

**From:** Aaron Nisenson, AAUP Senior Counsel [Communications@aaup.org](mailto:Communications@aaup.org)  
**Subject:** Friedrichs and the Supreme Court  
**Date:** February 17, 2016 at 9:48 AM  
**To:** [tpolicano@nysaaup.org](mailto:tpolicano@nysaaup.org)

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Dear AAUP Member:

As you probably have heard, the death of Supreme Court justice Antonin Scalia this weekend will have repercussions for a number of cases currently before the court. Among them is *Friedrichs v. California Teachers Association*, a case in which the plaintiffs seek to have the collection by public-sector unions of fair-share fees, or agency fees, ruled unconstitutional. ([More background on the case.](#))

While no one knows for sure what will happen, Scalia's death strengthens the likelihood that the forty years of precedent finding agency fees constitutional will not be overturned in this case. This would be a positive development for unions and American workers in general. The AAUP legal office will continue to monitor the situation closely and update you as developments occur. AAUP general counsel Risa Lieberwitz offered her analysis in a blog post today on *Academe Blog*, "[The Future of Friedrichs in the Supreme Court.](#)"

What we do know is that whatever happens with the *Friedrichs* case, we must continue to build strong unions with high membership. We know that other attacks on unions are likely, both in the courts and in state legislatures. Wherever the threat comes from, our best preparation has always been an organized, mobilized membership.

Regards,  
Aaron Nisenson  
AAUP Senior Counsel  
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The AAUP-CBC supports unionization as the most effective means for academic employees to protect shared governance and academic freedom, to uphold professional standards and values, and to promote higher education as an investment in our common future. Visit the [AAUP-CBC website](#) and [Facebook](#). Follow us on [Twitter](#).

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**From:** Howard Bunsis, AAUP-CBC [Communications@aaup.org](mailto:Communications@aaup.org)  
**Subject:** Important Supreme Court case  
**Date:** January 12, 2016 at 12:56 PM  
**To:** [tpolicano@nysaaup.org](mailto:tpolicano@nysaaup.org)

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Dear AAUP Member:

Yesterday the US Supreme Court heard arguments in *Friedrichs v. California Teachers Association*, an important case for unions and workers.

In brief, the case seeks to weaken unions by limiting or eliminating the collection of agency fees. The AAUP supports the right of unions to charge agency fees, also known as “fair share.” These fees ensure that nonmembers help pay for the costs of the representation that the union provides to all. Even if bargaining unit members choose not to join as full members, they are represented by the union and benefit from the contract it negotiates. In higher education, strong unions help protect academic freedom and shared governance, limit contingency, and promote economic security for faculty and quality education for students.

For the past forty years, the Supreme Court has endorsed the legality of fair share arrangements. This is now being challenged on the basis that the First Amendment bars this practice, since it compels individuals to pay for “speech” (by the union) with which they may not agree.

AAUP senior labor adviser Michael Mauer and associate counsel Nancy Long attended the oral arguments on Monday. They reported that the tone and content of the oral arguments affirmed that the court could issue a decision damaging to workers and unions. It appears likely that the issue will be resolved decisively. There is also a chance that the Supreme Court will just modify the present methods of collecting fair share payments, leaving the basic structure intact.

The AAUP filed a friend-of-the-court brief in this case, which [you can see on our website](#). You can also read an analysis of the oral arguments by AAUP general counsel Risa Lieberwitz on the [Academe Blog](#).

The court will issue its decision by June at the latest. **But we already know what we need to do.** The best insurance against a bad decision is a strong union with high membership. And a strong union benefits all of us--whichever way the decision goes. Strong, active membership enables your union to bargain hard, represent you effectively, and let the administration and board know that we are a force to be reckoned with.

AAUP leaders and staff are working with chapters on local organizing plans. Your participation is important. Please **contact your chapter leadership** to find out what is being planned on your campus and how you can help.

In Solidarity,

Howard Bunsis, Chair  
AAUP Collective Bargaining Congress

Rudy Fichtenbaum, President  
AAUP

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## Friedrichs v. California Teachers Association, No. 14-915 (2015)

On November 13, 2015, the AAUP filed with the American Federation of Teachers an [amicus brief](#) before the US Supreme Court arguing that the payment of agency fees by non-members in collective bargaining unions to support union representation is constitutional. The case started when the plaintiffs, sponsored by organizations seeking to weaken unions, sued the California Teachers Association and a local California school district seeking to invalidate agency fee provisions in the collective bargaining agreement, arguing that agency fee clauses in the public sector violate the First Amendment. On June 29, 2015, the Supreme Court granted certiorari, and thereby agreed to hear the appeal. The AAUP amicus brief argues that collective bargaining, supported by the agency fee system, significantly benefits the educational system, and that removal of the ability to charge agency fees would upset the balance set by the states and burden the rights of union members.

Agency fee has been deemed constitutional since the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*. Last year in *Harris v. Quinn*, the Supreme Court declined to overrule *Abood*, although the Court raised questions regarding its vitality. Anti-union groups brought the *Friedrichs* case in California and pushed it through the courts. In the Supreme Court, the *Friedrichs* plaintiffs have advanced the argument that all agency fee arrangements in the public sector violate the First Amendment as they compel non-members to pay for activities that they believe address matters of public concern. The plaintiffs also argued in the alternative that even if some agency fee system is unconstitutional, the current opt-out system of charging agency fee payers is unconstitutional.

The Supreme Court accepted two questions for review: (1) Whether *Abood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

Given the questions before the Court there are several potential outcomes. First, the Court could answer "no" to both questions, and leave the law status quo. Second, the Court could answer the first question in the affirmative, and it would overrule *Abood* and prohibit agency fee in the public sector. This would impose a right to work style system nationwide in the public sector. (This would render the second question before the Court moot.)

Third, the Court could answer the first question "no", thereby allowing agency fee, but could answer the second question "yes". The second question addresses the current law regarding agency fee payers and objectors. Under the current law, non-members can be charged a rate equivalent to full union dues unless they affirmatively object. Once a non-member formally objects, they can only be charged the agency fee rate. This creates an "opt-out" situation in which non-members must affirmatively opt out to pay the lower agency fee rate. If the Court answered the second question "yes", then agency fee would still be permissible, but all non-members would be considered objectors automatically and could therefore only be charged the lower agency fee rate.

Finally, in answering the questions, the Court could leave some charges for agency fee standing, while substantially changing the amount that can be permissibly collected. For example, the Court could narrow the types of activity for which agency fees can be charged, such as by excluding from chargeable activity work such as bargaining for tenure or pay. It is difficult to anticipate what such a ruling would look like.

The AAUP/AFT brief supports the charging of agency fees and provides examples from AAUP higher education chapters of the benefits of the agency fee system. The brief provides strong arguments in favor of the agency fee system including that agency fees are an essential component of the states' management of some of their most important institutions; that petitioners' facial, all-or-nothing challenge to all aspects of every agency fee ever charged anywhere, on the basis of no record at all, should be rejected on its face; and that to the extent the court entertains petitioners' facial claim, it must account for petitioners' failure to challenge the underlying regime of exclusive representation in collective bargaining. The brief explains that "fair share fees are . . . used to fund a wide range of other activities that promote the state's compelling interest in providing students a high quality education and directly benefit nonmembers." Thus, based on the significant benefits provided by agency fees, compared to the minimal burdens, charging agency fees to non-members does not violate the First Amendment.

Amicus Brief Topics:

[Faculty Collective Bargaining Rights](#)

## The Academe Blog

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# Thinking about the Friedrichs Oral Arguments at the Supreme Court

Today, the U.S. Supreme Court heard oral arguments in the case of *Friedrichs v. California Teachers Association*. Friedrichs and the other petitioners in the case argue that the Supreme Court's 40 year precedent upholding the constitutionality of agency fees – or fair share fees – should be overruled. The AAUP filed an *amicus* brief in *Friedrichs*, with the American Federation of Teachers, arguing that the Court should reaffirm that the payment of agency fees by nonmembers to support their fair share of the costs of collective bargaining is constitutional.

In 1977, in *Abood v. Detroit Board of Education*, the Supreme Court unanimously upheld the constitutionality of agency / fair share fees in the public sector workplace. These fees ensure that employees who are not union members, but who benefit from collective bargaining, pay their fair share of the costs. As Justice Elena Kagan explained in a 2014 case: "For some 40 years, *Abood* has struck a stable balance—consistent with this court's general framework for assessing public employees' First Amendment claims—between those employees' rights and government entities' interests in managing their workforces." (*Harris v. Quinn*, dissent by Kagan, Ginsburg, Breyer, Sotomayor).

In today's oral arguments in the *Friedrichs* case, it's not surprising that the conservative Supreme Court Justices were highly critical of fair share fees, given their ideological positions. Justice Scalia, though, in an earlier decision had shown that he understood that fair share fees are necessary for the union to fulfill its legal duty to represent members and nonmembers alike. In *Lehnert v. Ferris Faculty Association* (1991), Scalia explained, "What is distinctive, however, about the 'free riders' who are nonunion 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." During the *Friedrichs* oral arguments, however, Scalia appeared hostile to agency fees, based on the view that all public sector collective bargaining is political. While oral arguments are often not a reliable predictor of the Court's ultimate decision, Scalia may have signaled a willingness to be part of a majority to overrule *Abood*.

Overruling *Abood* would be the wrong decision. The Court should reaffirm *Abood*, upholding fair share fees in public sector collective bargaining. The balance struck in *Abood* takes into account multiple interests:

- Agency / fair share fee arrangements respect nonmembers' First Amendment interests. Nonmembers

are not required to join the union, but are required to pay their fair share of the costs of negotiating and administering the collective bargaining agreement that benefits all employees. But nonmembers are not compelled to pay for expenses related to union political activities.

- Upholding agency fees also takes into account the First Amendment interests of union members to have effective collective bargaining without carrying nonmembers as free riders.
- The *Abood* balance considers the benefits to state governments' interests as employers in strong collective bargaining relationships that promote positive and stable workplace relationships. In addition to negotiating for higher wages, benefits, and job security, unions often work with employers to improve working conditions. For example, AAUP collective bargaining agreements include joint faculty-administration committees on issues such as environmental safety, paid parental leave policy, workload, and faculty professional development.

This balance of interests can be described in terms of democracy, fairness and common sense. Unions are democratically elected through a majority vote, which makes the union the exclusive collective bargaining representative for all the employees. The union has a corresponding legal duty to fairly represent the interests of all the employees. This means that union members and nonmembers alike receive the benefits the union gains in collective bargaining, including union representation in employee grievances, which may entail the costs of arbitration hearings. As noted by the AFT / AAUP joint *amicus* brief in the Supreme Court, Friedrichs and the other petitioners do not object to the exclusive representation system or the union's duty to fairly represent all employees. Yet, the petitioners object to paying a penny of their fair share of the union's expenses. As we stated in the *amicus* brief, Friedrichs and the other petitioners are seeking to "have their cake and eat it, too, maintaining the benefits of union representation without having to pay for it."

It's expected that the Supreme Court will issue its decision in *Friedrichs* by June 2016, at the latest. If the Supreme Court does overrule *Abood*, it's likely that many union supporters will be reminding us of Joe Hill's words: "Don't waste time mourning, organize!" And they are right. If the Supreme Court upholds *Abood*, the advice to organize is still right. Strong organizing makes strong unions. In the face of adversity, workers can and do organize. They organize and build union membership in the face of state laws seeking to harm public sector unions and in the face of weak federal labor laws in the private sector. And unions will continue to organize and build strong membership whatever the Supreme Court decides in the *Friedrichs* case. As we look toward the national holiday honoring Dr. Martin Luther King, Jr., we should think of his reminder that "the arc of the moral universe is long, but it bends toward justice." That's what unionizing is about – and we can fight for justice with or without support from the courts.

## About Risa Lieberwitz



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This entry was posted on January 11, 2016 by Risa Lieberwitz in AAUP, American Association of University Professors, collective bargaining, faculty, unions.

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