

# SPLIT SUPREME COURT UPHOLDS UNION AGENCY FEES...FOR NOW

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On March 29, 2016, the United States Supreme Court affirmed a decision permitting public-sector unions to continue collecting “agency fees” from nonmember workers. This is a major victory for public sector unions, as a contrary result would have crippled their ability to collect fees from workers who chose not to join unions, and who do not want to pay for the unions’ collective bargaining activities.

By way of background, in *Friedrichs v. California Teachers Association*, ten California teachers, including lead plaintiff Rebecca Friedrichs, alleged that agency fee requirements in collective bargaining agreements violated their First Amendment rights by forcing them to support an organization – the union - with which they disagreed. The union argued that agency fees simply allowed the union to avoid “free riders” who reaped the benefits of wages and other negotiated benefits. Even if workers elected not join, the union argued, the union was still required to represent these nonmembers. The union’s argument largely rested on a 1977 United States Supreme Court decision, *Abood v. Detroit Board of Education* where the court held that public employers may require all employees – both union and nonunion members – to pay union fees, so long as employees were not forced to pay a portion of the fees that covered political or ideological activities.

*Friedrichs* was ultimately argued before the Ninth Circuit. Relying on *Abood*, the Ninth Circuit upheld provisions in collective bargaining agreements that require nonmembers to pay agency fees.

*Friedrichs* was heard by the United States Supreme Court on January 11, 2016. Over the past several years, the Supreme Court had seemed to become more critical of *Abood*, even noting in a 2014 decision that *Abood* had “questionable foundations.” Thus, it was believed that the Supreme Court would reverse *Abood* in *Friedrichs*. Indeed, that seemed to be the likely case, based on the Supreme Court’s questions during oral arguments in *Friedrichs*, and the Court’s composition at that time. Commentators speculated that the Ninth Circuit decision would be reversed 5-4, with Chief Justice Roberts, and Justices Alito, Kennedy, Scalia, and Thomas in the majority. However, the Court’s decision – issued after Justice Scalia’s death – was no more than a one sentence announcement that the Ninth Circuit’s decision was affirmed by an equally divided court. Without an opinion, the *Friedrichs* case gives

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little guidance to practitioners.

The Court's decision in *Friedrichs* does not set precedent and, instead, merely allows the lower court's holding – and *Abood* – to stand. The door is open for future challenges whose success will be largely dependent on the composition of the United States Supreme Court.