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Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey’s Public Sector Unionism Data Sufficiently Reliable?

Patrick Wright†

INTRODUCTION

In *Abood v. Detroit Board of Education*, the Supreme Court held that it was constitutional for public-sector unions to charge non-union members an obligatory fee (commonly called an agency fee or less often a service fee) to defray the costs of contract negotiation and grievance administration related to a mandatory collective bargaining agreement that controlled the terms and conditions of the nonmembers’ employment. In *Knox v. Service Employees International Union* and *Harris v. Quinn* a majority of the Supreme Court questioned the rationale in *Abood* supporting agency fees. Specifically, the *Harris* majority questioned whether an agency fee was necessary in order for a state to have a statutory scheme supporting exclusive bargaining representatives. Both *Knox* and *Harris* were decided without the need to resolve whether *Abood* remained good law. That question was directly at issue in *Friedrichs v. California Teachers Ass’n*, which was argued in front of the full court and ended in a 4-4 tie after Justice Scalia’s passing. In the Supreme Court’s opinions in *Harris*, the parties’ and the amici’s briefs in *Friedrichs*, and at oral argument in *Friedrichs*, there was significant discussion about whether unions would survive without agency fees.

This paper is meant to examine some of the major available evidence to help determine whether an agency fee is necessary to satisfy

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† Vice President for Legal Affairs, Mackinac Center for Public Policy.

2 Id. at 222.
5 Id. at 2640–41.
6 136 S. Ct. 1083 (2016) (mem.)
the state interest in having a viable bargaining partner in the mandatory public-sector collective bargaining context. It begins by looking at the union membership data gleaned from the Current Population Survey, a monthly 60,000 household survey sponsored by the Census Bureau and the Bureau of Labor Statistics. This survey obtains information on employment and unemployment and includes questions on union membership. The accuracy of the CPS data having been questioned by an amicus in Friedrichs and others, a second method is used—examination of state employer payroll dues and/or agency fee deductions to approximate union membership.

This payroll methodology calls into question the reliability of some CPS survey data for predicting and measuring the effect of agency fees or lack thereof on union viability in the public sector.

I. SYNOPSIS OF SUPREME COURT’S CASE LAW ON PUBLIC SECTOR BARGAINING AND UNION VIABILITY

In Abood, Detroit teachers challenged both Michigan’s statutory scheme permitting exclusive representation and the agency fee provision contained therein. In discussing the “principle of exclusive union representation,” the Supreme Court stated:

The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

In discussing agency fees, the Supreme Court noted: “The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money.” These tasks must be performed for both members and nonmembers. While recognizing that Michigan only

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8 Id. at 220–21.
9 Id. at 221.
10 Id.
made the “use of an agency [fee] in public employment” permissive rather than mandatory, the Supreme Court held such fees are constitutional since they have “been thought to distribute fairly the cost of [the union’s tasks] among those who benefit, and [they] counteract[] the incentive that employees might otherwise have to become ‘free riders’ to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.”

The Supreme Court began to reexamine the Abaad holding in Knox v. Service Employees. The Court stated that agency fees “constitute a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights.’” It was noted that free-rider arguments are “generally insufficient to overcome First Amendment objections.” The Court explained that acceptance of the concept of “labor peace” to justify “compelling nonmembers to pay a portion of union dues” was an “anomaly.”

In Harris v. Quinn, the Supreme Court considered whether Abaad should be extended to allow the imposition of agency fees on personal care providers who were considered less than “full-fledged state employees.” The Harris majority holding discussed Abaad’s perceived shortcomings at length.

The shortcoming that is the focus of this paper was the contention that exclusive representation requires agency fees: “[A] critical pillar of the Abaad Court’s analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation is dependent on a union or agency shop.” The Supreme 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. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee. Under federal law, in agencies in which unionization is permitted, “[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each

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11 Id. at 222, 229.
13 Id. at 2289.
14 Id.
15 Id. at 2290.
17 Id. at 2632–34.
18 Id. at 2634.
employee shall be protected in the exercise of such right.” 5 U.S.C. § 7102 (emphasis added).¹⁹

The *Harris* dissenters recognized that the majority’s logic imperiled *Abood* “as to all public employees.”²⁰ They attempted to defend the link between exclusive representation and agency fees. While recognizing that free-riding arguments usually fail, the dissenters noted there is “an essential distinction between unions and special-interest organizations generally.”²¹ They elaborated:

The law compels unions to represent—and represent fairly—every worker in a bargaining unit, regardless whether they join or contribute to the union. That creates a collective action problem of far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers. *In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty—as against financial self-interest—can explain their support.* Hence arises the legal rule countenancing fair-share agreements: *It ensures that a union will receive adequate funding, notwithstanding its legally imposed disability—and so that a government wishing to bargain with an exclusive representative will have a viable counterpart.*²²

The dissenters then questioned whether the personal care providers’ union would survive without agency fees and pointed to the fact that only around a third of federal employees who are covered by a collective bargaining agreement pay dues.²³ They argued:

And why, after all, should that endemic free-riding be surprising? Does the majority think that public employees are immune from basic principles of economics? If not, the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions.²⁴

Thus, the dissenters defended public-sector agency fees as the only way a union could remain a viable exclusive representative in collective bargaining with the government.

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¹⁹ Id. at 2640.
²⁰ *Harris*, 134 S. Ct. at 2651 (Kagan, J., dissenting).
²¹ Id. at 2656.
²² Id. (emphasis added).
²³ Id. at 2657 n.7.
²⁴ Id. at 2657.
Friedrichs v. California Teachers Association brought this issue directly into conflict. A group of California school teachers brought a direct challenge to Abood’s holding that agency fees were constitutional. In that case, this author (representing the Mackinac Center for Public Policy) endeavored to test Justice Kagan’s theory in two amicus briefs. The constitutional remedy sought in Friedrichs—permitting exclusive representation while prohibiting agency fees—would have had the same practical effect as a right-to-work law.

The briefs examined situations where two of the factors identified by Justice Kagan in her Harris dissent could be held constant—mandatory exclusive representation and the duty of fair representation (the requirement to treat both members and nonmembers fairly)—while the third—a mandatory agency fee or lack thereof—could be isolated. Given the state of the opposing opinions in Harris, if it could be shown that the effect of a lack of an agency fee would not be “too severe,” then the state interest in having a viable bargaining partner would not be sufficient to overcome the nonmembers’ First Amendment rights.

II. The Current Population Survey as a Means of Examining Union Viability in a Right-to-Work Setting

Data on union membership and worker representation most often comes from the U.S. Bureau of Labor Statistics (BLS), which describes itself as “the principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy.” The data on union membership are collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 households that obtains information on employment and unemployment among the nation’s civilian noninstitutional population age 16

25 136 S. Ct. 1083 (2016) (mem.) (per curiam).
28 The two Harris opinions did not discuss what level of union membership would lead to a threat to viability. Both generally discussed federal employees, which the dissent claimed had a 33% union membership rate, but neither opinion set out a constitutional threshold based on general union membership rates. Further, there was no detailed discussion of what a union must be able to do to be viable, no matter what the general membership rates are.
29 Justice Scalia passed after oral argument in Friedrichs and the case ended in a 4-4 tie leaving Abood as controlling.
and over.”  The BLS indicates comparable data exists back to 1983. The CPS has been described as “the principal data source from which researchers compile and obtain information on union membership and coverage for states, metropolitan areas, industries, and occupations.”

The Basic CPS Questionnaire has two labor union membership questions:

**ERNLAB**
On this job, (are/is) (name/you) a member of a labor union or of an employee association similar to a union?
Yes
No

**ERNCOV**
On this job, (are/is) (name/you) covered by a union or employee association contract?
Yes
No

These questions have been in use since 1977.

Part B Chapter 5.C of the CPS Interviewing Manual discusses that portion of the interview concerning “Union Membership and Coverage Concepts”:

> [Y]ou ask about labor union or employee association membership on the person’s sole or main job. Select “yes” for these questions if the person is a member of a labor union or an association that serves as a collective bargaining representative for the person.

> You will ask persons who are not members of a union or employee association whether or not (s)he is covered by a union or employee association contract at their sole or main job. Covered means: there is a contract between their employer and a union

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32 Id.
35 Hirsch & Macpherson, supra note 33, at 3.
or association that affects the wages, working conditions, and/or benefits at the job.\footnote{U.S. Census Bureau, Current Population Survey Interviewing Manual B5-4 (June 2013), https://www.census.gov/prod/techdoc/cps/CPS_Manual_June2013.pdf [https://perma.cc/ZG Y3-LXBX].}

At the certiorari stage of Friedrichs, using BLS data, the author of this article compiled private-sector union membership rates among union-represented workers from 2000 through 2014 from three categories of states: (1) states that never had right-to-work laws during that period ("agency-fee states"); (2) states that have had right-to-work laws during that entire period; and (3) Indiana, Oklahoma, and Michigan, each of which has adopted a right-to-work law since 2000.\footnote{2012 Ind. Acts 7 (codified at IND. CODE §§ 22-6-6-1–13); 2012 Mich. Pub. Act No. 348 (codified as amended in scattered sections of MICH. COMP. LAWS, ch. 423); OK. CONST., art. XXXIII, § 1A (passed September 2001).} To calculate the membership rate for a set of states in a given year, the number of union members in those states was divided by the number of workers under a union contract.

Private-sector numbers were chosen partly because they were easily accessible and involved a bargaining environment with both exclusive representation and a duty of fair representation—elements the Harris dissenters believed justified an agency fee. Private-sector data were also chosen because the state-by-state CPS data for private-sector employees allowed the impact of agency-fee requirements on union membership rates to be isolated by comparing states that require private-sector agency fees with those that do not.

In states with agency fees over the 14-year period, roughly 93\% of union-represented private-sector employees, on average, were full union members. In mixed-status states the number was 94\%, while in right-to-work states it was 84\%.\footnote{The Michigan Education Association: Members, Fee Payers, and Related Income, Fiscal Years 2005–2014, Mackinac Ctr. for Pub. Policy, http://www.mackinac.org/21020 [https://perma.cc/LQ3C-6AT5] (last visited Apr. 1, 2017).}
At the merits stage in *Friedrichs*, the raw CPS data for public-sector workers were run through a statistical analysis program. This program allowed very specific subsets to be extracted from the entire CPS data set, and it enabled the removal of federal employees from the CPS figures to thereby isolate state and local government employees’ union membership and union contract coverage data.\(^{39}\) Federal employees were removed since they are not governed by state and local labor laws.

\(^{39}\) These figures were compiled by James Sherk, then a research fellow in labor economics at the Heritage Foundation. The figures are available at MACKINAC CENTER FOR PUBLIC POLICY,
The focus was placed on states that mandated not only exclusive representation, fair representation, and an absence of agency fees (right-to-work), but also had a broad scope of collective bargaining. Ultimately, eight states met these requirements: (1) Florida; 40 (2) Idaho; 41 (3) Iowa; 42 (4) Kansas; 43 (5) Nebraska; 44 (6) Nevada; 45 (7) North Dakota; 46 and (8) South Dakota. 47 The aggregated CPS data for state and local government workers in these eight states yielded figures very similar to those for private-sector employees in right-to-work states. The union membership rate among workers covered by public-sector collective bargaining agreements ranges in percentage from the mid-70s to the low-80s.

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These 80% figures were in line with the union membership rate of the railway unions when the Railway Labor Act was amended to eliminate voluntary unionism in 1951.48

Thus, using the CPS method, the private sector and public sector right-to-work numbers were in alignment. These modern numbers also were roughly the same as the Railway Labor Act numbers when voluntary unionism was ended in 1951.

III. QUESTIONS AS TO CPS METHODOLOGY

A. Social Scientists’ Amicus Brief in Friedrichs

In Friedrichs, three academics questioned the CPS methodology presented here.49 Their pertinent argument related to what they called the free-rider rate.50 To compute this rate, the three social science professors expressed a preference for the School and Staffing Survey (SASS), which is limited to employees in elementary and secondary education and which is administered by the Department of Education’s National Center for Education Statistics, over the CPS.

Under their analysis, the membership rate of their group 2, which roughly correlates to the eight states that were used in this author’s public sector CPS analysis, would be 66% instead of around 80%.51 So, they agree with the use of public employee survey data, but would have used a survey that showed a slightly lower union membership result.

B. Economic Policy Institute Paper

This author’s Friedrich amicus briefs also led to a briefing paper from the Economic Policy Institute authored by Jeffrey H. Keefe.52 Keefe used CPS to indicate that: “In RTW states between 2000 and 2014, free-riders averaged 20.3 percent of public-employee bargaining units.”53 After setting forth the two CPS questions related to union

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50 As defined previously, the term “union membership rate” is the number of union members covered by a collective bargaining agreement divided by the total number of workers—union and nonunion—covered by a collective bargaining agreement. In both agency fee and right-to-work situations, it measures those that do not want to be union members. So, if two out of ten employees under a collective bargaining agreement were not members, the union membership rate would be 80% and there would be 20% nonmembers. In their brief, the three social science professors measure the “free-rider rate” as “the number of such free-riders divided by benefiting population, which includes the free-riders and those contributing.” Id. at 13. In a right-to-work situation, this would lead to the same 80-20 split, but they would refer to it as a 20% free-rider rate instead of an 80% union membership rate. In an agency-fee situation, the results would be different. If eight out of ten were union members, the union membership rate would still remain 80% but the free-rider rate would drop to 0% since nonmembers would be forced to contribute an agency fee.
51 They use their terminology of a 34% free-rider rate, which in this circumstance is the same as a 66% membership rate. See id. at 23.
53 Id. at 6. Like the social science professors, Keefe also calculates the free-rider rate as opposed to union membership rate. His union membership rate would be 79.7%, which was right in line with this author’s private and public sector right-to-work CPS calculations.
membership and contract coverage, he indicated that the CPS methodology may have some flaws. He claimed in states where mandatory public sector bargaining is prohibited the coverage rate is too high.\textsuperscript{54} The second possible flaw was whether SASS should be used instead of CPS. Keefe states the SASS “data show that free riders are 35–40 percent of employees covered by a collective bargaining agreement when agency fees are banned, and not the 20–25 percent derived from the CPS data; these data discrepancies are not easily resolved.”\textsuperscript{55}

Thus, both the social scientists’ brief and the EPI paper indicated that SASS might be more accurate than CPS. Further, both note that the union membership rate for SASS in right-to-work scenarios is around 60 to 65% instead of 80% using the CPS method.

\textbf{IV. THE PAYROLL DEDUCTION METHODOLOGY}

The best place for information on union membership and representation would be the unions themselves. They would know how many people are covered under a particular collective bargaining agreement and the membership status of those covered. Further, given the unified membership and dues structures of many of the prominent public sector unions, the national unions would have aggregated information as well as information on a state-by-state basis. But, there is no union reporting requirement that provides all the necessary data points for determining aggregate union membership for public sector employees.

Some unions do have to file a LM-2, which is an annual financial report that labor organizations are required to submit with the U.S. Office of Labor Management Standards.\textsuperscript{56} But, LM-2s are union specific and not every union has to file one. Further, in Schedule 13, which discusses membership, the LM-2s require both full members and agency fee payers to be set out, but there is no mention of nonmember employees who are covered by a collective bargaining agreement and pay no dues (essentially right-to-work).\textsuperscript{57} The CPS’s relative advantage over LM-2s is that it covers all workers and has a specific question on membership.

Having considered government data from the unions (LM-2s) and other government data from the unionized employees (CPS), a logical third place to turn is to the public employers. Traditionally, many of

\textsuperscript{54} Id.

\textsuperscript{55} Id. at 6–7.

\textsuperscript{56} See generally 29 C.F.R. § 403.2

these employers have allowed dues deductions to be made. By determining what percentage of employees that are part of a collective bargaining unit has dues deducted for the union, it might be possible to ascertain a union membership percentage floor. But, there are thousands of public-sector employers in the United States. Obtaining information from all these employers would be too daunting of a task. Therefore, the payroll-deduction information was sought for state employees (from all 50 states). Many of the states use a centralized payroll system for state employees even if the employees work in numerous departments. This made data accumulation easier.\textsuperscript{58}

There are some drawbacks with a paycheck-withdrawal methodology. For instance, while a particular state with mandatory bargaining may allow paycheck withdrawals, there may be no requirement that the union and public employer agree to such in any particular collective bargaining agreement. Further, many states require an employee provide affirmative consent before a payroll deduction is allowed. Some employees who do not give this consent may be paying dues or agency fees by other methods. Thus, the union membership figure derived through the payroll method is at least a membership “floor”—a low-end boundary condition not based on estimates or surveys for how many public-sector union members are in a state.\textsuperscript{59}

Generally categorizing the state bargaining laws and setting forth their paycheck withdrawal schemes will help provide context to the paycheck-withdrawal survey results. The first category has states that have mandatory bargaining and permit agency fees.\textsuperscript{60} States in the second category have mandatory bargaining, but have no agency fees.\textsuperscript{61} One state, Wisconsin, has mandatory bargaining, no agency fees, and no dues deduction and constitutes a third category. States in the fourth category largely prohibit mandatory collective bargaining yet permit “voluntary dues” (here generally defined as dues not required under the union security clause of a collective bargaining agreement). The fifth

\textsuperscript{58} Many states have state universities with their own payroll and governing structure. To avoid the complications of having to navigate all of these, university employees were not included within the instant survey. The university employees are included within the CPS count of state employees, however, which will mean that the CPS is looking at all state employees and the payroll method is looking at all non-university state employees.

\textsuperscript{59} The author would like to thank research assistant Justin Davis for handling the overwhelming majority of the calls and also the various state officials who took time to understand the nuanced issues and to provide their assistance.

\textsuperscript{60} To the extent that a rough comparable for this category is sought under the previously computed CPS method, the best one would be private sector agency fee states that came in with a union membership percentage around 93%. No CPS numbers were previously computed for public sector agency fee states.

\textsuperscript{61} A rough comparable for this category would be the eight states that had broad public sector bargaining without agency fees.
category has states with no mandatory bargaining and prohibit voluntary dues collection.

For comparison’s sake, a new custom cut of CPS data was generated—that of state employees. A table of the results from that CPS data for each category is followed by the payroll methodology.

A. States With Mandatory Bargaining, Agency Fees, and Dues Collection

The states in this category are:
(1) Alaska;
(2) California;
(3) Connecticut;
(4) Delaware;

62 Alaska allows mandatory bargaining for state employees. ALASKA STAT. §§ 23.40.250(5)–(7). Union dues and agency fees may be collected by the state. ALASKA STAT. § 23.40.220; see also ALASKA STAT. § 23.40.225 (discussing collective bargaining agreements that include “a union shop or agency shop provision”).


Its payroll deductions numbers were provided by email. Email from Frolan R. Aguiling, Chief Counsel for the California Dep’t of Human Res., to Justin A. Davis (Oct. 18, 2016, 06:53 EST) (on file with author). The numbers were compiled from the PDB4707R Report for the December 2015 Pay Period. For total state employee numbers, see CALIFORNIA DEPT OF FIN., SCHEDULE 4: POSITIONS AND SALARY COST ESTIMATES AT 2016 BUDGET ACT, http://www.ebudget.ca.gov/2016-17/pdf/Enacted/BudgetSummary/BS_SCH4.pdf [https://perma.cc/E3CM-VVML].

64 Connecticut allows mandatory bargaining for state employees. CONN. GEN. STAT. § 5-270. Agency fee and dues deductions are permitted. CONN. GEN. STAT. § 5-280.

Its payroll numbers were obtained in a series of emails. Email from Natalie A. Braswell, Esq., Assistant Comptroller and Gen. Counsel, Connecticut Office of the State Comptroller, to Justin A. Davis (Sept. 30, 2016, 09:14 EST); Id. (Oct. 12, 2016, 01:21 EST); Id. (Oct. 12, 2016, 01:23 EST); Id. (Oct. 12, 2016, 01:42 EST) (all on file with author).

65 Delaware allows mandatory bargaining for state employees. DEL. CODE ANN. tit. 19, § 1302(o) and (p). Delaware permits deductions for dues and agency fees. DEL. CODE ANN. tit. 19, § 1319.

Its payroll numbers were obtained in an email. Email from Brenda Lakeman, Dir. of Human Res. Mgmt. and Statewide Benefits at the Delaware Office of Mgmt. and Budget, to Justin A. Davis (Dec. 23, 2016, 02:03 EST) (on file with author).

Ms. Lakeman explained a discrepancy in the Delaware numbers: “The reason that the employees with a Union deduction is higher than those appearing covered [by a collect bargaining agreement] is that many School job records do NOT show the union code, but yet the employees are correctly set up to have the DSEA deduction taken. Unfortunately that is what the data shows.”
Fair Share Fee Calculations.

Information, but that came out in 2013. Office of the Legislative Auditor, State Employee Union (on file with author). Minnesota also put out an audit report of fair share fees that contains similar information, but that came out in 2013. Office of the Legislative Auditor, State Employee Union Fair Share Fee Calculations.

Agency fees exist, Agency fees are permitted. 5

Advisor, Massachusetts Office of Labor Relations, to Justin A. Davis (Nov. 23, 2016, 10:09 EST) (on file with author).


Its total state employment number is from Maryland Dep’t of Budget and Mgmt., Annual Personnel Report for Fiscal Year 2015 3 http://www.dbm.maryland.gov/employees/Documents/AnnualPersonnelReportFY15.pdf Annual [https://perma.cc/L4TH-XCN]. Its payroll numbers were obtained by email. Email from Catherine Hackman, Deputy Exec. Dir., Maryland Dep’t of Mgmt. and Budget, to Patrick J. Wright (January 11, 2017, 03:46 EST) (on file with author).


Its payroll numbers were obtained via email. Email from Greg McKinney, Labor Relations Advisor, Massachusetts Office of Emp. Relations, to Justin A. Davis (Nov. 23, 2016, 10:09 EST) (on file with author). Of the 1,993 covered employees not paying full dues through payroll, 176 are agency fee payers who are paying those fees through payroll deductions. Id.

Minnesota allows mandatory bargaining for state employees. Minn. Stat. § 179A.03. Agency fees are permissible. Minn. Stat. § 179A.06. While it is clear that payroll deductions for agency fees exist, Office of the Legislative Auditor, State Employee Union Fair Share Fee Calculations, http://www.auditor.leg.state.mn.us/ped/pedrep/fairshare.pdf [https://perma.cc/MY5E-TWM6], the statutory or administrative basis for this is unclear.

Its payroll numbers were obtained via email. Email from Carolyn J. Trevis, Assistant State Negotiator, Labor Relations Div., Minnesota Mgmt. & Budget, to Justin A. Davis (Oct. 17, 2016) (on file with author). Minnesota also put out an audit report of fair share fees that contains similar information, but that came out in 2013. Office of the Legislative Auditor, State Employee Union Fair Share Fee Calculations.


(6) Illinois; Illinois allows mandatory bargaining for state employees. 5 Ill. Comp. Stat. 315/3. Agency fees are permitted. 5 Ill. Comp. Stat. 315/6(a), (o). Payroll deductions for dues and agency fees are allowed. 5 Ill. Comp. Stat. 315/6(f).

Its payroll numbers were obtained via email. Email from Robert P. Osgood, Staff Attorney, Illinois Office of the Comptroller, to Justin A. Davis (Nov. 7, 2016, 10:37 EST) (on file with author).


Its payroll numbers were obtained by email. Email from Avery T. Day, Chief Legal Counsel, Office of Maine Governor Paul LePage, to Justin A. Davis (Oct. 5, 2016, 08:49 EST). Email from Avery T. Day, Chief Legal Counsel, Office of Maine Governor Paul LePage, to Justin A. Davis (Nov. 14, 2016, 10:31 EST) (both on file with author).


Its total state employment number is from Maryland Dep’t of Budget and Mgmt., Annual Personnel Report for Fiscal Year 2015 3 http://www.dbm.maryland.gov/employees/Documents/AnnualPersonnelReportFY15.pdf Annual [https://perma.cc/L4TH-XCN]. Its payroll numbers were obtained by email. Email from Catherine Hackman, Deputy Exec. Dir., Maryland Dep’t of Mgmt. and Budget, to Patrick J. Wright (January 11, 2017, 03:46 EST) (on file with author).


Its payroll numbers were obtained via email. Email from Greg McKinney, Labor Relations Advisor, Massachusetts Office of Emp. Relations, to Justin A. Davis (Nov. 23, 2016, 10:09 EST) (on file with author). Of the 1,993 covered employees not paying full dues through payroll, 176 are agency fee payers who are paying those fees through payroll deductions. Id.

(10) Minnesota; Minnesota allows mandatory bargaining for state employees. Minn. Stat. § 179A.03. Agency fees are permissible. Minn. Stat. § 179A.06. While it is clear that payroll deductions for agency fees exist, Office of the Legislative Auditor, State Employee Union Fair Share Fee Calculations, http://www.auditor.leg.state.mn.us/ped/pedrep/fairshare.pdf [https://perma.cc/MY5E-TWM6], the statutory or administrative basis for this is unclear.
(11) Missouri; 72
(12) Montana; 73
(13) New Hampshire; 74
(14) New Jersey; 75
(15) New Mexico; 76
(16) New York; 77

72 Missouri allows state employees to engage collective bargaining. Mo. Rev. Stat. §§ 105.500–105.510. But, that bargaining is limited to “meet, confer and discuss . . . proposals.” While there is no explicit mention of agency fees in the bargaining statute, such fees are permissible. Schaffer v. Board of Educ. of City of St. Louis, 869 S.W.2d 163 (Mo. Ct. App. 1993). Upon a state employee’s written authorization, dues can be withheld. Mo. Rev. Stat. § 33.103.


Its payroll numbers were obtained via email. Email from Guy R. Krause, OA/Div. of Pers. Research Assoc., Pay, Leave and Reporting Section, to Justin A. Davis (Oct. 3, 2016, 02:56 EST) (on file with author).


Its payroll numbers were obtained by email. Email from Therese Simpson, Senior Human Res. Analyst, Montana Dep’t of Admin. to Michael Manion, Chief Legal Counsel, Montana Dep’t of Admin. (Oct. 11, 2016, 01:55 MST) (on file with author).


Its payroll numbers were obtained by email. Email from Matthew Newland, Manager of Emp. Relations, New Hampshire Div. of Pers., to Justin A. Davis (Oct. 28, 2016, 04:00 EST) (on file with author).


Its payroll numbers were obtained via email. Email from Nadia Jordan, Office of Mgmt. and Budget, Centralized Payroll, New Jersey Dep’t of Treasury, to Justin A. Davis (Nov. 7, 2016, 10:36 EST); Email from Nadia Jordan, Office of Mgmt. and Budget, Centralized Payroll, New Jersey Dep’t of Treasury, to Justin A. Davis (Oct. 26, 2016, 02:59 EST).


Its payroll numbers were obtained via email. Email from Sandy Martinez, State Pers. Officer, New Mexico Div. Dir. of Labor Relations to Justin R. Najaka, New Mexico State Pers. Dir. (Oct. 6, 2016, 01:36 PST) (on file with author).

77 New York permits state employees to engage in mandatory collective bargaining. N.Y. Civ. Serv. § 204; N.Y. Civ. Serv. § 2(5). Agency fees are permissible. N.Y. Civ. Serv. § 208(3)(b). Upon the employee’s written request, dues may be deducted. N.Y. Civ. Serv. § 208(1)(b). Agency fees are automatically deducted. N.Y. Civ. Serv. § 208(3)(b).
(17) Ohio;\textsuperscript{78} (18) Oregon;\textsuperscript{79} (19) Pennsylvania;\textsuperscript{80} (20) Rhode Island;\textsuperscript{81} (21) Vermont;\textsuperscript{82} and (22) Washington.\textsuperscript{83}

Its payroll numbers were obtained via a freedom of information request. New York Office of State Comptroller, Freedom of Information Law Request #2016-507 (Nov. 29, 2016) (on file with author). Within the 36,355 not paying dues by paycheck withdrawal, there are 35,607 agency fee payers.\textsuperscript{Id.}

\textsuperscript{78} Ohio allows mandatory bargaining for state employees. OHIO REV. CODE ANN. § 4117.01. Agency fees are permitted. OHIO REV. CODE ANN. § 4117.09(C). Payroll deductions of agency fees do not require the employee’s written authorization. \textit{Id.} The total employee and collective bargaining membership numbers can be found at DEPT OF ADMIN. SERVS., MONTHLY REPORT—NUMBER OF STATE EMPLOYEES (Sept. 7, 2016), http://www.das.ohio.gov/Portals/0/DASDivisions/HumanResources/pdf/Trends%20Reports-8-2016.pdf [https://perma.cc/73VE-MYQZ]. The payroll numbers were received via email. Kevin Milstead, DAS Human Res. Div., Ohio Dept of Admin. Serv., to Justin A. Davis (Oct. 30, 2016, 07:49 EST) (on file with author).

\textsuperscript{79} Oregon allows mandatory bargaining for state employees. OR. REV. STAT. § 243.650. Agency fees are permitted, but union security agreements are sometimes subject to a separate vote from the general collective bargaining agreement. OR. REV. STAT. § 243.650(10). Upon written request of an employee, payroll deductions for dues are proper. OR. REV. STAT. § 292.055. Payroll deductions for agency fees do not require a written authorization. \textit{Id.}

Its payroll numbers were obtained by email. Email from Matthew Shelby, Communications Strategist, Oregon Office of the Chief Operating Officer to Justin A. Davis (Oct. 11, 2016 07:36 PST) (on file with author).

\textsuperscript{80} Pennsylvania allows mandatory bargaining for state employees. 43 PA. CONST. STAT. § 1101.301. Agency fees are permissible. 43 PA. CONST. STAT. § 1102.3. Agency fees may be collected with a notice to the employer. \textit{Id.} Its total state employee number (for 2016) can be found at Workforce Statistics, SRCY OF ADMIN., http://www.oabis.state.pa.us/SGWS/2016/SGWS_MAIN.html, then clicking “Overall Complement” and then clicking “Union/Management Status” and adding the entries. The remaining payroll numbers were obtained via email. Email from Wha Lee Strohecker, Agency Open Recorders Officer, Pennsylvania Governor’s Office of Admin., to Justin A. Davis (Nov. 2, 2016, 02:54 EST).

\textsuperscript{81} Rhode Island allows mandatory bargaining for state employees. R.I. GEN. LAWS § 36-11-1. Nonmembers must pay an agency fee that is deducted from their paychecks. R.I. GEN. LAWS § 36-11-2. Union dues can be withheld upon an employee request. R.I. GEN. LAWS § 36-6-17.

Its payroll numbers were obtained via email. Email from Melanie Maraccio, Acting Exec. Dir. of Human Res./Pers. Admin., Rhode Island Dep’t of Admin., to Justin A. Davis (Nov. 14, 2016, at 04:26 EST); Email from Melanie Maraccio, Acting Exec. Dir. of Human Res./Pers. Admin., Rhode Island Dep’t of Admin., to Justin A. Davis (Oct. 31, 2016, at 08:19 EST) (on file with author).

\textsuperscript{82} Vermont allows mandatory bargaining for state employees. VT. STAT. ANN. tit. 3, § 902. Agency fees are permitted. \textit{Id.} at § 902(19). Agency fees and dues can be gathered through payroll deduction. \textit{Id.}

Its payroll numbers were obtained via email. Email from Amerin Aborjaily, Records Officer, Vermont Dep’t of Human Res., to Justin A. Davis (Nov. 8, 2016, 10:18 EST); Email from Amerin Aborjaily, Records Officer, Vermont Dep’t of Human Res., to Justin A. Davis (Oct. 21, 2016, 09:58 EST) (on file with author).

\textsuperscript{83} Washington allows mandatory bargaining for state employees. WASH. REV. CODE § 41.80.005. Agency fees are permitted. WASH. REV. CODE § 41.80.100. Both fees and dues can be deducted at a collective bargaining agent’s request. \textit{Id.}

The total number of state employees is from a website. \textit{Number of Employees and Headcount Trends, OFFICE OF FIN. MGMT.,} http://hr.ofm.wa.gov/workforce-data-planning/workforce-data-
<table>
<thead>
<tr>
<th>State</th>
<th>CPS Total Employment</th>
<th>CPS Coverage</th>
<th>CPS Union Members</th>
<th>CPS Covered Non-Members</th>
<th>CPS Membership Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>35,856</td>
<td>18,090</td>
<td>16,794</td>
<td>1,297</td>
<td>92.8%</td>
</tr>
<tr>
<td>California</td>
<td>807,020</td>
<td>399,492</td>
<td>374,643</td>
<td>24,849</td>
<td>93.8%</td>
</tr>
<tr>
<td>Connecticut</td>
<td>80,863</td>
<td>47,647</td>
<td>47,647</td>
<td>0</td>
<td>100.0%</td>
</tr>
<tr>
<td>Delaware</td>
<td>45,129</td>
<td>15,525</td>
<td>14,459</td>
<td>1,066</td>
<td>93.1%</td>
</tr>
<tr>
<td>Hawaii</td>
<td>78,313</td>
<td>42,688</td>
<td>42,037</td>
<td>651</td>
<td>98.5%</td>
</tr>
<tr>
<td>Illinois</td>
<td>262,982</td>
<td>127,951</td>
<td>122,373</td>
<td>5,578</td>
<td>95.6%</td>
</tr>
<tr>
<td>Maine</td>
<td>23,511</td>
<td>14,919</td>
<td>10,967</td>
<td>3,952</td>
<td>73.5%</td>
</tr>
<tr>
<td>Maryland</td>
<td>129,315</td>
<td>32,593</td>
<td>26,375</td>
<td>4,218</td>
<td>87.1%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>133,596</td>
<td>72,618</td>
<td>71,014</td>
<td>1,603</td>
<td>97.8%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>130,476</td>
<td>54,323</td>
<td>54,323</td>
<td>0</td>
<td>100.0%</td>
</tr>
<tr>
<td>Missouri</td>
<td>157,849</td>
<td>30,547</td>
<td>23,798</td>
<td>6,749</td>
<td>77.9%</td>
</tr>
<tr>
<td>Montana</td>
<td>38,258</td>
<td>12,952</td>
<td>11,642</td>
<td>1,310</td>
<td>89.9%</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>26,810</td>
<td>12,354</td>
<td>10,852</td>
<td>1,502</td>
<td>87.8%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>163,114</td>
<td>88,117</td>
<td>80,504</td>
<td>7,613</td>
<td>91.4%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>77,121</td>
<td>15,202</td>
<td>11,938</td>
<td>3,264</td>
<td>78.5%</td>
</tr>
<tr>
<td>New York</td>
<td>368,974</td>
<td>230,740</td>
<td>227,556</td>
<td>3,184</td>
<td>98.6%</td>
</tr>
<tr>
<td>Ohio</td>
<td>191,251</td>
<td>53,635</td>
<td>50,416</td>
<td>3,219</td>
<td>94.0%</td>
</tr>
<tr>
<td>Oregon</td>
<td>110,593</td>
<td>55,888</td>
<td>49,166</td>
<td>4,522</td>
<td>91.6%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>205,135</td>
<td>117,687</td>
<td>109,723</td>
<td>7,964</td>
<td>93.2%</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>23,382</td>
<td>14,255</td>
<td>13,623</td>
<td>632</td>
<td>95.6%</td>
</tr>
<tr>
<td>Vermont</td>
<td>20,056</td>
<td>11,277</td>
<td>10,342</td>
<td>935</td>
<td>91.7%</td>
</tr>
<tr>
<td>Washington</td>
<td>212,719</td>
<td>116,572</td>
<td>113,207</td>
<td>3,365</td>
<td>97.1%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,323,523</strong></td>
<td><strong>1,582,870</strong></td>
<td><strong>1,495,398</strong></td>
<td><strong>87,472</strong></td>
<td><strong>94.5%</strong></td>
</tr>
</tbody>
</table>

Source: Mackinac Center for Public Policy

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trends/number-employees-and-headcount-trends [https://perma.cc/23NY-DEAZ]. Its payroll numbers were obtained by email. Emails from Nathan Sherrard, Assistant Legal Affairs Counsel, Washington Office of Fin. Mgmt., to Justin A. Davis (Jan. 16, 2017, 09:31 EST) (on file with author); Id. (Nov. 1, 2016, 06:06 EST) (on file with author).
Before comparing the CPS numbers with the payroll method, some anomalies in the payroll method must be explored. Remember that payroll methodology is supposed to set a membership floor. Yet Alaska, Hawaii, Maryland and Montana are all at 100%, and Delaware is at
102.9%. Delaware is a data tracking error. 84 Hawaii makes any agency-fee payer seek a rebate outside the payroll process. 85 With Alaska, Maryland, and Montana, the problem appears to be errors in the data provided.

Those anomalies aside, both the CPS and payroll methods show union membership rates above 80% when the states are aggregated. The CPS’s membership rate is nearly 15% higher at 94.5%. Remembering that payroll methodology is supposed to operate as a floor, the results do not seem inconsistent with each other.

B. Mandatory Bargaining, No Agency Fees, and Dues Collection

These states are:
(1) Colorado; 86
(2) Florida; 87
(3) Iowa; 88

84 Delaware’s payroll numbers were obtained in an email. Email from Brenda Lakeman, Dir. of Human Res. Mgmt. and Statewide Benefits at the Delaware Office of Mgmt. and Budget, to Justin A. Davis (Dec. 23, 2016, 02:03 EST) (on file with author).
Ms. Lakeman explained a discrepancy in the Delaware numbers: “The reason that the employees with a Union deduction is higher than those appearing covered [by a collective bargaining agreement] is that many School job records do NOT show the union code, but yet the employees are correctly set up to have the DSEA deduction taken. Unfortunately, that is what the data shows.”
86 Since 2007, Colorado allows mandatory bargaining for state employees. Colo. Exec. Order No. D 028 07 (Nov. 2, 2007). The executive order does not specifically permit agency fees. Id. This order also permits state employee unions to collect dues through payroll. Id. at II(E). COLO. REV. STAT. § 24-50-104(e) and (f).
Its total employment number was obtained by email. Email of Jolina Lewis, Open Records Request Liaison, Colorado Exec. Dir.’s Office, to Justin A. Davis (Oct. 18, 2016, 12:20 EST) (on file with author). Its payroll coverage number was obtained by compiling all of the eligible employees from Colorado’s eight 2008 state employee bargaining unit certification elections.

Florida also has a unique manner in which it resolves impasses with regard to state employees in the public sector. If an impasse occurs between the Governor and a collective bargaining agent, either party notifies the Florida Public Relations Commission and the matter is then forwarded to the state Legislature for resolution. FLA. STAT. § 447.403. The “legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues.” FLA. STAT. § 447.403(d). Thus, the state Legislature has almost unlimited discretion in resolving these disputes. This may help explain its low union membership rate under the payroll method.

Its total employment number were obtained via email. Email from Jill Hough, Gov’t Analyst, Florida Bureau of State Payers, to Justin A. Davis (Nov. 3, 2016, 03:10 EST) (on file with author). The payroll numbers were obtained via email. Email from James J. Parry, Assistant General Counsel, Florida Dep’t Mgmt. Serv., to Patrick J. Wright (Sept. 13, 2016, 03:53 EST) (on file with author).
88 Iowa allows mandatory bargaining for state employees. IOWA CODE § 20.3. Agency fees are prohibited. IOWA CODE § 20.8(4). Iowa permits dues checkoffs, but such checkoffs require a written
(4) Kansas;\textsuperscript{89} 
(5) Michigan;\textsuperscript{90} 
(6) Nebraska;\textsuperscript{91} 
(7) North Dakota;\textsuperscript{92} and 
(8) South Dakota.\textsuperscript{93}

request from the employee. IOWA CODE § 20.9.

Its total employment number was obtained via email. Email from Tami Wiencik, Legislative
Liaison/Pub. Info. Officer, Iowa Dept of Admin. Officer to Justin A. Davis (Nov. 16, 2016, 06:19
P.M. EST) (on file with author). The payroll numbers were also obtained via email. Email from
Tami Wiencik, Legislative Liaison/Pub. Info. Officer, Iowa Dept of Admin. Officer to, Patrick J.

\textsuperscript{89} Kansas allows mandatory bargaining for state employees. KAN. STAT. ANN. § 75-4432. Kansas
has a right-to-work clause in its Constitution. KAN. CONST. art. XV, § 12. Kansas has payroll
deduction, but such checksoffs require a written request from the employee. KAN. STAT. ANN. § 75-
5501(d).

Its payroll numbers were obtained via email. Email from John Yeary, Kansas Dep't of Ad-
min., to Justin A. Davis (Dec. 16, 2016, 05:52 EST) (on file with author).

\textsuperscript{90} Michigan's state employees are governed by the State Civil Service Commission. MICH.
CONST. art. XI, § 5. Mandatory collective bargaining is allowed, but agency fees are not permitted.
United Auto Workers v. Green, 870 N.W.2d 867, 876 (2015). Before Green, agency fees were per-
mitted and the Michigan Civil Service Commission could withhold dues and agency fees upon an

Both its total employment and payroll numbers are from the MICH. CIV. SERV., ANNUAL
documents/mdcs/WF_2016_3rd_Quarter_Complete_528226_7.pdf [https://perma.cc/ULD7-UUJ8].

\textsuperscript{91} Nebraska allows mandatory bargaining for state employees. NEB. REV. Stat. §§ 81-1369–
81-1388. Dues deduction appears to be on a contract-by-contract basis. See LABOR CONTRACT (July
ma.cc/4VRV-TN5].

Its payroll numbers were obtained via email. Email from Melissa Lee Trueblood, Econ. De-
velopment Research Manager, Nebraska Dept of Econ. Development, to Justin A. Davis (Novem-
ber 4, 2016, 01:46 EST) (on file with author); Email from William Wood, Chief Negotiator/Adm'r,
Nebraska Dep't Admin. Serv., to Patrick J. Wright (Sept. 16, 2016, 03:45 EST) (on file with author).

\textsuperscript{92} North Dakota allows state employees to engage in mandatory bargaining. N.D. CENT. CODE
§ 34-11.1-01. But, these employees cannot be forced to pay agency fees. N.D. CENT. CODE § 34-11.1-
05(6). An employee can request that their dues be withheld from their paycheck. N.D. CENT. CODE
§ 34-11.1-03.

Its payroll numbers were obtained by telephone. Telephone interview by Justin A. Davis
with Tina M. Bauer, North Dakota State Payroll Manager (Oct. 28, 2016).

\textsuperscript{93} South Dakota allows mandatory bargaining for state employees. S.D. CODIFIED LAWS § 3-
18-1. Agency fees are prohibited. S.D. CODIFIED LAWS § 3-18-2. Dues deductions are permitted
upon an employee's written authorization. S.D. CODIFIED LAWS § 3-10-8; S.D. ADMIN. R.
39:03:01:03.

Its payroll numbers were obtained by email. Email from Tony Venhuizen, Chief of Staff to
South Dakota Governor Dennis M. Daugaard to Justin A. Davis (Nov. 16, 2016 03:07 MST) (on file
with author).
In contrast to the figures for the category 1 states, the difference between union membership rate under the CPS method and the payroll method is stark. In category 2, the difference in membership rates is sizable at 54.6% with the CPS method at 83.2% and the payroll method at 28.6%. Note too that Michigan only clearly entered this category as
a result of a 2015 court case. Its exclusion would drop the aggregate union membership floor under the payroll method to 17.1%.

Category 2 is essentially mandatory bargaining with right-to-work, which is essentially the constitutional remedy that was being sought in Friedrichs. Category 2 will be discussed more fully below.

C. Mandatory Bargaining, No Agency Fees, No Dues Collection

The sole state with these characteristics is Wisconsin.

<table>
<thead>
<tr>
<th>Mandatory bargaining, no agency fees, no dues collection</th>
<th>CPS Total Employment</th>
<th>CPS Coverage</th>
<th>CPS Union Members</th>
<th>CPS Covered Non-Members</th>
<th>CPS Membership rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wisconsin</td>
<td>165,813</td>
<td>37,334</td>
<td>26,535</td>
<td>10,799</td>
<td>71.1%</td>
</tr>
</tbody>
</table>

Source: Mackinac Center for Public Policy

Wisconsin's unique public bargaining laws seemingly prevent its experience from providing much guidance nationally.

D. No Mandatory Bargaining and Voluntary Dues Collection

The states in this group are:

1. Arizona;

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94 Supra note 90.

95 Wisconsin allows mandatory bargaining for state employees. Wis. Stat. § 111.82. The scope of that bargaining is quite limited, however. Wis. Stat. § 111.91. Agency fees are prohibited. Wis. Stat. § 111.85. Dues deductions are also generally prohibited. Wis. Stat. § 111.845. Police, however, can have dues, agency fees, and payroll deductions.

Its payroll numbers were obtained by email. Email from John M. Wiesman, Compensation Specialist, Wisconsin Dep't of Admin., to Justin A. Davis (Dec. 7, 2016, 10:47 EST) (on file with author). Those under the “Payroll Coverage” and “Payroll Union Members” entries are just state police. Id.

(2) Arkansas;\(^{97}\)
(3) Idaho;\(^{98}\)
(4) Indiana;\(^{99}\)
(5) Kentucky;\(^{100}\)
(6) Louisiana;\(^{101}\)
(7) Mississippi;\(^{102}\)
(8) Nevada;\(^{103}\)
(9) North Carolina;\(^{104}\)


Its payroll numbers were obtained by email. Email from Kevin Donnellan, Deputy Dir., Arizona Dep’t of Admin., to Justin A. Davis (Oct. 14, 2016, 01:16 EST) (on file with author).

\(^{97}\) Arkansas does not have mandatory bargaining for state employees. Voluntary union dues can be withheld. Ark. Code §§ 19-4-1602(7), (9).

Its payroll numbers were obtained email. Email from Vicki Mills, Assistant Pers. Adm’r, Payroll, Arkansas Dep’t of Fin. and Admin., to Patrick J. Wright (Feb. 2, 2017, 11:51 EST) (on file with author).

\(^{98}\) Idaho does not allow state employee bargaining. Payroll dues deductions are permitted with an employee’s written authorization. Idaho Code § 44-2004(1); Idaho Code § 44-2011. But payroll deductions for union political activities are prohibited. Idaho Code § 44-2004(2). This payroll-deduction ban due to political activity ban was upheld by the Supreme Court. Ysursa v. Pocatello Educ. Ass’n, 555 U.S. 353 (2009).

Its payroll numbers were obtained by email. Email from Audrey Musgrave, Deputy State Controller, to Justin A. Davis (Oct. 5, 2016, 02:52 EST) (on file with author).


Its payroll numbers were not obtained.


Its payroll numbers were obtained by email. Email from Public Records Request, Louisiana Div. of Admin. to Patrick J. Wright (Feb. 14, 2017, 04:38 EST).


Its total state employee number was obtained by email. Email of Chuck McIntosh, Mississippi Dep’t of Fin. and Admin., to Justin A. Davis (Dec. 15, 2016, 05:02 EST) (on file with author).

Its number of dues payers was obtained by email. Email of Chuck McIntosh, Mississippi Dep’t of Fin. and Admin., Patrick J. Wright (Feb. 13, 2017, 11:15 EST) (on file with author).

As noted above, Nevada had broad public sector bargaining, but that does not include state employees. Right-to-work applies to the public employees that can engage in public bargaining. Nev. Rev. Stat. § 288.140. Nevada allows state employees to have union dues deducted from their paychecks. Nev. Rev. Stat. § 281.129.

Its payroll numbers were obtained by email. Email from Mary Woods, Pub. Info. Officer, Nevada Dep’t of Admin., to Justin A. Davis (Sept. 30, 2016, 10:47 PST) (on file with author).

\(^{103}\) North Carolina bans mandatory bargaining for state and local public employees. N.C. Gen.
(10) Oklahoma;\(^{105}\)
(11) South Carolina;\(^{106}\)
(12) Tennessee;\(^{107}\)
(13) Texas;\(^{108}\)
(14) Utah;\(^{109}\)
(15) Virginia;\(^{110}\)
(16) West Virginia;\(^{111}\) and

STAT. § 95-98. Despite, this ban, voluntary dues payments through paycheck withdrawals are permitted. N.C. GEN. STAT. § 143B-426.40A(g).

Its state employee number was obtained by email. Email from Paula Woodhouse, Interim Dir., North Carolina Office of State Human Res., to Justin A. Davis (Dec. 17, 09:54 EST) (on file with author). Its payroll numbers are from an audit report. NORTH CAROLINA OFFICE OF STATE AUDITOR, EMP. ASS’NS — REPORT OF MEMBERSHIP COUNT 3 (Nov. 23, 2015), http://www.ncauditor.net/EPSWeb/Reports/FiscalControl/FCA-2014-9202.pdf [https://perma.cc/4MEA-5HYW].

\(^{105}\) Oklahoma does not permit state employees to engage in mandatory collective bargaining. State employees whose union has at least 2000 members may have their dues withheld from their paycheck. OKLA. STAT. tit. 62, § 34.70.

Its payroll numbers were not obtained.


Its payroll numbers were not obtained.

\(^{107}\) Tennessee does not permit mandatory collective bargaining for state employees. Tennessee allows payroll deductions for union dues. TENN. CODE ANN. § 8-23-204.

Its payroll numbers were obtained by email. Email from Ashley Fuqua, Legislative Liaison & Pub. Info. Officer, to Patrick J. Wright (Feb. 10, 2017, 10:06 EST) (on file with author). Email from Ashley Fuqua, Legislative Liaison & Pub. Info. Officer, to Justin A. Davis (Feb. 2, 2017, 01:15 EST) (on file with author).

\(^{108}\) Texas prohibits mandatory collective bargaining by state employees. TEX. GOV’T CODE ANN. § 617.002. Upon written authorization, state employees may have their dues withdrawn. Texas Office of Attorney General, Opinion No. MW-130 (January 25, 1980).

Its payroll numbers were obtained via letter. Letter from James G. Nolan, Assoc. Deputy Gen. Counsel, Texas Comptroller of Pub. Accounts, to Annie Spilman, NFIB/Texas Legislative Dir. (Nov. 29, 2016) (on file with author).

\(^{109}\) Utah does not have mandatory state employee bargaining. Utah allows voluntary dues deductions upon the employee’s written request. UTAH CODE ANN. § 34-32-1. But payroll deductions for union political activities are prohibited. UTAH CODE ANN. § 34-32-1.1. This payroll-deduction ban due to political activity ban was upheld by the Tenth Circuit. Utah Educ. Ass’n v. Shurtleff, 565 F.3d (10th Cir. 2009).

Its payroll numbers were obtained via email. Email of Mark Austin, Utah State Payroll Manager, to Patrick J. Wright (Dec. 30, 2016, 12:53 EST) (on file with author).

\(^{110}\) Virginia bans mandatory collective bargaining for state employees. VA. CODE ANN. § 40.1-57.2. While there is no statutory basis, voluntary dues withholdings are allowed.

Its total employment number was obtained by email. Email of Felix Sarfo-Kantanka, Jr., Deputy Sec’y of Admin., Office of Virginia Governor Terry McAuliffe, to Justin A. Davis (Oct. 6, 2016, 02:06 EST) (on file with author). Payroll withholding numbers were obtained by email. Email of Doug Page, Dir. Fin. and Admin., Virginia Dep’t of Accounts, to Justin A. Davis (Feb. 1, 2017) (on file with author).

\(^{111}\) West Virginia does not permit state employees to engage in mandatory collective bargaining. It does allow state employees to have voluntary dues deducted. W. VA. CODE § 12-3-13B.

Its payroll numbers were obtained via email. Email of Joe. F. Thomas, Acting Director, West Virginia Div. of Pers., to Justin A. Davis (October 27, 2016, 03:15 EST) (on file with author).

Its state employee number was obtained by email. Email of Lori Eichheim, Wy. Admin. & Info. Human Res. Div., to Justin A. Davis (Dec. 21, 2016 02:40 MST) (on file with author).
By definition, all of the “CPS coverage” numbers in category 4 should be zero since these states do not allow state employee mandatory bargaining. The fact that they are not likely means there is a problem in the manner the CPS frames its union membership and union coverage questions. According to the CPS Interviewing Manual, the “CPS Union Members” numbers should also be zero since the employees are not members of “a labor organization that serves as a collective bargaining agent for the person” because there is no mandatory bargaining and therefore no collective bargaining representative.

Also, note the differences between the total employee numbers. Under the CPS method, there are over 2.5 million state employees, while under the payroll methodology there are about 750,000. Some of this
difference can be accounted for due to the CPS including state university employees, yet it is doubtful that there are 1.75 million state university employees that would thereby fully account for the difference.

E. No Mandatory Bargaining and At Least Some Limits to State-Assisted Dues Collection

The states in this category are Alabama\textsuperscript{113} and Georgia.\textsuperscript{114}

<table>
<thead>
<tr>
<th>No mandatory bargaining and ban state-assisted dues collection</th>
<th>CPS Total Employment</th>
<th>CPS Coverage</th>
<th>CPS Union Members</th>
<th>CPS Covered Non-Members</th>
<th>CPS Membership rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>99,378</td>
<td>27,385</td>
<td>25,334</td>
<td>2,526</td>
<td>90.9%</td>
</tr>
<tr>
<td>Georgia</td>
<td>185,754</td>
<td>19,980</td>
<td>17,308</td>
<td>2,672</td>
<td>86.6%</td>
</tr>
<tr>
<td>Total</td>
<td>284,952</td>
<td>47,365</td>
<td>42,642</td>
<td>5,198</td>
<td>89.1%</td>
</tr>
</tbody>
</table>

Source: Mackinac Center for Public Policy

<table>
<thead>
<tr>
<th>No mandatory bargaining and ban state-assisted dues collection</th>
<th>Payroll Total Employment</th>
<th>Payroll Coverage</th>
<th>Payroll Union Members</th>
<th>Payroll Covered Non-Members</th>
<th>Payroll Membership rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>33,834</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>N/A</td>
</tr>
<tr>
<td>Georgia</td>
<td>56,961</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>N/A</td>
</tr>
<tr>
<td>Total</td>
<td>90,795</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Source: Mackinac Center for Public Policy

\textsuperscript{113} Alabama does not permit state employees to engage in mandatory collective bargaining. There are some conflicting statutes on dues withdrawals. ALA. CODE. § 36-1-4.3(a) specifically allows withdrawal for “membership dues.” A withdrawal can be cancelled by the employee after two months’ notice. Id. But, in 2010, Alabama prohibited state and local government from collecting dues for entities that engage in “political activity.” ALA. CODE § 17-17-5(b). Because most unions engage in some sort of political activity, dues withdrawals for them are generally banned. The Eleventh Circuit rejected a facial challenge to the ban. Alabama Educ. Ass’n v. State Superintendent of Educ., 746 F.3d 1135 (11th Cir. 2014).

Its state employee numbers were obtained by email. Email from Kathleen Baxter, Alabama Deputy State Comptroller, to Justin A. Davis (Dec. 12, 2016, 06:51 EST) (on file with author).

\textsuperscript{114} Georgia bans state employees from payroll deductions for union dues. GA. CODE ANN. § 45-7-54(e).

Its state employee number was obtained by email. Email from Nicole Long, Dir., Compensation and Benefits, Georgia Human Res. Admin., to Justin A. Davis (Dec. 15, 2016, 01:28 EST) (on file with author).
In category 5, there is also the same volume of total employees issue that arose in category 4. Under the CPS methodology there are nearly three times as many state employees and, again, it is unlikely that state university employees can make up the difference. As in category 4, the “CPS coverage” and “CPS Union Members” numbers should be zero and are not.

V. UNION VIABILITY IN LIGHT OF FINDINGS

The payroll methodology raises the question whether there are serious flaws with the CPS data that is being accumulated in relation to public sector unionism, which may undercut that specific subset of CPS data’s use in assessing union viability. But the payroll methodology also provides some new evidence that unions can survive without agency fees.

The first issue is the CPS data. The gap in union membership in category 2 between the CPS method and the payroll method is massive. Before entirely discounting the CPS, it should be noted that its union membership percentage from 2000 to 2014 (80%) is closer to the SASS figure (66%) than is the payroll union membership percentage. Further, the CPS union membership rate is in line with the union membership rate in existence when the Railway Labor Act was amended.

But, the differences discussed in Categories 2, 4, and 5 seem to indicate there must be some fault with the CPS. While I have taken the position that the CPS labor questions and the explanatory guide mean that union membership should only occur where there is mandatory bargaining, perhaps many of those being interviewed and performing the interviews fail to understand the significance of the mandatory bargaining portion of the labor questions and are claiming or recording union membership wherever there is a union regardless of the exclusive bargaining component. This could, at least in part, explain why the CPS figures for union membership are higher, but would not explain why the CPS numbers of total employees is so much higher than the payroll method.

Turning to the union viability question, using just the CPS numbers would mean that unions are viable bargaining partners. It is difficult to believe that the Harris dissenters would argue that a union with 80% of those in the unit paying full dues would be somehow unfit to meet the state interest in having a viable bargaining partner. But, in category 2, the CPS method shows an 83.2% union membership rate while the payroll method is at 28.6%. Category 2 is the situation most like the constitutional remedy sought in Friedrichs—mandatory bargaining and a lack of an agency fee.
More specifically, under the payroll method, there are states like Florida at a 10.5% membership rate and Colorado at 5.5%, even though CPS indicates Florida has a union membership rate of 80.1% and Colorado has a rate of 94.3%. Florida and Colorado have the two lowest union membership rates in category 2 using the payroll methodology.

The largest state employees’ union in Florida is AFSCME with 47,653 represented state employees and 1,369 of those employees having dues withdrawn by the state. The second largest was Teamsters Local Union No. 2011, which had 17,909 represented state employees and 4,436 of those employees having their dues withdrawn. Florida Public Employees Council 79 of AFSCME is the signatory of the “Master Contract” with the State of Florida. It did not file an LM-2. Local 2011 did file an LM-2, and it claimed that it had 4,456 members, which is right in line with the payroll method number.

The Master Agreement between Florida and Florida Public Employees Council 79 indicates that the union is the certified representative of four separate units and that these certifications occurred in 1976, twice in 1978, and once in 1981. Thus, this union has been able to serve as an exclusive bargaining agent for around four decades without an agency fee.

The Master Agreement between Florida and Teamsters Local Union No. 2011 indicates that the union was certified in 2011. However, in December of 2016, as a result of an election, the new certified bargaining agent for this unit became the Police Benevolent Association. The Police Benevolent Association had previously represented these workers from 1985 to 2011. Thus, this unit has a low membership rate, yet unions are actively seeking to represent it.

Colorado Wins, the state employee union in Colorado, also did not file an LM-2. The Colorado certifications occurred in 2008. As with

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115 BUREAU OF LAB. STAT., supra note 30.
116 Id.
120 State of Florida and The Teamsters Loc. Union No. 2011, Agreement, http://www.dms.myflorida.com/content/download/86949/497952/SSU_FY_2015-16_Agreement.pdf [https://perma.cc/FJN5-E5SD.] However, in December of 2016, as a result of an election the new certified bargaining agent for this unit became the Police Benevolent Association thereby making that unit the second largest in Florida. The Police Benevolent Association had previously represented these units from 1985 to 2011. Florida Public Employment Relations Commission Certifications 1902, 1779, and 667.
121 Supra note 84.
Florida, the low union membership rates have not prevented long-term representation of the units by the union.

Assuming the payroll method membership rate numbers are correct for Colorado and Florida, it appears that the state employees’ unions in these states have remained viable. Both states have had long-running unions serve as collective bargaining agents despite no agency fees and low membership rates, which calls into question the Harris dissenters’ concern that without agency fees a union will not be able to “attract sufficient dues to adequately support its functions.”

Perhaps future research will indicate unions with low membership rates like those in Florida and Colorado have been kept viable by subsidies from national unions that have agency-fee requirements. But, in the case of Florida and Colorado unions discussed above, only Teamsters Local Union No. 2011 has filed an LM-2, and that document did not disclose such a subsidy. The national AFSCME LM-2 disclosed that Florida Public Employees Council 79 made health insurance payments to the national organization, but did not receive any subsidies from it. But, Colorado Wins is receiving subsidies from the Service Employees International Union (around $1.1 million) and the American Federation of Teachers ($430,817).122

Oddly, at oral argument in Friedrichs, counsel for the unions and the State of California repeatedly forwent direct requests from the Justices to discuss facts surrounding union viability.123 Further, with Florida and Colorado, there is no simple explanation why under the payroll method their union membership numbers would be so low, while Iowa’s, which is also in category 2, is slightly over 50%.124

Turning to category 4, both the CPS data and the payroll method provide some other interesting numbers. The CPS method should have all states within this category with CPS coverage numbers of zero by definition. But, they do not, somehow measuring thousands of people who are members of nonexistent mandatory bargaining unions. This failure calls into question the efficacy of the CPS questions and instructions as it relates to public sector unionism.

122 SEIU 2016 LM-2 (file number 000-137) at Schedule 15; AFT 2016 LM-2 (file number 000-012) at Schedule 15.

123 Transcript of Oral Argument at 50–52, 56–63, 71–72, 79–80, Friedrichs v. California Teachers Ass’n, 136 S. Ct. 1083 (2016) (No. 14-915). To the extent that further evidence is required, the unions are the best source of the membership and coverage information and if the matter were to arise in discovery in future litigation, the trial court should consider the limitations shown here under the CPS and payroll methods.

124 Michigan’s 84.6% union membership rate under the payroll method is traceable to its long history as an agency fee state, a history that only clearly ended in 2015.
On union viability, again, the constitutional question presented in *Friedrichs* was whether agency fees must be permitted so that states can have viable exclusive representative bargaining partners. Category 4 is for states that do not have exclusive representatives and therefore necessarily do not have agency fees. What is interesting are the numbers from North Carolina and Arkansas. In both states, more than 40% of all state employees pay union dues voluntarily to a union that is not an exclusive bargaining agent. Note too, that these 40% figures are not “union membership rates” as defined in this paper. Rather, they are voluntary contributors divided by total state employees, whereas the union membership rate for categories 1, 2, and 3 is union members divided by total state employees covered by a collective bargaining agreement (obviously less than total state employees). The Arkansas and North Carolina payroll method numbers are difficult to reconcile with the *Harris* dissenters’ views as to union viability. But, as with category 2 of the payroll method, it is difficult to explain why states within category 4 have divergent numbers.

Turning to the question presented in the title of this article, the answer is at best unclear. The large gap in the CPS numbers and the payroll numbers presents significant doubt about the reliability of the CPS public sector unionism numbers. These numbers have been collected for decades and are used in more than constitutional litigation. At a minimum, this paper should lead the Bureau of Labor Statistics to audit its state and local public sector unionism numbers.

As to the larger constitutional question, the question of the reliability of CPS may be irrelevant. If the CPS union membership numbers for category 2 are accurate, union viability cannot seriously be questioned. But, while the payroll methodology numbers raise concerns about the accuracy of the CPS numbers, those same payroll methodology numbers provide strong evidence that agency fees are not necessary to have a viable union. Even where union membership rates are quite low, we see unions that have served as viable collective bargaining agents for long periods of time.

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125 Whether these concerns would seep into the CPS private sector union numbers is unknown. It may be that private sector union law being uniform throughout the country and well understood, there would be less confusion than there is with 50 different legal regimes covering state and local public sector unionism.