIONS OF THE CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD

REGS. OF CAL. PERB § 32992—Notification of Nonmember

(a) The exclusive representative shall provide annual written notice to each nonmember who will be required to pay an agency fee. The notice shall include:

(1) The amount of the exclusive representative's dues and the agency fee;

(2) The percentage of the agency fee amount that is attributable to chargeable expenditures and the basis for this calculation;

(3) The amount of the agency fee to be paid by a nonmember who objects to the payment of an agency fee amount that includes nonchargeable expenditures (hereinafter referred to as an "agency fee objector"); and

(4) Procedures for (A) objecting to the payment of an agency fee amount that includes nonchargeable expenditures and (B) challenging the calculation of the nonchargeable expenditures.

(b)(1) The calculation of the chargeable and nonchargeable expenditures will be based on an audited financial report, and the notice will include either a copy of the audited financial report used to calculate the chargeable and nonchargeable expenditures or a certification from the independent auditor that the summarized chargeable and nonchargeable expenditures contained in the notice have been audited and correctly reproduced from the audited report, or

(2) the calculation of the chargeable and nonchargeable expenditures may be based on an unaudited financial report if the exclusive representative's annual revenues are less than $50,000 and a nonmember is afforded a procedure sufficiently reliable to ensure that a nonmember can independently verify that the employee organization spent its money as stated in the notice.

(c) Such written notice shall be sent/distributed to the nonmember either:

(1) At least 30 days prior to collection of the agency fee; or

(2) Concurrent with the initial agency fee collection provided escrow requirements in Section 32995 are met; or

(3) In the case of public school employees, where the agency fee year covers the traditional school year, on or before October 15 of the school year, provided escrow requirements in Section 32995 are met.

REGS. OF CAL. PERB § 32993—Exclusive Representative's Objection Procedure

Each exclusive representative that has an agency fee provision shall administer an Objection Procedure in accordance with the following:

(a) An agency fee objection shall be filed in writing with the designated representative of the exclusive representative.

(b) The procedure shall allow at least 30 days following distribution of the notice required under Section 32992 of these regulations for the filing of an agency fee objection.

REGS. OF CAL. PERB § 32994—Exclusive Representative's Challenge Procedure

(a) An agency fee payer who disagrees with the exclusive representative's determination of the chargeable expenditures contained in the agency fee amount and who files a timely agency fee challenge with the exclusive representative shall be hereafter known as an "agency fee challenger." An agency fee challenger may file an unfair practice charge that challenges the determination of the chargeable expenditures contained in the agency fee amount; however, no complaint shall issue until the agency fee challenger has first exhausted the Exclusive Representative's Challenge Procedure. No agency fee challenger shall be required to exhaust the Exclusive Representative's Challenge Procedure where it is insufficient on its face.

(b) Each exclusive representative that has an agency fee provision shall administer a Challenge Procedure in accordance with the following:

(1) An agency fee challenge shall be filed in writing with the official designated by the exclusive representative in the annual notice.

(2) The procedure shall allow at least 30 days following distribution of the notice required under Section 32992 of these regulations for the filing of an agency fee challenge.

(3) Upon receipt of an agency fee challenge, the exclusive representative shall within 45 days of the last day for filing a challenge request a prompt hearing regarding the agency fee before an impartial decisionmaker.

(4) The impartial decisionmaker shall be selected by the American Arbitration Association or the California State Mediation Service. The selection between these entities shall be made by the exclusive representative.

(5) Any party may make a request for a consolidated hearing of multiple agency fee challenges based on case similarities, including but not limited to, hearing location. At any time prior to the start of the hearing, any party may make a motion to the impartial decisionmaker challenging any consolidation of the hearing.

(6) The exclusive representative bears the burden of establishing the reasonableness of the amount of the chargeable expenditures.

(7) Agency fee challenge hearings shall be fair, informal proceedings conducted in conformance with basic precepts of due process.

(8) All decisions of the impartial decisionmaker shall be in writing, and shall be rendered no later than 30 days after the close of the hearing.

(9) All hearing costs shall be borne by the exclusive representative, unless the exclusive representative and the agency fee challenger agree otherwise.