

CLIENT ALERT

Equally Divided Supreme Court Affirms Ninth Circuit in Public Unions Case

MARCH 29, 2016

By an equally divided vote, the Supreme Court today issued a one-line ruling affirming a Ninth Circuit decision that rejected a First Amendment challenge to public-sector union fees. *Friedrichs v. California Teachers Association*, No. 14-915, [decision available](#). Although the decision is non-precedential, it is significant for what it does not do—namely, overturn *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), an important and often-criticized decision favoring public sector unions.

Many commentators expected that *Friedrichs* would be *Abood*'s last stand. With Justice Scalia's death, however, the Court likely lost the fifth vote to overturn it. This is the second time in recent weeks that the Court has issued a non-precedential affirmance by an equally divided vote in the absence of a ninth justice.

Friedrichs arose out of a challenge to California's law requiring non-union employees to affirmatively opt out of paying the non-chargeable portions of a union membership fee. Such fees are divided into two parts: germane or "fair share" fees (costs related to collective bargaining activities) and non-chargeable fees (which may be used for the union's political purposes). The plaintiffs were public school teachers who resigned their union membership. They objected that requiring non-union members to use opt out procedures to avoid paying non-chargeable fees violated their constitutional rights to free speech and freedom of association.

The District Court granted judgment on the pleadings for the defendant, a California teachers union. The court found that plaintiffs' claims were foreclosed by *Abood*, which held that it was constitutional for unions to use fees from nonunion members for political or ideological causes, provided those members had an opportunity to opt out of that portion of the fees. The Ninth Circuit affirmed, based on similar reasoning. Today's order allows that decision to stand.

Even without an opinion, today's decision provides two takeaways. First, it confirms that there are four votes to overturn *Abood*. And second, it forecasts that the next time this issue comes before the Court—and it surely will—the Justice who fills the seat of the late Justice Scalia will likely cast the deciding vote.

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