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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

RYAN YOHN, et al.,

Plaintiffs,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Defendants.

Case No. 8:17-cv-00202-JLS-DFM

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Judge: Hon. Josephine Staton
Hearing Date: April 28, 2017
Time: 2:30 p.m.
Courtroom: 10A
Trial Date: None Set

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. Because Plaintiffs Are Facially Challenging Regimes Currently Permitted Under Binding Precedent, Defendants Cannot Identify a Single *Material* Factual Dispute. 3

II. Defendants Will Not Be Prejudiced by the Commonplace Practice of Resolving Questions on the Pleadings Where the Material Facts Are Not in Dispute. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 1, 8

Elrod v. Burns,
427 U.S. 347 (1976) 8

Friedrichs v. Cal. Teachers Ass'n,
No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014) 13

Harris v. Quinn,
134 S. Ct. 2618 (2014) 8

Janus v. AFSCME,
851 F.3d 746 (7th Cir. 2017) 4

Mitchell v. Los Angeles Unified School District,
963 F.2d 258 (9th Cir. 1992) 1

O'Hare Truck Serv., Inc. v. City of Northlake,
518 U.S. 712 (1996) 8

Rutan v. Republican Party of Ill.,
497 U.S. 62 (1990) 8

Sovak v. Chugai Pharm. Co.,
280 F.3d 1266 (9th Cir. 2002) 3

Standard Fire Ins. Co. v. Knowles,
133 S. Ct. 1345 (2013) 5

OTHER AUTHORITIES

REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32994 5

INTRODUCTION

Faced with a Complaint that admits defeat under binding precedent, Defendants insist that Plaintiffs actually *do* state viable claims for relief, and ask the Court to ignore Plaintiffs' admission so that the Court can waste scarce resources to "adjudicate" claims that are currently foreclosed. But Plaintiffs are asserting the *exact same claims* as the plaintiffs in *Friedrichs v. California Teachers Association* (No. 8:13-cv-676-JLS), where these same lead Defendants (represented by some of the same attorneys) acknowledged that the only possible result was judgment in their favor. Now, Defendants want the Court to oversee necessarily *non*-adversarial fact-finding on issues that have no bearing on the legal validity of Plaintiffs' claims and for which no relief can be granted.

Defendants can advance this position only by rewriting Plaintiffs' claims, transforming Plaintiffs' *facial* challenges to the public-sector agency shop and opt-out requirement into *as-applied* challenges to Defendants' *implementation* of those regimes. To erase the doubt Defendants are attempting to create, Plaintiffs reiterate, without equivocation, what their Complaint already states: Plaintiffs are not challenging the manner in which Defendants' execute the agency shop or opt-out. Rather, Plaintiffs claim that *any* implementation of those practices is unlawful under the First Amendment. Indeed, Plaintiffs obviously have no interest in pursuing the as-applied challenges that Defendants imagine, because they seek to *overturn Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), not have them properly *adhered to*. And because the facial challenges Plaintiffs *are* pursuing are currently doomed by Supreme Court and Ninth Circuit precedent, there is literally nothing for the parties to do in this Court at this time: the only possible result right now is judgment in Defendants' favor.[1]

[1] Defendants do not deny that the Court has the power to grant Plaintiffs' motion for judgment on the pleadings in Defendants' favor, even over their

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There is a simple explanation for Defendants' about-face: having received a reprieve in the form of the Supreme Court's unexpected 4–4 split in *Friedrichs*, and rightly worried about their prospects in a return to the Supreme Court, Defendants have decided to delay this litigation by any means necessary. After all, every day of delay is a day in which the Union Defendants can continue to collect agency fees from public employees who have specifically rejected union membership. This needless delay would not only burden the Plaintiffs but the Court, by wasting scarce resources on a pointless and time-consuming "hearing" on immaterial facts.

The Court should not let Defendants so manipulate the adversarial process. Defendants should have moved to dismiss Plaintiffs' claims, which are concededly foreclosed in this Court under binding precedent. It is only because they made clear that they would not file a motion to dismiss that Plaintiffs were forced to seek judgment on the pleadings against themselves. Just as this Court recognized in *Friedrichs*, granting dismissal is the only proper result under the law as it stands today. Nor have Defendants identified any basis for deviating from what this Court did in *Friedrichs*. Their claim that fact-finding is needed to facilitate appellate review is the exact same argument the *Friedrichs* defendants made to the Ninth Circuit, only to have that argument rejected when the Ninth Circuit summarily affirmed this Court's entry of judgment.

The lack of a record did not in any way prejudice the *Friedrichs* defendants' ability to defend the challenged regimes before the Supreme Court, because the defendants retained every right to argue to the Court that the proper outcome of the case should depend on some factual dispute needed to be resolved on remand. That Court saw no problem with considering the facial validity of the agency shop and opt-out on the basis of pleadings and assumed facts—after all, the Supreme Court

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objection. Unions' Opp. at 5; Cal's Opp. at 5-6. Nor is Plaintiffs' acknowledgement that the law forecloses their claims any sort of "gamesmanship." Cal.'s Opp. at 6.

routinely resolves sweeping constitutional questions in exactly that posture. And the defendants were able to advance every factual and legal argument they wanted to in defense of their practices, just as they will be able to do here.

There is no reason to consume this Court's limited time and resources holding a mock trial so that this Court can issue an advisory opinion on the basis of facts that *might* be relevant under a hypothetical future Supreme Court decision, or that distinguishes a currently non-existent Supreme Court opinion that will supposedly leave wiggle room for some form of agency shop and/or opt-out regime. Federal courts can resolve only *actual* disputes where the parties disagree about what existing law requires. There is no such dispute here. Accordingly, Plaintiffs respectfully ask the Court to dispense with the hearing currently scheduled for April 28 and expeditiously enter judgment in Defendants' favor, so that Plaintiffs can pursue relief from the only Court capable of granting it.

ARGUMENT[2]

I. Because Plaintiffs Are Facially Challenging Regimes Currently Permitted Under Binding Precedent, Defendants Cannot Identify a Single *Material* Factual Dispute.

Defendants insist that this Court must resolve factual disputes as to (1) the details of their agency-shop and opt-out schemes and (2) the State's interests in maintaining those schemes. This is wrong. Because Plaintiffs are facially challenging binding precedent, there is not a single fact this Court could find right now that would have any bearing here. Indeed, Defendants acknowledge that the

[2] As the Court now has a full set of pleadings before it, there is no reason it cannot enter judgment on the pleadings. *Contra* Unions' Opp. at 2-3; Cal.'s Opp. at 5-6. And if Defendants truly believe that Plaintiffs, by admitting that the law forecloses their claims today, are inviting error (Unions' Opp. at 3), Defendants are free to make that appellate argument before the appellate courts. Of course, these same Defendants made no such argument in *Friedrichs*, presumably because the invited-error doctrine obviously does not apply where a party simply acknowledges—as Rule 11 requires—the impact of binding precedent. *Contra Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) ("The invited error doctrine holds that "[o]ne may not complain on review of errors below *for which he is responsible*' …." (citation omitted; emphasis added)).

Seventh Circuit last month disposed of a separate challenge to the agency shop, which, because it arose from an order granting a motion to dismiss, involved a set of assumed facts. *See Janus v. AFSCME*, 851 F.3d 746, *2 (7th Cir. 2017) (non-union public employee's claim was "properly dismissed" for "fail[ure] to state a valid claim because … neither the district court nor this court can overrule *Abood*, and it is *Abood* that stands in the way of his claim"). Nobody in *Janus*—including the union defendants—thought fact-finding was needed.[3] Nor is it needed here.

First, Defendants' principal argument is that various assertions in the Complaint somehow could form the basis for "viable claims" that Defendants have *improperly* collected agency fees or implemented the opt-out regime, and thus *exceeded* the authority bestowed on them by *Abood* and *Mitchell*. Unions' Opp. at 5; Cal.'s Opp. at 11. But the Complaint could not be clearer that it is *not* challenging any potential *departure* from the *Abood* and *Mitchell* regimes, and instead is facially challenging only what is unequivocally *allowed* under that precedent—which is why the Complaint solely seeks to overturn that precedent. The only claims asserted in the Complaint—and the only relief sought—target *any* collection of agency fees and *any* annual opt-out requirement. *See* Compl. at ¶¶ 8-9 (asking the Court to enjoin "California's practice of forcing nonunion members to contribute funds to unions" and "Defendants' practice of requiring an annual affirmative opt-out to avoid contributing to nonchargeable union expenditures"). There is no alternative, as-applied, claim that Defendants' regimes fall outside the "proper" agency-shop and opt-out regimes upheld in *Abood* and *Mitchell*. While

[3] Trying to downplay the harm stemming from their delay tactics, Defendants argue that the Supreme Court can address the constitutionality of the agency shop in *Janus*. Even if the theoretical possibility of Supreme Court review in totally different litigation were relevant, *Janus* does not present any question of opt-out and thus could not possibly result in the total relief that Plaintiffs seek. It would be a hollow victory for Plaintiffs and other public employees to be liberated from the agency shop, only to remain subject to a rule that forces them to repeatedly reassert their right not to subsidize unions.

Defendants can of course *defend* against Plaintiffs' claims however they choose (Unions' Opp. at 4; Cal.'s Opp. at 7), that does not authorize them to rewrite Plaintiffs' claims (and then "defend" against those nonexistent claims). Plaintiffs, not Defendants, "are the masters of their complaints." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013).

The Complaint clearly shows that Plaintiffs' actual claim is that *Abood* itself—and with it, *any* implementation of the agency shop—is constitutionally impermissible: "By requiring Plaintiffs to make *any* financial contributions in support of any union, California's agency-shop arrangement violates Plaintiffs' rights to free speech and association under the First and Fourteenth Amendments to the United States Constitution." Compl. ¶ 97 (emphasis added). And when the *Friedrichs* plaintiffs pursued the exact same claim before the Supreme Court, they did not seek to distinguish *Abood* or to have its rule modified; instead, they unequivocally argued that "the logic and reasoning of this Court's decisions have shattered the legal foundation of its approval of" the agency shop in *Abood*, such that "[t]he Court should now discard that jurisprudential outlier." Pets.' Opening Br. at 2, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915) (https://goo.gl/l47aCb). Thus, Plaintiffs do not seek to distinguish *Abood* or to establish that Defendants have crossed the line drawn in that decision by charging nonmembers for expenditures unrelated to collective bargaining. Indeed, Defendants have already admitted as much: if they truly believed this was an *Abood* germaneness challenge, they would have had to move to dismiss so that the case could be arbitrated, as required by California law.[4] They did not, because they

[4] *See* REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32994(a) (requiring "[a]n agency fee payer who disagrees with the exclusive representative's determination of the chargeable expenditures contained in the agency fee amount [to] file[] a timely agency fee challenge with the exclusive representative"); *id.* § 32994(b)(3), (4), (7) (providing that "[a]gency fee challenge hearings shall be fair, informal proceedings," and requiring the union who receives an agency-fee challenge to "request a prompt hearing regarding the agency fee before an impartial

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know that Plaintiffs are actually challenging *Abood* itself.

Similarly, Plaintiffs' claim is that—contrary to *Mitchell*—*any* opt-out requirement runs afoul of basic constitutional principles: "By requiring Plaintiffs to undergo opt-out procedures to avoid making financial contributions in support of nonchargeable union expenditures, California's agency-shop arrangement violates Plaintiffs' rights to free speech and association under the First and Fourteenth Amendments to the United States Constitution." Compl. ¶ 100. Just as in *Friedrichs*, Plaintiffs' position is that it is *always* unconstitutional to make public employees opt out of paying avowedly political expenses, whether opting out is burdensome or not, and whether employees must opt out once or every year.[5]

Because Plaintiffs are interested only in facially challenging the practices upheld in *Abood* and *Mitchell*, all of the supposed factual disputes that Defendants identify are red herrings. It does not matter whether the expenses charged by Defendants are closely related to collective bargaining (Unions' Opp. at 10-11); it does not matter whether any Defendants are violating California's religious-objector accommodation (*id.* at 12-13); it does not matter whether the opt-out process is burdensome (*id.* at 11-12; Cal.'s Opp. at 10). These factual assertions

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decisionmaker" that is "selected by the American Arbitration Association or the California State Mediation Service").

[5] The Union Defendants claim that the *Friedrichs* plaintiffs shifted positions, first "piously assert[ing]" that they were not challenging opt-out as burdensome and later arguing that it is burdensome. Unions' Opp. at 7-8. But the plaintiffs' position—in both their Motion for Judgment on the Pleadings *and* before the Supreme Court—was actually that opt-out is unconstitutional "whether or not doing so is burdensome." *Id.* at 7 (quoting Pls.' Mot. for Judgment on the Pleadings at 8, *Friedrichs v. Cal. Teachers Ass'n*, No. 8:13-cv-676 (C.D. Cal. July 9, 2013), ECF 81); *see also* Pets.' Reply to Unions' BIO at 8, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (https://goo.gl/Of3Kto) ("[T]he ease of the [opt-out] process is irrelevant."). Thus, Plaintiffs' position was and is that it is *immaterial* whether the "burdensome" label is attached to the opt-out regime, because it is unconstitutional regardless of whether that label applies. Stated another way, whether characterized as "burdensome" or only a minor inconvenience, Plaintiffs' legal position is that opt-out is an undue burden under the First Amendment *as a matter of law*. Thus, again, there is no basis for holding an evidentiary hearing to resolve this immaterial "fact."

only illustrate what sorts of practices *Abood* and *Mitchell* have *permitted*. Nothing in the Complaint suggests that these practices *violate* the precedents Plaintiffs seek to overturn. Thus, if Defendants in an evidentiary hearing conclusively established their perfect compliance with *Abood* and *Mitchell*, this would be entirely *immaterial* to the only issue presented here: whether such perfect compliance violates the First Amendment, necessitating the reversal of *Abood*'s and *Mitchell*'s misinterpretation of that Amendment. But federal courts resolve only *material* factual disputes.

Since such compliance questions are so manifestly irrelevant to Plaintiffs' facial claims, Plaintiffs will not participate in any evidentiary hearing designed to resolve the nonexistent "dispute" over whether Defendants have faithfully (or badly) implemented *Abood*'s and *Mitchell*'s unconstitutional regimes. For the same reason, Plaintiffs offered Defendants the opportunity to include in their Answers any facts that they thought showed their faithful compliance or otherwise corrected any inaccuracies in the Complaint. While the same Defendants in *Friedrichs* took advantage of this opportunity, they now have eschewed that opportunity—solely to implement their delaying tactic of seeking an "evidentiary" hearing to resolve *undisputed* facts. (Nonetheless, Plaintiffs will not object on appeal to Defendants' reliance on their expanded *Friedrichs* Answer to support any factual assertions.)

Second, there is neither a basis nor a need for this Court to hold some sort of evidentiary hearing on the State's interests in maintaining either of the challenged regimes. *Contra* Cal.'s Opp. at 8-11. The Court did not hold any such hearing in *Friedrichs*, but that did not stop the defendants from offering a full-throated defense of the state interests that supposedly necessitate the agency shop and opt-out requirements.[6] All eight Justices in *Friedrichs* were able to assess the

[6] *See* Cal.'s Br. at 12, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (https://goo.gl/AZe0k8) ("We begin by discussing how the State's structure serves important interests of public employers, and how each piece relates to the whole."); Unions' Br. at 11, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (https://goo.gl/khJBxA) ("*Abood* properly recognized that the agency shop serves States' strong interests in

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constitutionality of the challenged regimes without an evidentiary hearing. Indeed, the Court routinely assesses the strength of state interests under the First Amendment on the basis of the pleadings, absent any such factual hearing.

Abood itself proves the point. In holding that the agency shop was justified by the supposed state interests in preventing free-riding and promoting labor peace, the *Abood* Court was not relying on evidence presented at some hearing—there was no hearing, because the case arose on Michigan's "equivalent to dismissal under [Rule] 12(b)(6)." 431 U.S. at 213 n.4. And more recently, in *Harris v. Quinn*, the Supreme Court held that similar state interests *did not* justify the compulsion of dues from non-union home healthcare workers—again, notwithstanding the fact that the case arose on a motion to dismiss and thus that the proffered interests had not been developed in an evidentiary hearing. 134 S. Ct. 2618, 2627, 2639-41 (2014). These are only two examples among many in which the Court had no problem weighing proffered state interests that had not been developed in any evidentiary hearing.[7] This is, in fact, the typical way that the Court resolves constitutional questions like those presented here: the State *asserts* its interests; it does not present legislators or other state officials at some evidentiary hearing so that they can offer undefined evidence purportedly supporting those interests.

Moreover Defendants are silent on what they would actually offer at the hearing they request. For example, as in *Friedrichs*, they cannot even *suggest* that they would present evidence that the agency shop is necessary to ensure unions'

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the orderly negotiation of terms and conditions of employment and resolution of employee grievances.").

[7] *See also, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715, 722-26 (1996) (considering state interests in patronage practices for independent contractors, in case arising on motion to dismiss); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 67, 71-75, 78-79 (1990) (considering state interests in patronage-based employment actions, in case arising on motion to dismiss); *Elrod v. Burns*, 427 U.S. 347, 350, 362-73 (1976) (plurality) (considering state interests in patronage-based termination, in case arising on motion to dismiss).

survival—let alone identify even a single fact that they think they could establish in support of this proposition.

As this reflects, an evidentiary hearing serves no purpose here and certainly is not needed to avoid "prejudice" to Defendants. The absence of such hearing did not impede their defense in *Friedrichs* in any way. For example, when Justice Ginsburg asked the union defendants' counsel point blank what facts he would have put in if he "had had that opportunity to develop a record," counsel did not even claim that the defendants would have sought to develop evidence of the state interests at play. Instead, he responded that "the first thing I would have put in" was evidence relating to *the plaintiffs* in that case—namely, the lead plaintiff's views on her union's compensation policies. *Friedrichs* Tr. 61:23-62:12 (https://goo.gl/kd5TlC). Even setting aside that those views have no bearing on the constitutionality of the practices challenged here, the crucial point is that the *Friedrichs* defendants could not even *claim* that they had been in any way hindered in their efforts to present the relevant state interests. Nor will they be hindered by adhering to the exact same procedure here.

Indeed, the lack of an evidentiary hearing inherently cannot adversely affect Defendants. If their *asserted* interests are found sufficient (or insufficient) *on their face,* an evidentiary hearing is inherently immaterial. Conversely, if the Supreme Court concludes that any factual issues as to the State's interests are relevant to either of Plaintiffs' claims, it will not *invalidate* Defendants' policies, but will simply remand the case to resolve the legally significant factual disputes. But unless and until the Supreme Court identifies the factual circumstances rendering agency fees and/or opt-out regimes constitutional, there is no material factual dispute to resolve. As the law stands today, the Supreme Court has already told this Court—and all other courts—that the agency shop is justified by the states' interests in preventing free-riding and promoting labor peace. There is not a single fact this Court could find that would enable it to hold that those interests are, in

fact, insufficient (or sufficient).

In short, if the Supreme Court concludes that any such fact-finding will be relevant to the constitutional question, it will remand with instructions making that clear. But at this juncture, there is no reason to waste this Court's time and resources on a thought experiment.

II. Defendants Will Not Be Prejudiced by the Commonplace Practice of Resolving Questions on the Pleadings Where the Material Facts Are Not in Dispute.

Defendants insist that they were prejudiced in *Friedrichs* because the Supreme Court—rather than *assuming* the plaintiffs' factual allegations to be true for purposes of resolving the purely legal issues presented—somehow erroneously believed that Plaintiffs' allegations actually had been *established* as true, thus foreclosing Defendants from presenting their alternative view of the facts. Unions' Opp. at 5-8. That is obviously false.

The dispute in *Friedrichs* was not over whether *assumed* facts were actually true, but simply over whether the *absence* of a factual record mattered at all. When the *Friedrichs* plaintiffs sought a writ of certiorari, the union defendants and California's Attorney General urged the Supreme Court to deny review because, they said, the lack of a factual record made the case an inadequate vehicle for ruling on the constitutionality of the agency shop or opt-out requirements.[8] In the course of making that argument, the defendants picked a peripheral fight over whose pleadings the Court would need to accept as true; they argued that the Court should assume the truth of *their* allegations because they were the non-moving party in this

[8] *See* Unions' BIO at 22, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (https://goo.gl/erXKWh) (argument heading: "THE RECORD IS INADEQUATE TO PERMIT CONSIDERATION OF PETITIONERS' ATTACK ON *ABOOD*"); *id.* at 32 ("Petitioners have not made a record to support a claim that the Unions' opt-out objection procedure burdens their First Amendment interests …."); Cal.'s BIO at 10, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (https://goo.gl/1hYDOJ) ("Even if there were some reason to revisit *Abood*, … the record here has not been developed in a way that would allow the Court to consider the constitutional issues in any concrete or adequately tested factual context.").

Court.[9] The *Friedrichs* plaintiffs disputed this flawed premise, but their overarching point was that it *did not matter* whose facts the Court assumed, because the "only [] fact necessary to choose between" the parties' positions was "undisputed: Respondents admit they confiscate Petitioners' money against their will to fund Respondents' collective-bargaining efforts." Pets.' Reply to Unions' BIO, *supra* n. 4, at 10.

Thus, the *Friedrichs* plaintiffs were not asking the Supreme Court to *determine* that their allegations were true. Rather, they were simply asking the Court to overturn *Abood* because that precedent erroneously foreclosed their claims *as a matter of law*, even *assuming* the truth of their allegations.[10] That is, after all, precisely the posture the appeal would have been in if the defendants had filed the motion to dismiss that they should have filed. The Supreme Court sided with the plaintiffs, granting review and thus rejecting the defendants' vehicle arguments. And on the merits, the defendants were in no way constrained in their ability to advocate their view of the relevant constitutional and factual issues (including their view that the lack of a factual record counseled against the *Friedrichs* plaintiffs).[11]

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[9] Unions' BIO, *supra* n. 7, at 25 n.16 ("Even if this Court were charged only with determining whether the judgment was properly supported by the pleadings, the normal rule is that the reviewing court must accept as true the allegations of 'the non-moving party'—here the Unions and the California Attorney General." (citation omitted)); Cal.'s BIO, *supra* n.7, at 11 ("On a motion for judgment on the pleadings, courts must accept as true the allegations in the *non-moving* party's pleadings.").

[10] The Union Defendants claim that undersigned counsel "suggest[ed] … that the *Friedrichs* defendants were to blame" for the absence of a factual record in that case. Unions' Opp. at 6. But as is self-evident from the quotation that Defendants include, counsel was simply making the point that the defendants could not be heard to complain of the lack of a factual record, given that they had agreed that judgment had to be entered in their favor. There was nothing to "blame" anyone for; the point was that the Court did not need a factual record and the defendants' arguments to the contrary were contradicted by their own prior position.

[11] *See* Unions' Br., *supra* n. 5, at 14 ("This Court should be particularly unwilling to overrule *Abood* given the 'fact-poor record[]' before it." (citation omitted)); Cal.'s Br., *supra* n.5, at 46 ("[T]here is no basis in the record of this case—which petitioners affirmatively chose not to develop—to suggest that the line between 'chargeable' and 'nonchargeable' expenses is too difficult to discern.").

Just as Defendants were not prejudiced in *Friedrichs*, they will not be prejudiced here by the Court's entry of the only order that the law permits. As in *Friedrichs*, the only facts that matter are once again undisputed: under color of state law, the Union Defendants exact fees from nonmembers and require nonmembers to opt out of subsidizing nonchargeable expenses.[12] Those facts are all that the Supreme Court needs to resolve the constitutionality of the agency shop and the opt-out requirement. If the Court were to grant review, it would not then *decide* that anyone's assertions are true or false. Instead, it would simply resolve the purely legal question of whether *Abood* and *Mitchell* correctly foreclosed challenges to the agency shop and opt-out regimes as *a matter of law,* even *assuming* the truth of Plaintiffs' allegations. That Court is quite familiar with the difference between assuming the truth of allegations for purposes of answering a legal question and conclusively resolving factual disputes; as noted above, the Supreme Court routinely decides constitutional questions on the basis of pleadings.

Just as clearly, *this Court* obviously recognizes that facts assumed for purposes of appeal do not bind it in any subsequent proceedings on remand. If, after assuming the truth of Plaintiffs' allegations for purposes of appeal, the

[12] *See* Compl. ¶ 55 ("Under color of state law [], Defendant Local Unions have entered into agency-shop agreements" that "requir[e] all teachers in these districts to either join the unions or pay agency fees to the unions."); *id.* ¶ 56 ("For each school district in which Plaintiffs are employed, … the district automatically deducts … pro rata shares from teachers' paychecks … [and] sends the deducted amounts directly to the Defendant Local Union or CTA."); *id.* ¶ 61 ("[T]he opt-out process … requires [nonmembers] to object to the nonchargeable portion of the agency fee within approximately six weeks."); Unions' Ans. ¶ 55 ("The Union Defendants admit … that Defendant local unions have entered into collective bargaining agreements with the school districts where Plaintiffs … are employed as teachers and that those agreements include fair share fee provisions."); *id.* ¶ 56 ("The Unions Defendants admit the allegations of Paragraph 56 of the Complaint, but only to the extent that they are intended to describe payroll deductions of fair share fee amounts for fee payers and objectors"); *id.* ¶ 61 ("The Union Defendants further admit that [] non-members then have as much as a month and a half to decide whether to check a box and return a form opting to pay only the objector fee … and that, if they do so, the union does not collect the non-chargeable portion of the fee from … such individuals.").

Supreme Court concludes that any factual issues are relevant, this Court will be entirely capable of adjudicating those issues. But what this Court should not do is guess at what disputes *might* be relevant in the wake of a hypothesized decision partially invalidating *Abood* or *Mitchell*, and conduct proceedings to resolve those hypothetical issues. These Defendants tried to persuade the Ninth Circuit to do exactly that in *Friedrichs*, but that court rightly refused.[13] This Court should do the same.

CONCLUSION

The Court should reject Defendants' transparent attempt at wasting this Court's resources solely to delay appellate review. This Court is not a moot court, and Defendants have no right to irrelevant fact-finding on claims that are foreclosed by binding precedent. Because every day this case remains in this Court is a day that Defendants can maintain practices whose constitutionality is open to serious doubt, Plaintiffs respectfully request that the Court dispense with the hearing currently scheduled for April 28 and enter judgment on the pleadings as soon as is practicable.

[13] *Compare* Unions' Opp to Mot. for Summ. Affirm. at 3-4, *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095 (9th Cir. Oct. 14, 2014) ("[H]owever settled may be the substantive law that applies to this appeal, the parties' briefs present very different accounts of the facts, as framed by the pleadings, that are relevant to Plaintiffs' constitutional claims…. To properly frame the issues presented for decision, the Unions respectfully submit that, rather than affirming the district court's order without opinion, it would be appropriate for this Court to recount and consider the relevant facts that bear on Plaintiffs' claims."), *with Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014) ("Upon review, the court finds that the questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent.").

Dated: April 14, 2017

JONES DAY

By: /s/ John A. Vogt
John A. Vogt

Attorneys for Plaintiffs