

Plenary Two

Taylor Law at 50

May 10, 2018 | 10:45 a.m.-12:00 p.m.

The Potential Legal and Legislative Ramifications of *Janus v. AFSCME*

Including:
Outline and PowerPoint

Decision and Briefs

The Potential Demise of the Agency Fee and
Its Impact on Management and Unions

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The Potential Legal and Legislative Ramifications of *Janus vs. AFSCME*

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Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1956:** Voluntary dues check-off instituted for NYC workers prior to the grant of collective bargaining rights.
- **1958:** Executive Order 49: grants NYC workers the right to form, join, or assist a union or refrain from doing so.
- **1958:** Gen. Mun. Law §93-b permits membership dues deduction authorization to employee organizations.
- **1967:** Taylor Law and NYCCBL: grants public employees the right to form, join, and participate in unions as well as the right to refrain from doing so.

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1967:** Taylor Law: membership dues deduction and forfeiture as a penalty for union engaging, causing, instigating, encouraging or condoning a strike.
- **1968:** OLR General Counsel recommends support for state or local law to permit an agency shop.
- **1968:** Corp Counsel examines policy and legal issues associated with an agency shop.
- **1968:** Agency fees are a major stumbling block in settling the Ocean-Hill Brownsville strike by the UFT.

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1969:** Select Joint Legislative Committee on Public Employee Relations recommends amending the Taylor Law to permit the negotiability of an agency shop as a deterrent to strikes.
- **1969:** City-DC 37 reach written agreement imposing an agency fee for all non-members but Corporation Counsel concludes that it is not enforceable under state law.
- **1969:** Mayor Lindsay submits a legislative proposal to the State Legislature to permit New York City to negotiate an agency fee shop to “promote labor harmony and responsibility.”

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1970:** Hawaii becomes first state to mandate agency fees for non-members, followed by Rhode Island.
- **1970:** *Monroe-Woodbury Board of Education*, 3 PERB ¶3104 (1970), *pet. dismissed*, *Farrigan v. Helsby*, 68 Misc. 952 (Alb. Co., 1971) *aff'd*, 42 A.D. 2d 265 (1973).
Courts in other states reach similar conclusion finding that negotiated agency fee violated right to refrain from participating in a union under state law.
- **1972:** NYCCBL amended to permit the negotiability of agency fee.

Janus v. AFSCME

History of Dues Check-Off and Agency Fees

- **1977:** Shortly after *Abood v. Detroit Board of Education*, Taylor Law amended to mandate an agency shop for bargaining units of state workers, and making it a mandatory subject of bargaining in local government.
- **1980:** NYCCBL amended to make agency shop a mandatory subject of negotiations
- **1992:** Taylor Law amended to mandate agency fee deductions for non-members in all unit units represented by a certified or recognized public sector union. Subject to forfeiture if union organizes, supports, or condones a strike.

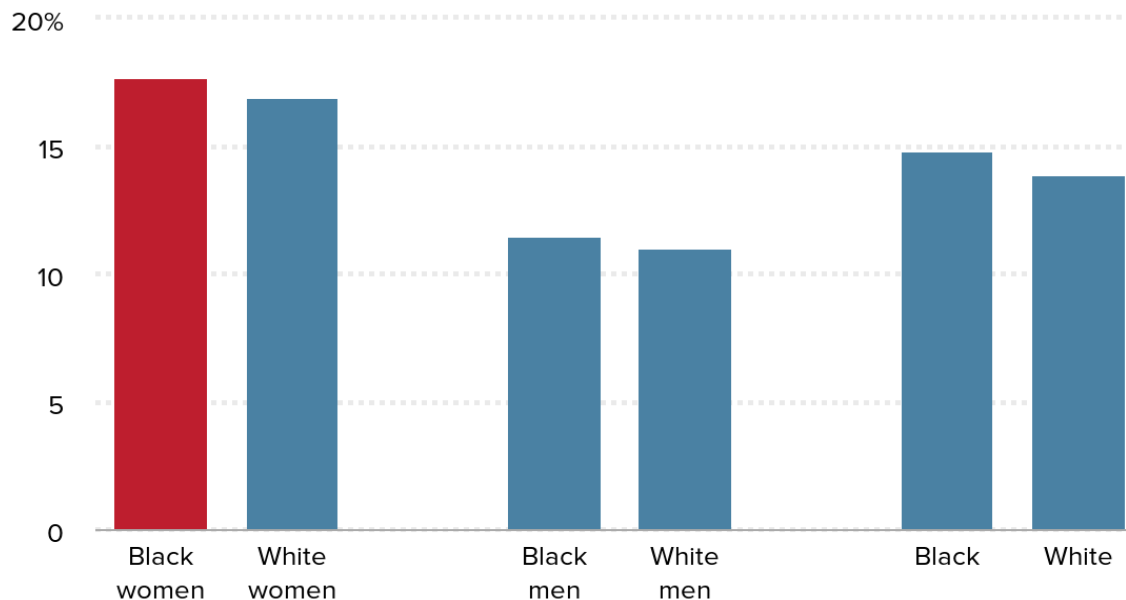
Janus v. AFSCME: Changes

- **Potential Changes to the Taylor Law and NYCCBL**
 - Modify Exclusive Representation for Grievances, etc.
 - Modify the Scope of the Duty of Fair Representation Concerning Discipline and Non-Contractual Issues
 - Require Non-Members to Pay a Fee to a Non-Profit.
 - Mandate Union Access and Employee Information
 - Create Members-Only Unions
 - Public Funding of Bargaining Fees for Non-Members
- **Pressure to Encourage Non- Members to Join**
 - Decreased Resources
 - Must Represent Non-Members Without Charge

Janus: Who Will Be the Most Adversely Impacted?

Black women have the highest share of workers in the public sector

Share of public sector employment, by gender and race, 2016



Source: EPI analysis of Current Population Survey Outgoing Rotation Group, 2016

Economic Policy Institute

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IN THE
Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE CITY OF NEW YORK AS
AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	5
I. The City authorized agency fees in response to a series of devastating strikes that caused massive public harm.....	5
A. The City's early adoption of public-sector collective bargaining proved insufficient to prevent labor disruption.	6
B. The City's use of agency shop provisions ultimately fortified a successful collective bargaining system.	13
II. Petitioner and amici ignore the compelling public interest of New York City and other jurisdictions in avoiding disruption of essential public services.	17
A. The City's circumstances render labor peace a particularly compelling interest here.	19

B. Governments' practical need to adapt to local circumstances points against constitutionalizing a single approach to public-sector labor relations.....	23
CONCLUSION.....	29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977).....	<i>passim</i>
<i>Bauch v. New York</i> , 21 N.Y.2d 599 (1968)	14
<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	25
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985).....	26
<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005).....	25
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Bill Jacket for Act of Aug. 3, 1977, ch. 67	15
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Local Law No. 53 (1967) of City of New York	10
Mich. Comp. Laws § 423.210(3)(c) (2017)	27
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Editorial, <i>This Beleaguered City</i> , N.Y. Times, Jan. 12, 1966.....	9
Emanuel Perlmutter, <i>Shots Are Fired in Refuse Strike; Filth Litters City</i> , N.Y. Times, Feb. 5, 1968.....	11
Emanuel Perlmutter, <i>Welfare Help in a City Curbed by a Walkout</i> , N.Y. Times, Jan. 5, 1965.....	8
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INTEREST OF AMICUS CURIAE

The City of New York submits this brief *amicus curiae* to describe how, decades ago, it came to embrace agency fees. This historical perspective will illuminate a key backdrop to *Abood v. Detroit Board of Education*, as well as the City's powerful interest, on behalf of all its residents, in the Court's preserving that decision now.

The story centers on a series of paralyzing public-sector strikes in the 1960s and 1970s that wreaked havoc on millions of City residents, including union members and their families but hardly limited to them. Garbage piled in streets, children missed weeks of school, and subways ground to a halt.

When a ban on strikes paired with collective bargaining and automatic dues collection proved an ineffectual response to the crisis, the City and State turned to agency shop agreements as part of a broader labor management strategy designed to promote labor stability. The City's collective bargaining system flourished thereafter, and its success has helped protect public health and safety ever since.

Over the decades, the reliable funding provided by agency fees has enabled the City's public-sector unions to pursue informed bargaining strategies that benefit the workforce broadly, rather than short-term or confrontational approaches designed to serve only the interests of those most willing to pay union dues. Effective collective bargaining

regimes are time- and resource-intensive, and must protect all represented employees, whether active or inactive, member or nonmember. Financial stability helps empower unions to build long-lasting and constructive bargaining relationships with the City, improving the provision of public services to the benefit of all residents. Indeed, disagreements between the City and its unions now rarely result in the sort of public disruption that plagued New Yorkers before agency fees were used.

Agency fees remain critically important. The City retains over 380,000 workers—more than all but five private employers in the country—and nearly all of those workers are currently represented by a union. It ranks first nationwide in the number of unionized workers it manages. And unionized public-sector workers are responsible for a wide range of services essential to the operation of the nation's densest and most populous city.

Overruling *Abood* would strip jurisdictions like New York City of a vital tool that has for years promoted productive relationships with public workforces. History shows that millions of everyday New Yorkers, including the City's public employees, would ultimately shoulder the cost of any resulting discord. That is a risk that should not be revived.

SUMMARY OF THE ARGUMENT

Under traditional collective bargaining schemes, employees have the right to select a union by majority vote to serve as their exclusive representative in negotiations. Agency shop provisions permit the selected union to charge employees who decline to join it a fee to defray the cost of its non-political activities that benefit the entirety of the workforce it represents. Forty years ago, this Court upheld the constitutionality of the public-sector agency shop in *Abood v. Detroit Board of Education*.¹ Relying on *Abood*, jurisdictions across the nation have legalized and negotiated the collection of agency fees to support public-sector collective bargaining.

New York City agrees with respondents that agency fees do not run afoul of the First Amendment, and that *Abood*'s decades-old precedent should be preserved. In support of these contentions, the City submits this brief to highlight two points which illustrate why agency fees are central to many public labor management schemes, and the strength of the government interest—as employer and protector of public welfare—in permitting their collection.

First, as the City's history demonstrates, agency fees are a key means of protecting the public from the disruption of government services caused by

¹ 431 U.S. 209 (1977).

labor disputes. The City embraced the agency shop as part of a comprehensive labor management system at a time when existing collective bargaining policy proved insufficient to yield a reliable alternative to strikes. The change helped to stabilize labor relations for the benefit of all City residents, not just the City's workers.

Second, and relatedly, the City's experience rebuts petitioner's crabbed portrayal of the government interest in agency fees. The collaborative benefits of strong bargaining relationships aside, Petitioner ignores the massive public harm that can arise from the disruption of public services, especially in large, densely populated cities like New York City. Given this threat, tools that reduce the risk of public-sector strikes—like agency fees—serve a compelling government interest that far exceeds mere administrative convenience. While different jurisdictions may reasonably find different labor management strategies better suited for their particular circumstances, *Abood* wisely left those choices to the political process.

ARGUMENT

I. The City authorized agency fees in response to a series of devastating strikes that caused massive public harm.

The City has found it essential public policy both to pursue collective bargaining with public-sector unions and to promote its effectiveness. Successful negotiations not only advance the welfare of wage-earners and their families, but more broadly serve the public's strong interest in prompt and successful resolution of labor disputes. In plain terms, the City's residents suffer when vital public services are interrupted by strikes.

The City had this consideration specifically in mind when it pushed for agency fees as part of a comprehensive program—based on successful private-sector models—that would protect the public from the catastrophic harm of public-sector strikes. The fees served to buttress the existing labor relations framework at a time when collective bargaining and union exclusivity alone proved inadequate to yield a sufficiently stable and robust alternative to strikes.

Certainly, no labor relations system is perfect. Nor can the impact of any of its components be measured in isolation. But it is undeniable that collective bargaining paired with agency fees has proven to be a successful formula for promoting labor peace in New York City (and across New York State).

A. The City’s early adoption of public-sector collective bargaining proved insufficient to prevent labor disruption.

Congress protected private-sector workers’ right to organize and bargain in the 1935 National Labor Relations Act.² For decades thereafter, however, no similar system existed for public-sector workers. Instead, many states, including New York, attempted to minimize the damage of public-sector labor disputes by simply banning government workers from striking and imposing harsh fines on violators.³

But banning strikes proved ineffective absent a mechanism to address and remedy the root causes of labor unrest.⁴ In response, the City pioneered collective bargaining as a means of promoting the fair resolution of public-sector labor disputes such that employees would not feel compelled to walk out on the job.

² See National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C § 157 (2012)).

³ See Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 256 (repealed 1967); see also Terry O’Neil & E.J. McMahon, Empire Ctr., SR4-07, *Taylor Made: The Cost and Consequences of New York’s Public-Sector Labor Laws* 3 (2007), available at <http://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf>.

⁴ O’Neil & McMahon, *supra* note 3, at 3 (noting Condon-Wadlin’s “mixed effectiveness” and that it ultimately was deemed “flawed and unenforceable”).

In 1958, Mayor Robert F. Wagner issued an executive order authorizing collective bargaining through public-sector labor unions for certain groups of City workers.⁵ The order recognized that “labor disputes between the City and its employees [would] be minimized, and that effective operation of the City’s affairs in the public interest [would] be safeguarded, by permitting employees to participate ... through their freely chosen representatives in the determination of the terms and conditions of their employment.”⁶ It positioned the City as “one of the first jurisdictions in the nation to adopt an essentially private sector model for municipal labor relations.”⁷ Similar rights would not be granted to any State workers until 1959,⁸ to federal public employees until 1962,⁹ or to New York State public employees until 1967.¹⁰

⁵ See Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York* 14 (1990) (describing the Executive Order); O’Neil & McMahon, *supra* note 3, at 4.

⁶ Exec. Order (Mayor Wagner) No. 49 § 2 (1958).

⁷ Michael Marmo, *More Profile than Courage: The New York City Transit Strike of 1966*, at 72 (1990).

⁸ Donovan, *supra* note 5, at v; Steven Greenhouse, *The Wisconsin Legacy*, N.Y. Times, Feb. 23, 2014, at BU1.

⁹ Exec. Order No. 10,988, 3 C.F.R. 321 (1959–1963).

¹⁰ See Public Employees’ Fair Employment Act (Taylor Law), ch. 392, §§ 202–03, 1967 N.Y. Sess. Laws 393, 396 (McKinney)

Without agency fees, the right to collectively bargain, even when paired with an outright ban on public-sector strikes, failed to prevent destructive labor disputes. New York City was the epicenter of a series of strikes from the mid-1960s through the early 1970s. State officials considered the City to be the poster child for the failure of then-existing law to “protect vital public interests.”¹¹ The effect on ordinary New Yorkers, including union members, was profound.

The wave of public-sector strikes began in 1965, when eight thousand welfare workers held a twenty-eight-day work stoppage, closing two-thirds of the City’s welfare centers.¹² It disrupted vital services for half a million welfare recipients, many of them children or seniors.¹³

(codified as amended at N.Y. Civ. Serv. Law §§ 202–03 (2015)); *see also* O’Neil & McMahon, *supra* note 3, at 6.

¹¹ Letter from Governor’s Comm. on Pub. Emp. Relations to Governor Nelson A. Rockefeller 10 (Jan. 23, 1969) (on file with the New York City Law Department).

¹² *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205 (2000); O’Neil & McMahon, *supra* note 3, at 3.

¹³ Emanuel Perlmutter, *Welfare Help in a City Curbed by a Walkout*, N.Y. Times, Jan. 5, 1965, at 1, 21; Emanuel Perlmutter, *Welfare Strike Due in City Today in Spite of Writ*, N.Y. Times, Jan. 4, 1965, at 1, 25.

Then, on the following New Year's Day, transit workers began a twelve-day strike—which persisted despite a court injunction—that cost the City's economy nearly \$9 billion in today's dollars.¹⁴ The strike effectively shut down the subway and bus system, overwhelming railroads, producing historic traffic jams, and closing public schools. This led the mayor to devise “the most urgent civil defense plan New York City has ever had to improvise for its own health and safety.”¹⁵ The New York Times captured the scene: “Seldom in its history has New York City been through more difficult days, ... and not since the draft riots of the Civil War has the normal course of life in [the] city been more profoundly altered for so many days.”¹⁶

In the aftermath of this vast turmoil, the City and State governments each made it a priority to promote the resolution of labor disputes through an

¹⁴ Donovan, *supra* note 5, at 19; Freeman, *supra* note 12, at 211; Marmo, *supra* note 7, at 151; O'Neil & McMahon, *supra* note 10, at 4; *see also News Summary and Index: The Major Events of the Day: Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33; *\$100-Million Loss Each Day Is Seen*, N.Y. Times, Jan. 5, 1966, at 1, 16

¹⁵ Editorial, *The Big Crush*, N.Y. Times, Jan. 3, 1966, at 26; Homer Bigart, *New Talks Today: Quill Scores Mayor—Says Walkout Could Last for a Month*, N.Y. Times, Jan. 2, 1966, at 1, 58; *Strict Rules Set on Travel into the City During Strike*, N.Y. Times, Jan. 1, 1966, at 1, 6.

¹⁶ Editorial, *This Beleaguered City*, N.Y. Times, Jan. 12, 1966, at 20.

effective bargaining system. In 1967, based largely on the City's recent experience, New York State enacted the Taylor Law to "protect[] the public against the disruption of vital public services ..., while at the same time protecting the rights of public employees."¹⁷ The law created a new comprehensive scheme for public-sector labor relations to address the root causes of labor unrest. It paired the State's prohibition on public employee strikes with an overarching process for collective bargaining, including an automatic deduction of union dues from paychecks (or "dues check-off"). The law also established a "new administrative agency charged exclusively with the regulation of public sector labor relations."¹⁸

Relying on a Taylor Law provision permitting local flexibility and experimentation, the City enacted its own Collective Bargaining Law, creating an Office of Collective Bargaining to

¹⁷ Governor's Comm. on Pub. Emp. Relations, *Final Report* 9 (1966) (internal quotation marks omitted) (on file with the New York City Law Department); *see also* Public Employees' Fair Employment Act (Taylor Law), ch. 392, § 200, 1967 N.Y. Sess. Laws 393, 394 (McKinney) (codified as amended at N.Y. Civ. Serv. Law § 200 (2015)) (describing its purpose as "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government").

¹⁸ Donovan, *supra* note 5, at v; O'Neil & McMahon, *supra* note 3, at 6.

“effectuat[e] sound labor relations and collective bargaining between public employers and institutions in the city and their employees.”¹⁹ The legislation took effect on the same day as the Taylor Law.²⁰

While a positive step, the new collective-bargaining laws, without agency shop provisions, failed to solve the problem of labor unrest. Instead, disagreements between the City and public-sector workers continued to impose enormous financial costs and public harm:

- In February 1968, a sanitation strike left the streets piled with nearly 100,000 tons of refuse—enough to fill the Titanic twice.²¹ This led to a proliferation of trash fires and the City’s first general health emergency since a 1931 polio epidemic.²² The New York Times likened the City to “a vast slum” as “mounds of refuse grew

¹⁹ Local Law No. 53 (1967) of City of New York.

²⁰ John V. Lindsay, City of N.Y., *Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act 7* (1969) (on file with the New York City Law Department).

²¹ See *Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 23; Tad Fitch, J. Kent Layton & Bill Wormstedt, *On a Sea of Glass: The Life and Loss of the RMS Titanic*, at App. A (2013).

²² See *Fragrant Days in Fun City*, *supra* note 21, at 23.

higher and strong winds whirled the filth through the streets.”²³

- Later in 1968, three teacher walkouts caused more than a million children to miss thirty-six days of school.²⁴ The City’s poorest children were hardest hit: 240,000 kids went without their free daily lunches.²⁵ Some parents fashioned improvised classrooms in churches and storefronts, while others resorted to smashing doors and windows to open their children’s schools.²⁶
- In January 1971, the City’s police force held an unscheduled walkout (or “wildcat strike”). For six days, less than a sixth of the City’s patrolmen reported for work.²⁷

²³ Emanuel Perlmuter, *Shots Are Fired in Refuse Strike; Filth Litters City*, N.Y. Times, Feb. 5, 1968, at 1, 37.

²⁴ See Leonard Buder, *Strike Cripples Schools, No Settlement in Sight*, N.Y. Times, Oct. 15, 1968, at 1, 38; *Strike’s Bitter End*, Time, Nov. 29, 1968, at 89.

²⁵ See *Strike’s Bitter End*, *supra* note 24, at 89.

²⁶ Leonard Buder, *Parents Smash Windows, Doors to Open Schools*, N.Y. Times, Oct. 19, 1968, at 1, 26; *Strike’s Bitter End*, *supra* note 24, at 89.

²⁷ Jeffrey A. Kroessler, *New York Year By Year: A Chronology of the Great Metropolis* 309 (2002); *The Police Strike in New York*, Chi. Trib., Jan. 21, 1971, at 20; Richard Reeves, *Police:*

The Chicago Tribune described a city “nakedly exposed to the threat of criminality on a massive scale.”²⁸

The continued turmoil made abundantly clear that more had to be done to forge an effective system of collective bargaining that would serve, consistently and in the long term, as a bulwark against public-sector strikes.

B. The City’s use of agency shop provisions ultimately fortified a successful collective bargaining system.

It was at this pivotal time that New York City looked to agency shop provisions to help create effective and stable collective bargaining and stem labor unrest. In 1969, the City’s Mayor urged the State Legislature to adopt “the agency shop, a recognized form of union security,” as a means of promoting both “labor harmony and responsibility.”²⁹

‘Attention Must Be Paid!’ Say the Men on Strike, N.Y. Times, Jan. 17, 1971, at E1.

²⁸ *The Police Strike in New York*, *supra* note 27, at 20.

²⁹ John V. Lindsay, City of N.Y., *Report and Plan Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City’s Labor Relations Practices into Substantial Equivalence with the Public Employees’ Fair Employment Act 9-10 (1969)* (on file with the New York City Law Department). The City pursued agency shop arrangements that same year.

Three years later, in 1972, the City explicitly amended its own Collective Bargaining Law to permit the negotiation of agency shop arrangements to the full extent permitted by state law.³⁰ Only a few years after that, and against the backdrop of repeated disruption of public services in New York and other cities, this Court decided *Abood*. The stakes would have been clear to any newspaper reader of the time—and could not have been lost on the Court.

After *Abood* resolved the constitutionality of agency fees in the public sector, New York State moved quickly to amend the Taylor Law to require state employees to pay agency fees and to designate them a mandatory subject of negotiation at the local level.³¹ The Legislature explicitly relied on

³⁰ See Local Law No. 1 (1972) of City of New York § 10; see also Presentation by the Majority Leader, Thomas J. Cuite 4, reprinted in New York Legislative Service, NYLS' New York City Legislative History: 1972 Local Law #1 (2010) at unnumbered 221. In *Bauch v. New York*, the Court of Appeals acknowledged that “[t]he maintenance of stability in the relations between the city and employee organizations, as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration.” 21 N.Y.2d 599, 607 (1968). The City interpreted agency shop arrangements as “further[ing] these objectives.” *Id.*

³¹ See Act of Aug. 3, 1977, ch. 677, § 3, 1977 N.Y. Sess. Law 1081, 1082 (McKinney); see also O’Neil & McMahon, *supra* note 3, at 24 n.17. In 1992, the State amended the Taylor Law to require agency shop arrangements for all public employees.

Aboud; a full copy of the decision was included in the bill's official legislative history.³²

The City strongly supported the amendment, urging the State Legislature that agency fees “generate a more stable and responsible labor relation atmosphere at the bargaining table” by providing unions with the organizational security necessary to resist “divisive elements”—those within and without their ranks who undermine meaningful negotiation—and thereby deterring strikes.³³ When the amendment passed, the Mayor directed city agencies to implement agreements with agency fees “expeditiously.”³⁴

Within only a few years of state-wide implementation of agency shop provisions, the rate of strikes plummeted by well over 90% across all of

See Act of July 24, 1992, ch. 606, § 2, 1992 N.Y. Sess. Laws 1650, 1650 (McKinney); *see also* O’Neil & McMahon, *supra* note 3, at 24 n.17.

³² *See* Bill Jacket for Act of Aug. 3, 1977, ch. 677.

³³ Richard L. Rubin, Memorandum in Support (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677; *see also* Memorandum from Donald H. Wollett, N.Y. State Office of Emp. Relations, to Judah Gribetz, Counsel to the Governor (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677 (noting that agency shop arrangements “provide[] to employee organizations the organizational security necessary for responsible collective bargaining”).

³⁴ Admin. Order (Mayor Beame) No. 38 (1977) (on file with the New York City Law Department).

New York State—a dramatic improvement in cooperation between labor and government.³⁵ As a result, “the last quarter-century has been an era of labor tranquility in ... state and local government throughout New York.”³⁶ Both workers and the general public have benefitted.

While the precise explanation for the reduction in strikes may be complex, government employers like New York City have good reason to conclude that agency shop provisions remain a cornerstone of successful strategies for promoting labor peace. Armed with a stable source of funding, public-sector unions have used collaborative approaches and adopted long-term perspectives in resolving labor disputes, rather than seeing strikes or other confrontational tactics as their only or best option. Agency fees also temper the influence of extreme elements and curb incentives for labor leaders to play up disputes or management intransigence as a means of attracting members.³⁷ A return to the

³⁵ In the 15 years after the first Taylor Law came into effect (1967–1982), there were, on average, about 20 public-sector strikes per year in New York State. *See* O’Neil & McMahon, *supra* note 3, at 10. By contrast, between 1983 and 2006, there were, on average, less than two per year. *Id.*

³⁶ *Id.*

³⁷ This mechanism is further explained in the brief of Amici Curiae Los Angeles County’s Department of Health Services, NYC Health + Hospitals, and Service Employees International Union.

failed labor regime of the past risks a serious regression which, as the City's history illustrates, would come at great cost to the public at large.

II. Petitioner and amici ignore the compelling public interest of New York City and other jurisdictions in avoiding disruption of essential public services.

The history of New York City's collective bargaining system demonstrates that petitioner and his amici frame the government interest in agency fees far too narrowly. In posing the relevant First Amendment question, petitioner mischaracterizes the pursuit of "labor peace" under *Aboud* as an interest in the mere administrative convenience of "bargaining with exclusive representatives."³⁸ Indeed, petitioner's brief does not even mention strikes or other work stoppages, when agency fees, as a matter of historical fact, were meant to help prevent them.³⁹

This amnesia about the origin and purpose of agency fees leads petitioner and his amici to overlook the substantial risk of injury to the public

³⁸ See Brief for the Petitioner at 61, *see also id.* at 53–60.

³⁹ See generally *Brief Amici Curiae of Los Angeles County's Department of Health Services, NYC Health + Hospitals, And Service Employees International Union Supporting Respondents*.

as a whole that can be posed by unsuccessful public-sector labor negotiations.⁴⁰ But these devastating strikes prompted the City and State to first embrace agency fees. When petitioner and his amici reduce this interest to mere “rational basis justification[s]” like limiting bargaining partners and avoiding confusion,⁴¹ they erase decades of history and ignore hardships endured by millions of City residents.

New York City’s experience also refutes petitioner’s assumption that the governmental interest in labor peace is uniform nationwide. We are a nation of many different governments—federal, state, and local—all with widely varying circumstances, histories, and needs that in turn may warrant different labor relations strategies.⁴²

⁴⁰ Similarly, when petitioner limits the advantages of “collectivization” to securing greater benefits for public-sector employees, he turns a blind eye to the broader public benefit that is confirmed by history, at least for some jurisdictions. *Id.* at 58–59.

⁴¹ *Id.* at 56; *see also id.* at 57–59.

⁴² This point shows the fallacy of the blunt comparison offered by Amicus Curiae Freedom Foundation and Economists between states with so-called “right-to-work” laws and those without them. That analysis fails to control for numerous relevant variables, and it cannot measure the impact of agency fees in any particular jurisdiction or predict the consequences of stripping them now. *See* Brief of the Freedom Foundation and Economists as Amicus Curiae in Support of the Petitioners at 6. As New York City’s experience

A constitutional rule that mandates a single answer to the agency shop question—the practical result of overruling *Abood*—is simply not workable.

A. The City’s circumstances render labor peace a particularly compelling interest here.

In New York City, the disruption of public services presents an untenable risk due to the City’s size, density, and diversity. It packs more than eight-and-a-half million residents into its tiny geography⁴³—outranking forty states⁴⁴ and standing as the nation’s most densely populated major city.⁴⁵ It also hosts 600,000 commuters each

illustrates, the unique challenges faced by some government employers, and the nature of the workforces they manage, render agency fees an essential tool, even if they are not uniformly necessary, or even sensible, nationwide.

⁴³ See *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2016 Population: April 1, 2010 to July 1, 2016*, U.S. Census Bureau (2017), <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANRSIP.US12A>.

⁴⁴ *Population Facts*, N.Y.C. Dep’t of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Dec. 6, 2017).

⁴⁵ Mike Maciag, *Mapping the Nation’s Most Densely Populated Cities*, *Governing* (Oct. 2, 2013), <http://www.governing.com/blogs/by-the-numbers/most-densely-populated-cities-data-map.html>.

weekday,⁴⁶ joined by over 60 million tourists each year.⁴⁷

Core governmental services loom large for the City's residents and visitors alike, leaving them especially vulnerable to labor disruption. For example:

- Public transportation is essential (less than 45 percent of City households own a car).⁴⁸ Mass transit provides nearly nine million rides every weekday, bringing employees and customers to thousands of businesses.⁴⁹

⁴⁶ Sam Roberts, *Commuters Nearly Double Manhattan's Daytime Population, Census Says*, N.Y. Times: City Room (June 3, 2013, 11:56 AM), <http://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says/>.

⁴⁷ Press Release, City of N.Y., *Mayor de Blasio Announces Total NYC Visitors Surpasses 60 Million for First Time* (Dec. 19, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/963-16/mayor-de-blasio-total-nyc-visitors-surpasses-60-million-first-time>.

⁴⁸ See *Physical Housing Characteristics for Occupied Housing Units: 2011-2015 American Community Survey 5-Year Estimates*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S2504/1600000US3651000.

⁴⁹ *The MTA Network*, Metro. Transp. Auth., <http://web.mta.info/mta/network.htm> (last visited Dec. 6, 2017).

- Garbage collection is critical for public health in the City’s incredibly dense environment. The volume of residents, visitors, and businesses in the City produces over 21,000 tons of waste every day—which the City employs a small army of sanitation workers to collect.⁵⁰ Without them, trash would quickly pile in the streets—as it did in 1968.
- The City runs the largest fire and police departments in the country.⁵¹ It also operates the biggest single-district public school system,⁵² employing over 90,000 educators who teach a million public school students each day.⁵³ The

⁵⁰ *About DSNY*, N.Y.C. Dep’t of Sanitation, <http://www1.nyc.gov/assets/dsny/about/inside-dsny.shtml> (last visited Dec. 6, 2017).

⁵¹ Brian A. Reaves, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Local Police Departments, 2013: Personnel, Policies, and Practices* 3 (2015), available at <http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf>; *Overview*, N.Y.C. Fire Dep’t, <https://www1.nyc.gov/site/fdny/about/overview/overview.page> (last visited Dec. 11, 2017).

⁵² *Enrollment, Poverty, and Federal Funds for the 100 Largest School Districts, by Enrollment Size in 2012*, U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Statistics (2015), https://nces.ed.gov/programs/digest/d14/tables/dt14_215.30.aspx.

⁵³ Dep’t of Citywide Admin. Servs., *New York City Gov’t Workforce Profile Report, Fiscal Year 2016* at 67 (2016),

disruption of any of these services would have devastating consequences for City residents.

Because of the scale and critical importance of basic public services in the City, even relatively small disruptions can wreak havoc.⁵⁴ Less than a week without mass transit, for example, would cost the City economy over a billion dollars.⁵⁵ A week without garbage collection would flood the streets with refuse, threatening a public health crisis.⁵⁶ One day without teachers would squander a million days' worth of learning.⁵⁷ Simply put, the damage inflicted by public-sector strikes in New York City is too great to risk. The City therefore has an overriding—and compelling—interest in ensuring its collective bargaining system works.

http://www.nyc.gov/html/dcas/downloads/pdf/misc/workforce_profile_report_fy_2016.pdf; *Statistical Summaries*, N.Y.C. Dep't of Educ., <http://schools.nyc.gov/AboutUs/schools/data/stats/default.htm> (last visited Dec. 6, 2017).

⁵⁴ See *supra* Part I.

⁵⁵ See Mike Pesca, *The True Cost of the NYC Transit Strike*, NPR (Dec. 21, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=5064612>.

⁵⁶ See *supra* Part I.B.

⁵⁷ Cf. *Statistical Summaries*, *supra* note 61.

The City’s experience also makes plain that the incremental benefit of agency fees does not have to be overwhelming for them to be constitutionally permissible. The harms of public-sector work stoppages are often so large that even a marginal reduction in the risk of strikes is compelling grounds for authorizing agency fees. This is not a theoretical justification. The City *tried* collective bargaining without agency fees, and despite employing techniques like the “government assistance with ... dues collection” suggested by petitioner,⁵⁸ the public continued to suffer.

B. Governments’ practical need to adapt to local circumstances points against constitutionalizing a single approach to public-sector labor relations.

To be sure, not all jurisdictions permit agency fees. Petitioner and his amici paint the variety in labor laws across the nation as evidence that such fees are unnecessary.⁵⁹ Yet they draw precisely the wrong conclusion. The diversity of labor laws nationwide is reason for this Court to adhere to *Abood*’s flexible framework, not to abandon it. Divergence in public-sector labor laws is the natural result of the dramatically different circumstances confronted by state and local governments across the nation.

⁵⁸ Brief for the Petitioner at 42.

⁵⁹ *See, e.g., id.* at 37; Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioner at 27-36.

For example, while several states have laws that prohibit agency fees (known as “right-to-work” laws),⁶⁰ the people in those States did not experience the same series of strikes that New Yorkers endured in the 1960s and 1970s. Nor do those jurisdictions have the same “long, deep tradition” of labor activism as New York City does, where unions are embedded in its institutions and its culture. Even its housing stock bears the imprint of its vibrant labor movement, with more than a dozen union-sponsored housing cooperatives anchoring neighborhoods across the City.⁶¹

Governments in “right-to-work” states, by contrast, manage different workforces, have endured different histories, and must satisfy different demands. Their legislative choices thus should not control outside their borders any more than New York City’s approach should dictate labor policy in Madison, Wisconsin or Fort Worth, Texas. In short, mandating one nationwide rule on agency fees would be deeply inconsistent with this Court’s

⁶⁰ *Right-To-Work Resources*, Nat’l Conf. of State Legislators, (2017), <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx>.

⁶¹ Freeman, *supra* note 12, at 100; David W. Chen, *Electchester Getting Less Electrical; Queens Co-op for Trade Workers Slowly Departs From Its Roots*, N.Y. Times, Mar. 15, 2004, at B1 (describing union-sponsored housing cooperatives providing nearly 50,000 apartments).

recognition that needs vary across the nation,⁶² and that local communities should have leeway to promote their own health, safety, and welfare through core labor policies.⁶³

Varied circumstances have even led to policy divergence among right-to-work states themselves. Some ban public-sector unions altogether,⁶⁴ rejecting collective bargaining as a labor management strategy entirely. Others, however, stop short of abandoning agency fees in all contexts. For example, while Michigan and Wisconsin currently prohibit agency fees for some public-sector unions, both States exempt local police and firefighter unions.⁶⁵ The exemptions are necessary because, as Wisconsin’s governor put it,

⁶² See *Kelo v. City of New London*, 545 U.S. 469, 482 (2005) (“Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.”).

⁶³ See *Bond v. United States*, 564 U.S. 211, 220–22 (2011) (discussing the role, and virtues, of federalism).

⁶⁴ For example, Texas does not permit the recognition of public-sector labor unions as bargaining agents, nor does it allow state officials to enter into collective bargaining contracts with public employees. Texas Gov’t Code § 617.002 (2017).

⁶⁵ See Mich. Comp. Laws § 423.210(4) (2017); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (2017).

“there’s no way we’re going to put the public safety at risk.”⁶⁶

Petitioner and his amici thus mistake public controversy for constitutional error. As this Court has made clear, “[t]he genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.”⁶⁷ Consistent with this principle, *Abood* left the “wisdom” of adopting agency fees to voters in each State, ensuring that no labor relations policy is frozen in place.⁶⁸

Judgments about risk tolerance and the necessity of public services necessarily differ, and they can even change over time within individual

⁶⁶ Mark Niquette, *Walker’s Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011, 12:00 AM), <http://www.bloomberg.com/news/articles/2011-02-25/walker-says-public-safety-means-wisconsin-cops-keep-collective-bargaining>.

⁶⁷ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

⁶⁸ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977).

jurisdictions.⁶⁹ While *Abood* itself concerned a Michigan law authorizing agency fees,⁷⁰ the state has since chosen to limit the use of such fees.⁷¹ That change was accomplished through state legislation, not a constitutional rule that imposed Michigan's choice on other communities.

New York City has a powerful interest in labor peace because of its importance to avoiding disruption of essential public services, precisely the rationale that petitioner ignores. Given its unique circumstances and history, the City reasonably views its public services as integral to public safety and welfare, and it accordingly extends to all public unions the same agency shop protection that other jurisdictions offer only to a subset of their public workforces.

More broadly, New York City has for decades chosen to rely on strong, stable unions as a key part

⁶⁹ The range of permissible policy judgments about labor practices is remarkably broad. While most jurisdictions prohibit public workers from striking, some States authorize strikes by some or all government workers. *See, e.g.*, Ohio Rev. Code Ann. § 4117.14(D)(2) (2017). But the existence of those laws does not refute the need to limit or prohibit public-sector strikes in New York and elsewhere.

⁷⁰ *Abood*, 431 U.S. at 211.

⁷¹ *See, e.g.*, Jack Spencer, *Right-to-Work Bills Pass Michigan House, Senate*, Mich. Capitol Confidential (Dec. 7, 2012), <http://www.michigancapitolconfidential.com/18028>; *see also* Mich. Comp. Laws § 423.210(3)(c) (2017).

of its governance strategy, one that embraces the provision of services to strengthen the fabric of the City and better the lives of its residents, while also ensuring fair treatment and protection for workers who serve the public. While other jurisdictions may choose a different course, this Court should not embed that choice in a constitutional rule that overrides New York City's successful long-term labor management scheme or the similar strategies of other cities and states.

CONCLUSION

The judgment below should be affirmed.

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In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

**On a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit**

**BRIEF OF THE NEW YORK CITY MUNICIPAL
LABOR COMMITTEE AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	10
 I. STRONG GOVERNMENT	
INTERESTS JUSTIFY AGENCY FEES	11
A. Whether To Permit Agency Fees Constitutes A State Policy Choice.....	11
B. The Exclusive Representation Designation Requires Agency Fees	20
C. States Have A Legitimate Interest In Avoiding The Free-Rider Problem	23
 II. THERE IS A CLEAR DISTINCTION BETWEEN BARGAINING WITH GOVERNMENT ON EMPLOYMENT MATTERS AND LOBBYING GOVERNMENT....	
A. Banning Agency Fees Would Create Significant Contradiction in First Amendment Jurisprudence.....	29
B. Aboud Is “workable” As New York City’s Public-Sector Unions Provide Services (Funded By Agency Fees) That Are Undeniably Non-Political And Non- Ideological	34
CONCLUSION.....	38

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	<i>passim</i>
<i>Ass’n of Surrogates & Sup. Ct. Reporters v. States</i> , 78 N.Y.2d 143 (1991)	12, 13
<i>Borough of Duryea v. Guarnieri</i> , 131 S. Ct. 2488 (2011)	30
<i>Brooks v. Arthur</i> , 685 F.3d 367 (4th Cir. 2012)	31
<i>Ellis v. Bhd of Ry., Airline & S.S. Clerks</i> , 488 U.S. 435 (1984)	23
<i>Emporium Capwell Co. v. Western Addition Cmty. Org.</i> , 420 U.S. 50 (1975)	14
<i>Engquist v. Oregon Dep’t of Agric.</i> , 553 U.S. 591 (2008)	30
<i>Fox v. Traverse City Area Pub. Sch. Bd. Of Educ.</i> , 605 F.3d 345 (6th Cir. 2010)	31
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006)	8, 29, 31

<i>Harris v. Quinn</i> , 134 S. Ct. 2618 (2014)	<i>passim</i>
<i>Leahey v. Patrolmen’s Benevolent Ass’n</i> , 47 OCB 22 (BCB 1991)	20
<i>Lehnert v. Ferris Faculty Ass’n</i> , 500 U.S. 507 (1991)	<i>passim</i>
<i>McAuliffe v. Mayor of New Bedford</i> , 29 N.E. 517 (Mass. 1892)	28
<i>Mills v. City of Evansville</i> , 452 F.3d 646 (7th Cir. 2006)	30
<i>O’Connor v. Ortega</i> , 480 U.S. 709 (1987)	30
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968)	8, 9, 32, 33
<i>Railway Employees’ Dep’t v. Hanson</i> , 351 U.S. 225 (1956)	11, 19

Statutes

5 I.L.C.S. 315/6(d)	14
29 U.S.C. § 152(2)	11
N.M. Stat. Ann. § 10-9-13.....	20
N.Y. Civ. Serv. L. § 200	13
N.Y. Civ. Serv. L. § 204	14
N.Y. Civ. Serv. L. § 208(3)(a).....	14

N.Y. Civ. Serv. L. § 209-a(2)(c)	20, 28
Railway Labor Act	10
Wisconsin's Act 10 (2011)	26, 27

Other Authorities

Admin. Code of the City of New York, Fourth Amendment § 12-303	1
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First Amendment.....	<i>passim</i>
Fourth Amendment	30
Cooper, David and Lawrence Mishel, “The Erosion of Collective Bargaining Has Widened the Gap Between Productivity And Pay,” <i>Economic Policy Institute Briefing Paper</i> , Jan. 6, 2015.....	24, 25
David, Joe C. and John H. Huston, “Right-to-Work Laws and Free Riding,” 31 <i>Econ. Inquiry</i> 52 (1993).....	23, 25
Donovan, Ronald, Administering the Taylor Law (ILR Press 1990)	12, 13
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Moore, William, “The Determinant and Effects of Right-To-Work Laws: A Review of the Recent Literature,” <i>Journal of Labor Research</i> , vol. XIX, no. 3 (1998)	25
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Olson, Mancur, “The Logic of Collective Action: Public Goods and the Theory of Groups.” Cambridge, MA: Harvard University Press (1965).....	23
N.Y. Governor’s Committee on Public Employee Relations, <i>Final Report</i> (1966)	12

N.Y. Div. of Budget, Budget Report for S. 6835, at 3, <i>reprinted in</i> Bill Jacket for ch. 677 (1977)	12, 13
Samuels, Robert, “Walker’s Anti-Union Law Has Labor Reeling In Wisconsin,” <i>Washington Post</i> , (Feb. 22, 2015).....	27

INTEREST OF *AMICUS CURIAE*¹

The issues presented raise significant concern to New York City's public-sector unions and their members. The New York City Municipal Labor Committee ("MLC") is an association of municipal labor organizations representing some 390,000 active workers dedicated to collectively addressing concerns common to its member unions and advocating on issues of labor relations relevant to City workers. The MLC was created pursuant to a Memorandum of Understanding dated March 31, 1966, signed by representatives of New York City and designated employee organizations and codified in Sections 12-303 and 12-313 of the Administrative Code of the City of New York. The workers represented by the MLC, comprising both uniformed and civilian employees, serve the public welfare, health and safety on a daily basis.

Each of the MLC member unions offers a "fair share" fee option for non-members to defray the cost of negotiating, administering and implementing the terms of its respective collective bargaining agreements, handling grievances and providing other union services. Each of these unions, as exclusive bargaining agent, is compelled under state law to bargain and otherwise act equally on behalf of the interests of all employees in its bargaining unit – members and non-members alike. The blanket

¹ No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. A consent letter on behalf of all parties is filed with this Court.

invalidation of “fair share” fees, contrary to Petitioner’s unsupported assertions, would materially impair the MLC unions’ abilities to represent New York City public-sector workers in negotiations for better terms of employment and would threaten the carefully balanced and well-established labor relations framework cultivated in the nearly five decades since the MLC was established, a history that includes nearly 40 uninterrupted years of reliance on the “agency fee” option.

SUMMARY OF ARGUMENT

For the second time in the Court’s last four terms, a petitioner seeks to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). This persistent attempt to overrule the 40-year precedent reflects not a sudden “special justification” for overturning this entrenched precedent— as required for reversal under basic principles of *stare decisis*— but a fervent politically motivated desire, emboldened by the ideological winds of the moment, to drive a stake through the heart of public-sector unions. Petitioner here sheds the pretense of an incremental chipping away at the *Abood* precedent, in favor of a frontal assault on the role of public-sector unions altogether as the state-created mechanism for managing the relationship between public employers and the collective interests of public employees.

For decades, Americans “have debated the pros and cons of right-to-work laws and fair-share requirements.” *Harris v. Quinn*, 134 S. Ct. 2618, 2658 (2014). Indeed, in recent years many states

have enacted right-to-work legislation based on their local needs and values. Today, 28 states have “right-to-work” laws. Yet, Petitioner now asks this Court to end that public discussion and impose a right-to-work regime for all public-sector employees in all states. The Court has thus far resisted the invitation to deprive every state and local government, in the management of their employees and programs, of an important tool, fair-share fees, that is necessary and appropriate to make collective bargaining work. The Court should continue to resist this invitation. Unions that give voice to public employees and the working middle-class in New York City and throughout the country depend on agency fees to effectively undertake their jobs within the labor relations structures chosen by each state to manage its public workforces.

Despite recent, persistent attempts to erode *Abood*, the precedent has repeatedly been affirmed. The Court has for decades determined that a union may, consistent with the First Amendment, require public-sector employees (like private sector ones) to pay their fair share of the cost the union (and its members) incurs in negotiating (and administering) collective bargaining agreements on their behalf for better terms of employment.

The importance of the doctrine of *stare decisis* operates at its summit in cases where a precedent has created strong reliance interests. There are few precedents in this Court’s jurisprudence that have engendered as much reliance as *Abood*.

Nowhere are the reliance interests more pronounced than in New York City. New York

framed an important component of its labor-management relations structure in express reliance on *Abood*. Authorization to negotiate for agency fees was recommended by legislative and research committees in the turbulent early years of the Taylor Law (New York State’s public-sector labor law), which saw considerable labor unrest in the late 1960’s and early 1970’s. Only after additional refinements to the law and ultimate inclusion of an agency fee provision – relying on the *Abood* decision – did matters stabilize.

The reliance continues today. As the Court recognized in *Harris*, “governments and unions have entered into thousands of contracts involving millions of employees in reliance on *Abood*.” 134 S. Ct. at 2652. (Kagan, J. dissenting).

In New York City alone, 97 public-sector unions represent some 390,000 active City workers (and 120,000 retirees) working under 144 contracts that have fair share arrangements and rely upon these fees in funding collective bargaining and related non-political union activities. They have done so for decades.

The *Abood* precedent stood, in part, on the recognition of the necessity and complexity of a well-functioning public-sector labor relations system, and (like in the private sector) the integral role of the union as an exclusive bargaining representative to that system:

The designation of a union as exclusive representatives carries with it great responsibilities. 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. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required.

Abood, 431 U.S. at 221.

Public-sector unions in New York must serve all represented employees. Despite Petitioner's bare assertion that the costs of the responsibility pales in comparison to the "powers and benefits that come with exclusive representative authority," Pet. Br. 47, serving all employees costs significant time and money. It means hiring professional staff and investing in resources that provide representation and services to all bargaining unit members, not just union members. Indeed, since the *Abood* precedent, the increasing complexity of public-sector labor relations – negotiating healthcare benefits, navigating changing and increasingly complex legislation and practices relating to pensions, among other complicating developments, have made the task of representing the interests of employees exceedingly more difficult and costly.

The agency or "fair share" fee is justified, in large part, because New York, like many other states, compels its unions by statute to promote and protect the interests of its members *and non-*

members alike in negotiating and administering collective bargaining agreements. While the duty of fair representation allows a spectrum of reasonable conduct, that duty does not permit treating agency fee payers differently than members with regard to contract negotiation and administration. For MLC unions, a compulsory agency fee fairly distributes the cost of bargaining among those who benefit and counteracts the inescapable economic incentive that public-sector employees (like most rational individuals) would otherwise have to “free-ride” on the union’s efforts for all. Petitioner’s and *amici*’s unsupported attempt to assume away the “free-rider” problem is belied by irrefutable principles of economics and human behavior, as well as our current national experience in “right-to-work” states. The simple truth is that someone must contribute to permit the union to perform its job and if all who benefit cannot be required to contribute, union members would be forced to carry the weight on their backs, subsidizing those who free-ride.

Rather than fairly treat the clear legitimate governmental interests, Petitioner focuses on the purported infringement of First Amendment rights that agency-fees impose, ascribing a nefarious “coercive” element to their payment. In reality, the fee is no more “coercive” than a taxpayer’s obligation to pay taxes. Agency fees, like taxes, are not a “political” statement, but a means of ensuring that the collective bargaining system as a whole – which, itself, is composed of individually and democratically elected union representatives – functions properly. A citizen pays taxes to ensure the provision of government services; an agency fee payer pays fees

to ensure his union can properly operate. Just like any taxpayer who disagrees with government policies, even with this fair share fee, nothing precludes a public-sector employee in New York City, like any other citizen, from expressing his or her political viewpoint or engaging in political activities with regard to the union or more broadly in the local, state and federal political arenas. Nothing prevents an agency fee payer from seeking to influence union policies through organizing other agency fee payers and exerting political pressure or even seeking decertification. Indeed, a union would be prohibited from taking any retaliatory action against either a member or agency fee payer wishing to so act. The union's exclusive ability to speak is narrowly limited to direct negotiation with the employer on terms and conditions of employment. It has no authority to silence its detractors internally or externally. The union and the individual member are free to lobby the legislature as any other citizen. Moreover, unlike private organizations, unions are obliged to have internal democratic processes. Thus, any First Amendment infringement, if such infringement exists at all, is minimal.

Ultimately, Petitioner not only betrays fidelity to this Court's decisions, which have long recognized the importance of public-sector unions in fostering peaceful labor-management relations, he threatens to significantly undermine unions' efforts within New York City's legislatively created collective bargaining system to protect middle class workers.

This case presents wide-ranging implications for the future of labor relations, union funding and collective bargaining. Petitioner's stance would

summarily and instantaneously eliminate the 40-year old distinction between union fees utilized for collective bargaining, contract administration and grievance adjustment, and those used for political or ideological activities established in *Abood* and refined in later cases.

Yet, even more broadly, Petitioner threatens to upend First Amendment jurisprudence in the public-sector altogether. Case law draws a clear distinction between political speech and speech on traditional employment-related matters in the context of public employment. *E.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

If, as Petitioner argues, all speech related to a union's collective bargaining negotiation – quintessentially “terms and conditions” of employment – is deemed “lobbying” because such negotiations may ultimately impact the public fisc, virtually all speech would enjoy full constitutional protection in the public workplace. If there “is no distinction between bargaining with the government and lobbying the government,” as Petitioner asserts Pet. Br. 10, any workplace complaint or demand would be considered political speech. The types of individual employee grievances, which under well-worn Supreme Court precedent lack First Amendment protection, would take on a constitutional dimension. There is simply no principled distinction in the Constitutional analysis between the content of one voice seeking to speak on employment-related matters, and the collective voices of a union seeking to speak on precisely the same subjects.

The point, contrary to Petitioner’s view, is not whether the *Pickering* test applies neatly in the agency fee context; it is that accepting Petitioner’s view regarding what constitutes political speech or “lobbying” as those terms have been understood in this Court’s First Amendment parlance, would obliterate the carefully drawn distinction between the government as employer and as sovereign. Petitioner’s position endangers not just ongoing labor-management relations in New York City and elsewhere, but the continuing coherence of First Amendment jurisprudence in the government employer context as well.

One final point merits brief mention. Petitioner and *amici* make much of the purported practical difficulty in administering the distinction, first articulated in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991), between chargeable activities – *i.e.*, those germane to collective-bargaining, contract administration and grievance procedures – and non-chargeable political activities. As in Illinois, New York City’s unions calculate the fair-share fee on the basis of detailed accounting that identifies a union’s expenditures and excludes all expenses not chargeable. That accounting is audited by an independent certified public accountant, and then reported to represented employees in a “*Hudson*” notice, and employees are entitled to bring a challenge to the amount in arbitration. A new *Hudson* notice with updated calculations is prepared each year. The procedure has been seamlessly ingrained in the dues collection process for years. The notion that the *Abood* precedent is too difficult to administer is a red herring, one proven immaterial

by New York City's experience. There has been no showing here that *Abood* cannot be administered in Illinois, let alone the entire nation.

Even if the line drawn between permissible assessments for collective bargaining activities and prohibited assessments for ideological activities appears "somewhat hazier" in the public-sector, *Lehnert*, 500 U.S. at 521, in the vast majority of instances chargeable activities may be readily distinguished from non-chargeable ones. The many day-to-day services our unions regularly provide are not only apolitical, but often mundane and ministerial, though no less critical for our members. In any event, the *Lehnert* and *Abood* required determination of what constitutes political versus non-political expenditure is precisely the type of jurisprudential test that arbitrators and courts are routinely called upon to decide.

ARGUMENT

Consistent with the Railway Labor Act cases before it and, indeed, constitutional jurisprudence more generally, the *Abood* Court approached the issue from the perspective of whether public employee unions should have a right analogous to that of private sector unions and framed its analysis as balancing (1) the legitimate interests of government in securing labor peace and avoiding the free-rider problem with (2) the First Amendment free speech rights of individuals.

Here, Petitioner has attempted to rig the scale unfairly with a foisted strict scrutiny analysis and conclusory political rhetoric in the absence of actual

material record facts. Self-serving declarations that exclusive representation alone is sufficient to carry out the responsibilities of a public-sector union within a state's chosen construct for engaging its employees or that a union's obligation to treat members and non-members alike would be unaffected by the wholesale elimination of agency fees, provide an insufficient basis on which to eliminate agency fees across the country.

**I. STRONG GOVERNMENT
INTERESTS JUSTIFY AGENCY FEES**

**A. Whether To Permit Agency Fees
Constitutes A State Policy Choice**

Public-sector bargaining regimes are creations of state law and reflect a state's considered judgment about how to organize and manage its public employee workforce. The National Labor Relations Act leaves regulation of state and local government labor relations to the states. *See* 29 U.S.C. § 152(2).

The Court in *Abood* correctly determined that any arguable interference caused by agency fees “is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations.” 431 U.S. at 222. While not “judg[ing] the wisdom” of the decision, the Court recognized it was for Michigan to determine whether labor stability would be best served by a system of exclusive representation and the permissive use of an agency shop fee for public-sector unions. *Id.* at 229; *see also Railway Employees’ Dep’t v. Hanson*, 351 U.S. 225, 234 (1956) (the “ingredients of industrial peace and stabilized

labor-management relations are numerous and complex” and the decision of whether the “union shop [is] a stabilizing force...rests with the policy makers, not with the judiciary”).

In New York, too, agency fees are allowed by statute to be part of public-sector collective bargaining agreements. The legislation authorizing these arrangements specifically relied on *Abood*. N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*). The carefully calibrated inclusion of agency fees in New York’s labor relations structure should not be dismissed. While strikes and other work disruptions by public-sector employees are now exceedingly rare, they were common when New York (and many other states) first adopted and refined public-sector labor relations laws. *See* Donovan,, Administering the Taylor Law (ILR Press 1990); *see also* N.Y. Governor’s Committee on Public Employee Relations, *Final Report* (1966) (there is “widespread realization that protection of the public from strikes in...public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment”); *Ass’n of Surrogates & Sup. Ct. Reporters v. States*, 78 N.Y.2d 143, 152-53 (1991) (in approving the Taylor Law the Governor noted the need for the legislation had been “unquestionably demonstrated over the years...to resolve paralyzing strikes and threats of strikes by public employees”).

Labor unrest continued in the early years of the Taylor Law as government employers and unions adjusted to their new roles and the law was refined, first in 1969 (adding unfair labor practices and

additional strike deterrents) and again in 1977 (authorizing agency fees). Donavan, *supra*, at 104-31. New York City, operating under a state-permitted local analogue to the Taylor Law, suffered some of the most crippling continuing labor strife. *Id.* at 204. Indeed, in 1969, as part of a response to legislative inquiry regarding public-sector labor relations in New York City, Mayor Lindsay urged authorization of agency fee arrangements. *Id.* at 126. The State Public Employment Relations Board agreed and sought to have the authorization extended state-wide. *Id.* These views coalesced with the recommendations of two other study committees in 1969 and again in 1973. *Id.* at 193. Ultimately, shortly after *Abood*, New York amended the Taylor Law (with New York City following suit) to permit agency fees. *Id.*

The designation of a single bargaining representative, coupled with the agency fee, helped to stabilize labor-management relations and avoid the confusion that would result from attempting to enforce multiple agreements specifying different terms and conditions of employment. *Abood*, 431 U.S. at 221 (explaining the benefits of eliminating this confusion). These changes helped ensure the uninterrupted provision of governmental services. *See* N.Y. Civ. Serv. L. § 200. And they gave public-sector workers a greater voice in determining the terms of their employment, which, too, acted to minimize labor strife. *See* N.Y. Governor's Comm. On Public Emp. Relations, *Final Report* at 42, 54 (1966) (inability of public employees to unionize and have "a greater voice" in determining the terms of their employment contributed to the use of strikes).

The basic system has remained undisturbed for decades and New York has relied upon agency fees ever since.

Petitioner now wishes to disrupt New York's (and other states') chosen system of managing labor relations. Petitioner and his political allies wish to avoid paying a single cent for collective bargaining from which all represented employees gain substantial benefit because of unspecified objections to the positions taken by teachers' unions in Illinois or unionization broadly. They are certainly entitled to have that opinion, but they should not be permitted to force that view on all state governments.

Illinois and New York, like many other states, have decided to manage their public-sector workforce by allowing workers to select, on a majority basis, a union as their collective bargaining representative. *See* N.Y. Civ. Serv. L. § 204; *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). The selected union, by statute, receives the exclusive right to negotiate terms and conditions of employment for the covered employees and becomes required to represent all members of the bargaining unit fairly. *See e.g.*, N.Y. Civ. Serv. L. § 208(3)(a); 5 I.L.C.S. 315/6(d). In turn, unit members who choose to not become union members must pay a service fee that is relevant only to the nonpolitical aspects of union representation. Illinois and New York have determined through their policies that the exclusive representation model best promotes sound workforce management and productivity. The "fair share" fee acts as a crucial component of that model.

Imagine New York City negotiating with the approximately 390,000 public employees separately with regard to terms and conditions of employment or, worse yet, unilaterally imposing terms and reaping the unrest of pre-*Abood* times. Such approach would be (and has been historically) untenable. New York State, among others, opted for a different approach, harmonizing the rights of public-sector workers with the needs of government employers and the public welfare. The services a union provides and the role it plays benefit not only the workers but extend to the labor-management framework as a whole.

Petitioner's objections to that framework are largely premised upon personal and political beliefs that unions are an ill rather than a good. *See* Pet. Br. 50 (asserting unionization, at its core, is improper "collectivization for a political purpose" in violation of the First Amendment). While Petitioner may believe that, government works by the majority setting policies applicable to all, not just those who favor them. Here, state government has determined that organizing public employees into unions within the structures of a labor law is beneficial to all. Petitioner has the same rights with regard to this policy as any other: he may voice his objection, he may vote his state government out of office in favor of those who support a right-to-work agenda, but he may not decline to pay the small service fee that is a part of the state's labor policy.

The distorting effect of these anti-union views on the legal analysis is amplified by Petitioner's (perhaps purposeful) conflation of the state as a sovereign, entitled to make policy choices as to how

public employers and public employees are to interact for the good of the state, and the specific bargaining interests of any particular public employer at the bargaining table. *See* Pet Br. 7 (discussing what Petitioner views as reasonable and beneficial bargaining demands proposed by Illinois and AFSCME Council 31’s resistance to those bargaining demands).²

Petitioner is correct to caution that the Court not confuse the interests of “partisan organizations with government interests,” Pet. Br. 36, but it is Petitioner that makes this mistake by substituting the union’s interests for those of the state. It is equally as important to not confuse a state’s interest in its labor relations policy with the specific bargaining position or interests of any one public employer at the bargaining table. The merits or lack thereof of any bargaining position have no bearing on the question presented here: whether a state’s choice of “recipe” for labor peace within its borders can lawfully include authorizing agency fees. Petitioner uses this improper focus on the bargaining interests

² Though purposefully avoided by Petitioner, the root of Governor Rauner’s purported bargaining dilemma is not *Abood*. Illinois has chosen a system of labor relations and its Governor, like other public employers in the state, must work within that system. Nothing in *Abood* (or any other case) prohibits Illinois from solving its own “problems,” as Petitioner sees them, by adopting right-to-work legislation. The issue in Illinois is not that any Supreme Court precedent has abrogated Petitioner’s rights; it is that a sufficient number of Illinois residents do not agree with Petitioner’s political views to enact right-to-work legislation. As a result, Petitioner seeks is to have the Supreme Court perform an end-run around Illinois’ and every other state legislature under the pretense of protecting public employees.

of individual public employers to the exclusion of the larger interest of the state to artificially narrow the Court's focus when weighing interests.

While it is Petitioner's view that government employers would have greater flexibility to operate when not bound by the strictures of union contracts, free from the obligation to bargain collectively and able to set terms and conditions unilaterally, Pet Br. 54-55, those value judgments cannot limit the ability of states to set priorities and adopt policies.

Petitioner asserts that there can be no state interest in bargaining with a union and certainly no interest in bargaining with a strong and competent union, even concluding that "no rational actor wants to deal with a powerful negotiating opponent." Pet. Br. 60-61. This observation, however, conflates the adversarial self-interest of a public employer at the bargaining table with the state's interest as a sovereign in creating a system with checks and balances by which employees are given a voice in setting their own terms and conditions of employment. In New York and elsewhere, these policy choices are informed by a history of labor strife, strikes and service interruptions resulting from the type of top-down imposition of terms of employment Petitioner praises.

Petitioner's approach to labor policy is summed up by his suggestion that public employers "can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate." Pet. Br. 55-56 (internal quotations and citations omitted). According to Petitioner, "government employers can

deal with any workplace issues simply by enforcing employee codes of conduct.” *Id.* By this logic, we could eliminate defense attorneys and courts, allowing prosecutors to unilaterally enforce the law.

Petitioner finds it “absurd” for states to feel compelled to protect their operations from the very public officials that manage them. Pet. Br. 55. However, many aspects of our democratic society functions through similar systems of adversarial contest and checks and balances.

Far from absurd, many state governments have made judgements finding that the sometimes adversarial and sometimes collaborative process of bargaining with two equal participants is most likely to result in terms and conditions of employment that balance both the interest of government as an employer and the interests of employees without risk of interrupting services to the public. The process also recognizes that hundreds of thousands of public employees (in New York City alone) are not merely resources for the government to use up in its provision of services, they are also its citizens.

Petitioner pays lip service to the ability of government to “control” its employment terms, Pet. Br. 58, except that he demands that all governments all over the country exclude from such terms a strong union-based labor relations policy in favor of Petitioner’s desired unilateral policy. States like New York “control” the terms and conditions of their public employees by establishing a legal framework for the setting of such terms and conditions. It is this fundamental interest of the state to set its own labor policy which is to be balanced against the

minimal intrusion of requiring a service fee be paid within that statutory structure.

Of course, New York's and Illinois' system of collective bargaining is not universal. Certain states have adopted similar but variant systems for conducting labor relations. Kearney & Mareschal, *Labor Relations in the Public Sector* 30–32 (5th ed. 2014) (there is “one set of [labor] laws for federal workers and 50 sets for the states...”). Others do not require collective bargaining or authorize agency fees at all. States like Wisconsin and Michigan are free to enact “right-to-work” legislation (though both states permit agency fees for certain public safety employees). *Abood* does not issue a command; rather, it provides a choice, leaving to states the right to devise their own systems in light of their history. Voters in each state ultimately have the final say over changes or amendments to labor policy. *Abood*, 431 U.S. at 224. In New York, the voters have decided and their conclusion on the proper system of labor relations for their public-sector workforce should not be judicially invalidated. *See Hanson*, 351 U.S. at 233–34 (because “[w]hat would be needful one decade might be anathema the next,” the decision whether to incorporate a closed shop in labor relations “rests with the policy makers, not with the judiciary”).

Moreover, union activity and subjects of bargaining vary greatly among situations and among states. Disciplinary procedures, for instance, are generally mandatory or permissible subjects of bargaining in some states (New York for one) and not in others. New Mexico, for example, which otherwise permits public-sector collective bargaining and

agency fee arrangements, sets disciplinary procedures by state agency rule, not collective bargaining. *See* N.M. Stat. Ann. § 10-9-13 (West) (requiring the state Personnel Office to promulgate rules for dismissal and demotion procedures for public employees). The wisdom of the inclusions and exclusions is not the issue; rather, the point is that these myriad formulations underscore the vast differences among jurisdictions in tailoring labor relation systems to suit their local needs.

**B. The Exclusive Representation
Designation Requires Agency Fees**

In the *Lenhert* decision, Justice Scalia recognized that the state interest that justifies agency fees arises from a union's statutory duties. Where "the state imposes upon the union a duty to delivery services, it may permit the union to demand reimbursement for them; or looked at from the other end, when the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Lenhert*, 500 U.S. at 557.

In New York, like many other states, the Taylor Law explicitly provides for a compulsory duty of fair representation. N.Y. Civ. Serv. L. 209-a(2)(c). All unions are required to treat all unit members equally with respect to the terms and conditions of employment. *Leahey v. Patrolmen's Benevolent Ass'n*, 47 OCB 22 (BCB 1991) (union breaches its duty of fair representation "if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements"). Thus, contrary to Petitioner's assertion, while "unions have wide latitude to agree

to contract terms that favor some employees and disadvantage others,” Pet. Br. 45, such distinction generally cannot be based upon membership.

Petitioner summarily insists that agency-fees are unnecessary for public-sector unions, because state-conferred exclusivity is “extraordinarily valuable.” Pet. Br. 38. Though no quantifiable dollar value is (or can be) ascribed to the so-called “valuable powers,” Petitioner dismisses one of the long-held justifications for requiring agency-fees and assumes that in the absence of the requirement, the “privilege of exclusive representation,” Pet. Br. 44, in itself, will pay for the costs of representing, in the case of New York City unions, hundreds of thousands of public-sector employees.

Exclusive representation does not pay a union’s bills. To give the Court a sense of the costs involved, just one of the City’s large unions budgets some \$2.5 million annually for its legal department, supporting bargaining, arbitrations, and statutory hearings. The costs for all unions would be millions of dollars more. The “valuable powers” conferred by exclusive representation, without fair funding by agency-fees, are wholly insufficient to shoulder this burden.

At the same time Petitioner seeks to ascribe a monetary value to exclusivity, Petitioner also attempts to downplay the true financial burden a union bears, stating that “any additional cost of representing nonmembers in addition to member is minor.” Pet. Br. 45. As an example, Petitioner dismisses the burden of representing nonmembers in grievances as “hypocritical,” because unions

contractually require that a union and not individual employees can pursue a grievance. Pet. Br. 46.

The argument may have political or aesthetic appeal to Petitioner and others of a similar viewpoint, but it subverts reality and fails to address the legal issue. A union is not an interloping entity distinct from the public employees it represents. It is its members. Thus, while some union expenses may not materially change in the absolute sense – for example, the cost of negotiating wage increases for 100 unit members rather than 80 members – that cost is borne by a smaller number of individuals, forcing union members to subsidize benefits for Petitioner and other former agency fee payers. This economic reality results in union members receiving a wage increase that, net of contributions, is actually lower than that of nonmembers who, under Petitioner’s desired construct, receive it without making any contribution at all. This burdens union members and, thus, unions. Basic economics precepts dictate that this would be an unsustainable system.

Similarly, the cost of other areas of union representation directly increases in relation to the number of represented employees that utilize them. Many MLC unions integrate disciplinary charges into their contractual grievance process; consequently, union processing of grievances necessarily includes the defense of disciplinary charges. Other MLC unions employ outside counsel to provide such services to employees as well as negotiate for and administer informal workplace procedures for minor infractions. Yet other MLC unions provide a team of attorneys through their

affiliation with a state labor organization for the defense of disciplinary charges. And all of these services, and far more discussed *infra* at Point II.B., are available to and utilized by agency fee payers, and cost substantial sums of money.

C. States Have A Legitimate Interest In Avoiding The Free-Rider Problem

This Court has continuously recognized a primary purpose of the agency shop fee is to counteract free-riding. *See Abood*, 431 U.S. at 222; *Lehnert*, 500 U.S. at 537-38; *see also, Ellis v. Bhd of Ry., Airline & S.S. Clerks*, 488 U.S. 435, 452 (1984) (allowing free-riding corrodes workplace harmony and cooperation by “stirring up resentment” because some employees can “enjoy[] benefits earned through the other employees’ time and money”).

The rationale for the Court’s repeated acceptance is self-evident: a rational economic individual would seek to enjoy the collective benefits a union provides without paying dues if he or she can avoid them.³ If agency fees are rendered unenforceable for public-sector employees, unassailable tenets of economics compel the conclusion that union membership would dramatically decline. *Harris*, 134 S. Ct. 2656 (Kagan, J. dissenting) (recognizing the duty of fair representation “creates a collective action problem of

³ *See* Olson, Mancur, “The Logic of Collective Action: Public Goods and the Theory of Groups.” Cambridge, MA: Harvard University Press (1965); *see also* David, Joe C. and John H. Huston, “Right-to-Work Laws and Free Riding,” 31 Econ. Inquiry 52 passim (1993) (finding the free-rider problem higher in right-to-work states).

far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers”). The resulting decline in membership would weaken unions, place pressure on a union’s ability to comply with the duty of fair representation, sow divisiveness, undermine the effectiveness of the collective bargaining process and likely push employee compensation below market levels. *See* Cooper, David and Lawrence Mishel, “The Erosion of Collective Bargaining Has Widened the Gap Between Productivity And Pay,” *Economic Policy Institute Briefing Paper*, Jan. 6, 2015 (linking the widening income and wage disparity to the erosion of collective bargaining rights).

Statistics and studies in the field prove the point. Right-to-work legislation significantly increases the level of free riding in public-sector unions. In “right-to-work” states during the years 2000 to 2013, free-riders represented 20.3% of public employee bargaining units. *See* Keefe, J., “On *Friedrichs v. California Teachers Association*,” *Economic Policy Institute Briefing Paper #411*, Nov. 2, 2015 (“Keefe 2015”). Public-sector union density⁴ in those areas registered at 17.4%. *Id.* By contrast, in states allowing agency shop agreements, only 6.8% of those in bargaining units chose not to join the union, with union density at a far more robust 49.6%. *Id.* Other data suggests that free-riders may actually represent as much as 35-40% of employees covered by a collective bargaining agreement when agency

⁴ Union “density” reflects the percentage of public sector employees represented by a union.

fees are banned. *Id.* Thus, right-to-work laws significantly reduce the likelihood of union representation of public-sector employees as a whole. *Id.*⁵

More recent studies have similar results. From 2015-2016, for example, union membership in right-to-work states fell by over 293,000 members. Union membership declined in 20 of the 26 states with right-to-work laws. Conversely, in fair-share collective bargaining states, overall union membership increased by over 56,000 members and declined in only 9 of the 25 agency fee states (including the District of Columbia).⁶

These empirical trends are beyond dispute. To buttress his contention that the “free rider” effect is minimal in right-to-work states, Petitioner footnotes a statistic from 2008 reflecting the percentage of union membership in right-to-work states with exclusive representation versus right-to-work states that ban exclusive representation. Pet. Br. 41, fn. 20. According to Petitioner, in Nevada, Iowa, Florida and Nebraska union membership rates were 37.9%, 31.6%, 27.9%, and 27.2%, respectively, while in Georgia, Virginia, Mississippi, North Carolina and

⁵ Citing Hundley, Greg, “Who Joins Unions in the Public Sector? The Effects of Individual Characteristics and the Law,” *Journal of Labor Research* 9, 301-23 (1988) and Moore, William, “The Determinant and Effects of Right-To-Work Laws: A Review of the Recent Literature,” *Journal of Labor Research*, vol. XIX, no. 3 (1998).

⁶ Manzo IV, Frank, “Union Membership Declined in ‘Right-to-Work’ States and Increased in Collective-Bargaining States Last Year,” Illinois Economic Policy Institute, May 10, 2017.

South Carolina, states that ban exclusive representation, the percentages were 4.2%, 5.2%, 6.0% and 8.2% respectively.

The statistics do not support overruling *Abood*. These states account for but 10% of public employees and 6% of all public-sector employee union members in the United States. Further, they show that exclusivity is an important factor in a successful union-based labor policy, not the only important factor.

Conveniently omitted from the footnoted analysis are the membership percentages for states that have exclusive representation *and* agency fees. Those percentages and their comparison to exclusive representation/non-agency fee states reveal the true impact of agency fees on union membership – and the differences are stark. In states such as New York, New Jersey, Rhode Island and Massachusetts where agency shop fees are built in to an exclusive representation framework, public-sector union membership hovers around 70.2%, 58.4%, 63.8% and 54.2% – generally double that of states with exclusivity that ban agency fees.⁷

In a post-*Abood* environment, those percentages would inevitably tumble. The recent case study of Wisconsin’s right-to-work legislation illustrates the likely consequences of prohibiting agency-fees. Wisconsin’s Act 10, passed in 2011, contained a right to work provision among other

⁷ See “Union Membership and Coverage Database from the CPS,” available at <http://www.unionstats.com/>, last visited January 18, 2018.

restrictions on collective bargaining. (Keefe 2015, at 10). Once implemented, union membership in Wisconsin’s largest teachers’ union immediately declined by 29%. By early 2014, that union had lost a third of its members and by February 2015, it had lost more than half. *Id.* The AFSCME union in Wisconsin reported a similar experience, suffering a 70% decline in membership since Act 10 was enacted. (Keefe 2015, at 10).⁸ Today, total union membership in Wisconsin hovers at 9%.

Amici submissions tell a similar story regarding Michigan’s 2012 right-to-work legislation. As *amicus* explains, since 2012, the Michigan Education Association’s membership has decreased by 25% (some 29,637 members). The union’s dues income has declined from \$61,895,814 to \$47,982,763 – a decrease of \$13,913,015.” Mackinac Ctr. Br. 37.

Petitioner takes great pains to try to explain away the free-rider problem and to hypothetically justify why exclusive representation alone suffices to “assist unions with recruiting and retaining members.” Pet. Br. 40. The empirical evidence and the recent experience of right-to-work states demonstrates otherwise. Overruling *Abood* would undeniably imperil collective bargaining nationwide.

Two final points merit brief mention. First, aside from the dubious statistical data, Petitioner dismisses the free-rider problem, at least in part, because unions *voluntarily* seek to be exclusive representatives. The argument is neither compelling

⁸ *Citing* Samuels, Robert, “Walker’s Anti-Union Law Has Labor Reeling In Wisconsin,” *Washington Post*, February 22 (2015).

nor correct. The notion that a union is “seldom required” by law to engage in activities that benefit nonmembers, Pet. Br. 47, is flatly untrue, at least in New York, where the Taylor Law explicitly provides for a compulsory duty of fair representation. N.Y. Civ. Serv. L. 209-a(2)(c). Further, to the extent Petitioner meant to assert that unions decide to organize knowing this duty exists, the same can be said of Petitioner. True, states do not compel unions to become exclusive representatives (Pet. Br. 44), but they also do not compel Petitioner to seek public employment in a state which chooses to manage its public employees using a union-based model, including compulsory agency fees. *See McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (Holmes, J.) (a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”).

Second, and relatedly, the elimination of agency fees would create a perverse incentive for unions to offer certain union services and benefits only to members. While the core of unionization is unity, where free riding threatens the viability of a union, a union could be compelled to find ways to attract dues-paying members. In states where such “members only” benefits are prohibited, unions would be severely hamstrung in their ability to perform their statutory function by the absence of agency fees. It would not only reduce union funding, but it would force unions to shift resources towards basic fee collection and away from core union duties. Stated differently, allowing free-riding places a significant economic strain on a union’s ability to effectively carry out its long-established and often

mandatory duty of fair representation for all bargaining unit members.

II. THERE IS A CLEAR DISTINCTION BETWEEN BARGAINING WITH GOVERNMENT ON EMPLOYMENT MATTERS AND LOBBYING GOVERNMENT

A. Banning Agency Fees Would Create Significant Contradiction in First Amendment Jurisprudence

Likely in recognition of the substantial governmental interests outlined above, Petitioner attempts to place great weight on the purported infringement of his First Amendment rights, arguing all speech directed at government which seeks to influence policy to benefit the speaker (here, the union) is lobbying, and, thus, political speech. But this simplistic view of the complexities of public employment stands in stark contrast to well-settled nuanced case law in both the First Amendment and other contexts.

The longstanding test for whether speech of a public employee is protected First Amendment speech is whether the speech is a matter of “public concern” or whether the speech is made “pursuant to” the employees’ official duties. *Garcetti*, 547 U.S. at 421. The rationale for this content-focused approach is that while the public-sector employee does not shed his or her constitutional protections when accepting public positions, the government may properly regulate employment-related speech necessary for efficient and effective operation as an

employer. *Garcetti*, 547 U.S. at 418.⁹ A “government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large,” *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 600 (2008), and a citizen who accepts public employment “must accept certain limitations on his or her freedom.” *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011) (Kennedy, J.) (quoting *Garcetti*, 547 U.S. at 418).

Speech made about and pursuant to one’s official duty as a public employee is not constitutionally protected. A police officer’s

⁹ The distinction between the government acting as employer as opposed to sovereign is not limited to the First Amendment context. A crucial difference exists with respect to constitutional analysis, “between the government exercising “the power to regulate or license as a lawmaker,” and acting “as proprietor, to manage [its] internal operations.” *Engquist*, 553 U.S. at 598 (internal citation omitted).

This Court has long held, for instance, that in certain circumstances public sector employees may have their property searched at the workplace without a warrant supported by probable cause despite the Fourth Amendment guarantee against unwarranted governmental searches and seizures (*O’Connor v. Ortega*, 480 U.S. 709, 721-22 (1987)); they may not petition the government under the Petition Clause of the First Amendment on private employment matters (*Guarnieri*, 131 S. Ct. at 2501); and they may not invoke the Equal Protection Clause “class-of-one” theory to challenge employment personnel decisions (*Oregon*, 553 U.S. at 598). Each of these precedents recognizes that when the government acts within the employment relationship, a modest infringement of constitutional rights gives way to more practical realities of a functioning governmental workplace. This case is no different.

complaints about planned department reassignments,¹⁰ for example; a teacher’s complaint about her workload,¹¹ or general speech about employment conditions¹² are the types of routine workplace matters that do not constitute protectable First Amendment speech.

Yet, under Petitioner’s view, the collective voice of a union, rather than an individual employee speaking on the very same matters – departmental reassignments, workload and employment conditions— constitutes protected political speech. The idea that these commonplace employment-related matters are suddenly transformed into political ones because they are asserted by a union, rather than a single employee, is unprincipled, finds no support in First Amendment case law and threatens to upend decades of this Court’s precedent.

Typically, the determination of whether the coerced or prohibited speech at issue implicates the government acting as employer or as sovereign requires consideration of the actual speech and the context of that speech. Courts primarily look to whether the speech relates to “a matter of public concern.” *Garcetti*, 547 U.S. at 418. If not, the employee has “no First Amendment cause of action.” *Id.* If the speech addresses a matter of public concern, contrary to Petitioner’s implication, the analysis does not stop there. The court then

¹⁰ *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006);

¹¹ *Fox v. Traverse City Area Pub. Sch. Bd. Of Educ.*, 605 F.3d 345, 347 (6th Cir. 2010);

¹² *Brooks v. Arthur*, 685 F.3d 367, 372 (4th Cir. 2012).

determines whether the government had adequate justification for its action by balancing the interests of the employee, “as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568.

Even if arising from separate precedential antecedents, *Abood*’s distinction between non-ideological and ideological speech functions as an overlay on *Pickering*’s distinction between speech in the government workplace of “public concern” and “speech of its employees.” *Pickering*, 391 U.S. at 568. Though the *Abood* Court did not extensively cite the *Pickering* balancing test, it surely understood this distinction between the government as an employer and as sovereign. The *Abood* Court correctly recognized that the “uniqueness of employment is not in the employees nor in the work performance; the uniqueness is in the special character of the employer,” the government which has a separate and independent constitutional obligation to its citizens. 431 U.S. at 227. Thus, the Court recognized the distinct duties of the government both to its employees and to citizens broadly.

The *Abood* Court drew a line between, on the one hand, lobbying and political activities directed at the government as sovereign, and on the other, collective bargaining or negotiating terms of employment, directed at the employer (which here happens to be the government). The union’s exclusive representation of a workforce, inextricably intertwined with the right to collect agency fees, is limited to the bargaining table. Such exclusivity

does not extend to street corners, voting booths or the steps of City Hall, where agency fee payers and union members alike may agree or disagree with particular positions taken by the union or government, including the adoption or repeal of right-to-work laws.

Petitioner suggests that his objection to paying fair share fees is political or reflects a matter of “public concern” because government spending *writ large* raises issues of public import. But Petitioner is applying the *Pickering* framework to the wrong speech. To attempt to invalidate agency fees, Petitioner claims that it is the union’s speech on issues pertaining to pay and working conditions that is protected political lobbying such that Petitioner should not be required to support it. The claim is tied directly to the distinction drawn by *Abood* and its progeny between union speech related to collective bargaining and political lobbying. The *Pickering* framework (like *Abood*), however, treats such speech about the adequacy of pay, hours of operation, the disrepair of facilities as generally constituting employee grievances and not protected speech on a matter of public concern. The only difference between an individual employee complaining about inadequate compensation (speech that, under *Pickering*, would *not* be protected speech) and a union seeking wage increases is the number of voices represented in the demand, not the nature of the speech.

For over 50 years, the Court has not only recognized but repeatedly emphasized this important, nuanced distinction between a union’s political expenditures, *i.e.*, those of a “public

concern,” and “those germane to collective bargaining” with only the latter properly chargeable to non-union members. *E.g., Lehnert*, 500 U.S. at 515. An employee’s free speech rights “are not unconstitutionally burdened because the employee opposes a position taken by the union in its capacity as collective bargaining representative.” *Id.* at 517. Basic speech by a union concerning quintessential employment matters – wages, benefits, discipline, promotions, leave, vacations and termination – do not necessarily transform into constitutionally protected First Amendment speech as addressed by a union simply because such decisions may in some, unspecified manner impact the public. *Harris*, 134 S. Ct. at 671 (Kagan, J., dissenting) (“we have made clear that except in narrow circumstances we will not allow an employee to make a federal constitutional issue out of basic employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations”) (internal citation omitted).

B. *Abood* Is “workable” As New York City’s Public-Sector Unions Provide Services (Funded By Agency Fees) That Are Undeniably Non-Political And Non-Ideological

The notion that *Abood* is “unworkable” is a convenient and academic argument asserted under the guise of practicality. In reality, *Abood* is eminently workable. And even if Petitioner could establish that the existing test for identifying chargeable expenses was somehow inadequate, the appropriate solution would be to refine the test, not

to jettison it altogether and risk dismantling public - sector labor relations in multiple states.

The bulk of the often voluminous collective bargaining agreements that our member unions sign with New York City and other City-affiliated public employers concern employment matters far beyond anything that could fairly be considered lobbying or of “public concern.” Just because unions at times align themselves with a “wide range of social, political, and ideological viewpoints” and causes, *Lehnert*, 500 U.S. at 587-88, does not mean they always, or even often, so align.

In the vast majority of instances chargeable activities may be readily distinguished from non-chargeable ones. Quite apart from lobbying and other ideological activities that occupy newspaper headlines, New York City municipal unions perform valuable administrative and other services. For example, many MLC unions provide personal pension consultation services (for members and agency fee payers alike). These consultations create no increase in pension costs or influence any governmental expenditure or budgetary item. The only cost associated with the consultation is borne by the union in providing trained consultants, facilities and materials.

There are elsewhere myriad examples of such chargeable services being regularly provided by MLC member unions that are valuable to members and agency fee payers alike, costly for the union to offer and, even by Petitioner’s own measure of lobbying (*i.e.*, attempting to influence policy) not political in

nature.¹³ MLC unions, for example, provide group legal services for a variety of members' personal matters, including house closings, will preparation, and matrimonial disputes, without regard to whether the member pays dues or an agency fee.

Moreover, workplace health and safety represent additional important chargeable areas for many New York City workforces. Unions provide safety education and represent workers in situations where their safety may be compromised. In fact, several New York City unions have industrial hygienists on staff (at no small cost), to address workplace health and safety issues – from contact with hazardous materials, to procedures for handling contagious diseases, to investigations that reveal whether a school or other public facility is located on a toxic site or contains asbestos. The benefits of these services inure to members, agency fee payers and, often, the public as well. Not having students and staff breathing in asbestos in a school undergoing construction, ensuring that female employees have sanitary facilities for clean-up, or that all employees have appropriate places for donning and doffing gear reflect typical workplace issues, not the manifestation of a political agenda.

¹³ Petitioner specifically relies on a comment made in *Harris* that a union's position on spending may have a "massive" effect on government spending. Pet. Br. 14. That assertion neither legally determines the issue nor is its implication that unions cause government to substantially increase spending true. Citations to the total cost of providing a public service do not speak to the impact of union speech, but to the scale of the service provided. In any event, studies have found that overall budgetary expenditures do not materially shift as a result of collective bargaining. (Keefe 2015, at 11).

Similarly, while Petitioner fixates on a union's role in negotiating wage increases, that task occurs only periodically upon the expiration of a prior agreement. Even in the realm of compensation, a union spends the vast majority of its day-to-day work administering the agreement, including helping workers understand pay structures, evaluate possible payroll errors and navigate the payroll correction processes. Viewed honestly, these activities cannot be characterized as remotely political in nature or lobbying, yet are immensely important to an individual public-sector employee.

These types of services, combined with matters of health and safety, handling grievances, and providing legal services, comprise the bulk of the work of our unions, which are funded by dues and agency fees.

Finally, public-sector unions in New York City, like many around the country, understand the distinction drawn in *Abood* and its progeny between chargeable and non-chargeable activities, and have implemented workable administrative pay structures consistent with its teachings. As the *Abood* Court recognized, while there may be occasional "problems in drawing lines between collective bargaining...and ideological activities," 431 U.S. at 236, they are few and far between – certainly not occurring with sufficient frequency to issue a blanket invalidation of fair share fees altogether.

This Court should be under no illusion: the Petitioner and his *amici* supporters, in drawing their hypothetical lines without any record to support it, mischaracterize the true realities of operating a union and managing a city's large public-sector

workforce. Theoretical classification issues are not a reason to disrupt such an important and well-established precedent, particularly one that the public-sector unions of New York have relied upon for decades.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and this Court should decline to overrule *Abood*.

Respectfully submitted,

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January 19, 2018

No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

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QUESTION PRESENTED

Should *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977), be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment?

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

Petitioner, a Plaintiff-Appellant in the court below, is Mark Janus.

Respondents, Defendants-Appellees in the court below, are American Federation of State, County, and Municipal Employees, Council 31; Michael Hoffman, in his official capacity as Acting Director of the Illinois Department of Central Management Services; and Illinois Attorney General Lisa Madigan.

Parties to the original proceedings below who are not Petitioners or Respondents include plaintiffs Illinois Governor Bruce Rauner, Brian Trygg, and Marie Quigley, and defendant General Teamsters/Professional & Technical Employees Local Union No. 916.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. Legal Background	1
B. Illinois’ Agency Fee Requirement	4
C. Proceedings Below	7
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. The Court Should Overrule <i>Abood</i>	10
A. <i>Abood</i> Was Wrongly Decided Because There Is No Distinction Between Bargain- ing with the Government and Lobbying the Government: Both Are Political Speech.....	10
B. <i>Abood</i> Conflicts with <i>Harris</i> , <i>Knox</i> , and Other Precedents That Subject Compelled Association and Speech to Heightened Scrutiny	18
C. <i>Abood</i> Is Unworkable	26
D. Reliance Interests Do Not Justify Retain- ing <i>Abood</i>	32
E. <i>Abood</i> Should Be Overruled	34

TABLE OF CONTENTS—Continued

	<u>Page</u>
II. Agency Fee Requirements Fail Heightened Constitutional Scrutiny Because They Are Not Necessary for Exclusive Representation	36
A. Exclusive Representatives Do Not Need Agency Fees Because the Status Provides Unions with Valuable Powers, Benefits, and Membership Recruitment Advantages	37
B. Agency Fees Are Unneeded Because the Obligations That Come with Exclusive Representative Authority Are Voluntarily Assumed and Are Limited	43
C. Agency Fees Force Nonmembers to Pay for Compulsory Representation That Infringes on Their Rights and Often Harms Their Interests	48
D. <i>Abood's</i> Free Rider Rationale Inverts Reality by Presuming That Exclusive Representation Burdens Unions and Benefits Nonmembers	52
E. Alternatively, No Compelling State Interest Justifies Agency Fee Requirements	53
III. The Court Should Hold That No Union Fees Can Be Seized from Nonmembers Without Their Consent	61
CONCLUSION	63

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>14 Penn Plaza LLC v. Pyett</i> , 556 U.S. 247 (2009).....	49
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977).....	<i>passim</i>
<i>AFSCME, Council 31 v. Ill. Dep’t of CMS</i> , No. 5-16-0510, 2016 WL 7399614 (Ill. App. Ct. Dec. 16, 2016)	7, 14
<i>Agency for Int’l Dev. v. All. for Open Soc’y Int’l</i> , 133 S. Ct. 2321 (2013).....	62
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997).....	10, 25, 34
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974).....	47
<i>ALPA v. O’Neill</i> , 499 U.S. 65 (1991).....	15, 45
<i>Am. Commc’ns Ass’n v. Douds</i> , 339 U.S. 382 (1950).....	39, 49
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009).....	35
<i>Bd. of Regents v. Southworth</i> , 529 U.S. 217 (2000).....	27, 33

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Beck v. Commc'ns Workers</i> , 776 F.2d 1187 (1985), <i>aff'd on reh'g</i> , 800 F.2d 1280 (4th Cir. 1986), <i>aff'd</i> , 487 U.S. 735 (1988).....	30, 33
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000).....	2, 19, 54, 59
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980).....	20
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	21
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986).....	5, 29, 31
<i>Citizens Against Rent Control v. City of Berkeley</i> , 454 U.S. 290 (1981).....	17
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	<i>passim</i>
<i>Civil Serv. Comm'n v. Letter Carriers</i> , 413 U.S. 548 (1973).....	24
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	17, 23, 24
<i>Davenport v. Wash. Educ. Ass'n</i> , 551 U.S. 177 (2007).....	32
<i>Ellis v. Bhd. of Ry. Clerks</i> , 466 U.S. 435 (1984).....	12

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	<i>passim</i>
<i>Emporium Capwell Co. v. W. Addition Cmty. Org.</i> , 420 U.S. 50 (1975).....	46
<i>FEC v. Wis. Right to Life, Inc.</i> , 551 U.S. 449 (2007).....	8, 21, 35
<i>First Nat’l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	21
<i>Force v. Haines</i> , 17 N.J.L. 385 (N.J. 1840).....	51
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 (1953).....	45, 49
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	17
<i>Glickman v. Wileman Bros. & Elliot, Inc.</i> , 521 U.S. 457 (1997).....	33
<i>Harris v. Quinn</i> , — U.S. —, 134 S. Ct. 2618 (2014)	<i>passim</i>
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976).....	25
<i>Humphrey v. Moore</i> , 375 U.S. 335 (1964).....	47, 49
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.</i> , 515 U.S. 557 (1995).....	19

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Ill. Dep’t of CMS v. AFSCME, Council 31</i> , 33 PERI ¶ 67, 2016 WL 7645201 (ILRB Dec. 12, 2016).....	<i>passim</i>
<i>Johanns v. Livestock Mktg. Ass’n</i> , 544 U.S. 550 (2005).....	33
<i>Kidwell v. Transp. Commc’ns Int’l Union</i> , 946 F.2d 283 (4th Cir. 1991)	40
<i>Knox v. SEIU, Local 1000</i> , 567 U.S. 298 (2012).....	<i>passim</i>
<i>Lehnert v. Ferris Faculty Ass’n</i> , 500 U.S. 507 (1991).....	11, 26, 27
<i>Litton Fin. Printing v. NLRB</i> , 501 U.S. 190 (1991).....	39
<i>Locke v. Karass</i> , 555 U.S. 207 (2009).....	26, 27
<i>Machinists v. Street</i> , 367 U.S. 740 (1961).....	16, 31, 33, 34
<i>McCutcheon v. FEC</i> , 134 S. Ct. 1434 (2015).....	21
<i>Medo Photo Supply Corp. v. NLRB</i> , 321 U.S. 678 (1944).....	5, 39
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....	48

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Miller v. ALPA</i> , 108 F.3d 1415 (D.C. Cir. 1997).....	27
<i>Montejo v. Louisiana</i> , 556 U.S. 778 (2009).....	10, 32
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	57
<i>Neal v. Newspaper Holdings, Inc.</i> , 349 U.S. 363 (7th Cir. 2003).....	47
<i>NLRB v. Allis-Chalmers Mfg. Co.</i> , 388 U.S. 175 (1967).....	4, 38, 48, 49
<i>NLRB v. Ins. Agents' Int'l Union</i> , 361 U.S. 477 (1967).....	60, 61
<i>N.Y. State Bd. of Elections v. Lopez Torres</i> , 552 U.S. 196 (2008).....	57
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964).....	59
<i>O'Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996).....	23, 52
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	32, 35
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968).....	22, 23, 24, 25
<i>Pocatello Educ. Ass'n v. Heideman</i> , 504 F.3d 1053 (9th Cir. 2007)	42

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Ry. Emps' Dep't v. Hanson</i> , 351 U.S. 225 (1956).....	16, 34, 56
<i>Riley v. Nat'l Fed'n of the Blind</i> , 487 U.S. 781 (1988).....	2, 20, 52
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	2, 3, 19
<i>Rutan v. Republican Party</i> , 497 U.S. 62 (1990).....	2, 20, 23, 56
<i>Scheffer v. Civil Serv. Emps. Ass'n</i> , 610 F.3d 782 (2d Cir. 2010)	27
<i>Schneider Moving & Storage Co. v. Robbins</i> , 466 U.S. 364 (1984).....	60
<i>Snyder v. Phelps</i> , 131 S. Ct. 1207 (2011).....	17
<i>State Emp. Bargaining Agent Coal. v. Rowland</i> , 718 F.3d 126 (2d Cir. 2013)	45
<i>Steele v. Louisville & Nashville Ry.</i> , 323 U.S. 192 (1944).....	38
<i>Sweeney v. Pence</i> , 767 F.3d 654 (7th Cir. 2014)	38, 39
<i>Teamsters, Local 391 v. Terry</i> , 494 U.S. 558 (1990).....	48
<i>United States v. Associated Press</i> , 52 F. Supp. 362 (S.D.N.Y. 1943)	59

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>United States v. NTEU</i> , 513 U.S. 454 (1995).....	24
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001).....	16, 17
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	46, 50
<i>Vienna Sch. Dist. No. 55 v. IELRB</i> , 515 N.E.2d 476 (Ill. App. Ct. 1987)	5
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	50
<i>Wis. Educ. Ass’n Council v. Walker</i> , 705 F.3d 640 (7th Cir. 2013)	42
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	2, 20
<i>Ysursa v. Pocatello Educ. Ass’n</i> , 555 U.S. 353 (2009).....	42
<i>Zoeller v. Sweeney</i> , 19 N.E.3d 749 (Ind. 2014).....	39
CONSTITUTION & STATUTES	
U.S. Const. amend. I	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Federal Statutes	
2 U.S.C. § 1602(8)(A)	12
5 U.S.C. § 7102.....	37, 40
5 U.S.C. § 7115(a)	42
5 U.S.C. § 7131.....	39
28 U.S.C. § 1254(1)	1
39 U.S.C. § 1209(c).....	37
Cal. Gov. Code §§ 3555–5558.....	42
Illinois Public Employee Labor Relations Act	
5 ILL. COMP. STAT. 315/1 et seq.	4
5 ILL. COMP. STAT. 315/6.....	<i>passim</i>
5 ILL. COMP. STAT. 315/7	4, 38, 60
25 ILL. COMP. STAT. 170/2	11
OTHER AUTHORITIES	
Mike Antonucci, <i>Union Report: 8 Ways the NEA Plans to Keep Power, Money, Members If SCOTUS Ends Mandatory Dues</i> , The 72 (Oct. 25, 2017).....	43
Charles W. Baird, <i>Toward Equality and Justice in Labor Markets</i> , 20 J. SOC. POL. & ECON. STUD. 163 (1995)	44
I. Brant, <i>James Madison: The Nationalist</i> (1948) ...	63
Bureau of Nat'l Affairs, <i>Basic Patterns in Union Contracts</i> (14th ed. 1995)	41

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Andrew Buttarro, <i>Stalemate at the Supreme Court: Friedrichs v. California Teachers Ass’n, Public Unions, and Free Speech</i> , 20 Tex. Rev. L. & Pol. 341 (2016).....	54
Lydia DePillis, <i>The Supreme Court’s Threat to Gut Unions Is Giving the Labor Movement New Life</i> , Wash. Post. (July 1, 2015)	40
Chris Edwards, <i>Public Sector Unions and the Rising Costs of Employee Compensation</i> , 30 Cato J. 87 (2010)	20, 41, 54
<i>Merriam-Webster’s Collegiate Dictionary</i> (11th ed. 2011)	11
Terry M. Moe, <i>Special Interest: Teacher Unions and America’s Public Schools</i> (2011)	14
Thom Reilly and Akheil Singla, <i>Union Business Leave Practices in Large U.S. Municipalities: An Exploratory Study</i> , 46(4) Pub. Personnel Mgmt. 342-67 (2017).....	40
Restatement (Third) of Restitution & Unjust Enrichment (11th ed. 2011)	51
<i>Right to Work States</i> , Nat’l Right to Work Legal Def. Found.....	37

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Clyde W. Summers, <i>Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle</i> , 20 Comp. Lab. L. & Pol’y J. 47 (1998).....	46
U.S. Bureau of Econ. Analysis, Nat’l Data GDP & Pers. Income.....	14
U.S. Dep’t of Labor, Bureau of Labor Statistics, Econ. News Release	55
U.S. Office of Pers. Mgmt., <i>Official Time Usage in the Federal Government Fiscal Year 2014</i> (Mar. 2017).....	40
Sally J. Whiteside, Robert P. Vogt, & Sherryl R. Scott, <i>Illinois Public Labor Relations Laws: A Commentary and Analysis</i> , 60 Chi.-Kent L. Rev. 883 (1984)	4

OPINIONS BELOW

The Seventh Circuit’s decision is reproduced in the Petition Appendix (Pet.App.1), as is the district court’s order dismissing Petitioner’s complaint (Pet.App.6).

JURISDICTION

The Seventh Circuit entered judgment on March 21, 2017. Pet.App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at Pet.App.43.

STATEMENT OF THE CASE

A. Legal Background

It is a “bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Yet, agency fee requirements are not rare. Approximately five million public employees are required, as a condition of their employment, to subsidize the speech of a third party that they may not support, namely a government-appointed exclusive representative. Pet. 9 n.3.

The legal sanction for these forced speech regimes is *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* approved the government forcing its employees to pay an exclusive representative for bargaining with the government and administering the resulting contract, *id.* at 232, but not for activities deemed political or ideological, *id.* at 236.

The *Abood* Court predicted that “[t]here will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.” *Id.* *Abood* was prescient on that score. “In the years since *Abood*, the Court has struggled repeatedly with this issue.” *Harris*, 134 S. Ct. at 2633 (citing cases).

In the years since *Abood*, the Court also has done something else: applied strict and exacting First Amendment scrutiny to instances of compelled speech and association outside of the agency fee context. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000); *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 800 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). In fact, the Court applied those levels of scrutiny to compelled speech and association prior to *Abood* as well. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977); *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion). *Abood*, however, conspicuously failed to apply either level of scrutiny to agency fees. *See Abood*, 431 U.S. at 262–64 (Powell, J., concurring in the judgment).

In 2012, these lines of precedent intersected in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), which applied *Abood*’s framework to a union assessment for opposing ballot initiatives. *Id.* at 315. *Knox* held that agency fee provisions are subject to at least “exacting First Amendment scrutiny,” which requires

that the mandatory association “serve a ‘compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.’” *Id.* at 310 (quoting *Roberts*, 468 U.S. at 623). *Knox* also recognized that *Abood*’s “[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly,” given that “[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections.” *Id.* at 311.

Two years later, the Court in *Harris* applied exacting scrutiny to an agency fee requirement afflicting personal care attendants and found it “arguable” that even that “standard is too permissive.” 134 S. Ct. at 2639. The Court also gave six reasons why “[t]he *Abood* Court’s analysis is questionable.” *Id.* at 2632. Specifically, *Abood*: (1) “fundamentally misunderstood” earlier cases concerning laws authorizing private sector compulsory fees; (2) failed to appreciate the difference between private and public sector bargaining; (3) failed to appreciate the difficulty in distinguishing between collective bargaining and politics in the public sector; (4) did not foresee the difficulty in classifying union expenditures as “chargeable” or “nonchargeable”; (5) “did not foresee the practical problems that would face objecting nonmembers”; and (6) wrongly assumed forced fees are necessary for exclusive representation. *Id.* at 2632-34. The Court stopped short of overruling *Abood*, however,

because doing so was unnecessary to resolve the question presented in *Harris*. *See id.* at 2638 & n.19.

B. Illinois' Agency Fee Requirement

1. On February 9, 2015, in the wake of *Harris*, Illinois Governor Bruce Rauner filed a lawsuit seeking to overrule *Abood* and have the agency fee requirement found in the Illinois Public Labor Relations Act (“IPLRA”), 5 ILL. COMP. STAT. 315/1 *et seq.*, declared unconstitutional. Pet.App.2.

The IPLRA, like other labor laws, grants unions an extraordinary power: the authority to act as “the exclusive representative for the employees of [a bargaining] unit for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment” 5 ILL. COMP. STAT. 315/6(c). This status vests a union with agency authority to speak and contract for all employees in the unit, including those who want nothing to do with the union and who oppose its advocacy. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).¹ The status also vests a union with authority to compel policymakers to bargain in good faith with the union, 5 ILL. COMP. STAT. 315/7, and to change certain policies only after first bargaining to impasse.

¹ Case law concerning the National Labor Relations Act is apposite because Illinois’ “legislature, in discussing the *IPLRA*, expressly stated that it intended to follow the [NLRA] to the extent feasible.” Sally J. Whiteside, Robert P. Vogt & Sherryl R. Scott, *Illinois Public Labor Relations Laws: A Commentary & Analysis*, 60 Chi.-Kent L. Rev. 883, 883 (1984).

Vienna Sch. Dist. No. 55 v. IELRB, 515 N.E.2d 476, 479 (Ill. App. Ct. 1987). These powers are “exclusive” in the sense that the State is precluded from dealing with individual employees or other associations. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944).

The IPLRA empowers an exclusive representative not only to speak for nonconsenting employees in their relations with the government, but also to force those employees to subsidize its advocacy. The Act does so by authorizing agency fee arrangements in which employees are required, as a condition of employment, to “pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment” to an exclusive representative. 5 ILL. COMP. STAT. 315/6(e).

The agency fee amount is calculated by the exclusive representative. *Id.* Under *Chicago Teachers Union v. Hudson*, a union calculates its mandatory fees based on an audit of its prior fiscal year and provides nonmembers with a financial notice explaining its fee calculation. 475 U.S. 292, 304–10 (1986).

2. AFSCME Council 31 is the designated exclusive representative of over 35,000 employees who work in dozens of agencies, departments, and commissions under the authority of Illinois’ governor. Pet.App.10. This includes Petitioner Mark Janus, a child support specialist. *Id.* Janus is not an AFSCME member, but

is forced to pay agency fees to that advocacy organization. *Id.* at 10, 14.

In February 2015, AFSCME began bargaining with newly elected Governor Rauner, who acts through Illinois’ Department of Central Management Services (“CMS”), over policies that affect state employees. The negotiations through January 2016 are detailed in an Illinois Labor Relations Board (“Board”) decision. *Ill. Dep’t of CMS v. AFSCME, Council 31*, 33 PERI ¶ 67, 2016 WL 7645201 (ILRB Dec. 12, 2016). Illinois’ dire budgetary and pension-deficit situation formed the negotiations’ backdrop. *Id.*, ALJD at 12–13.² The parties bargained over twelve disputed “packages” of issues: wages, health insurance, subcontracting, layoff policies, outstanding economic issues (mainly holiday pay, overtime, and retiree health care), scheduling, bumping rights, health and safety, mandatory overtime, filling of vacancies, union dues deduction, and semi-automatic promotions. *Id.* at 37–97.

Among other things, the Governor sought “contract changes that [would] provide[] additional efficiency and flexibility,” link pay increases to merit, and “obtain significant savings (in the proximity of \$700 million) from the healthcare program.” *Id.* at 19. AF-

² “ALJD” refers to the Administrative Law Judge’s Recommended Decision, and “Bd.” to the Board’s Decision, available at <https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf>.

SCME balked, leading to a bargaining impasse. *Ill. Dep't of CMS*, Bd. at 24.

The Governor has since been attempting to implement, over AFSCME's objections, policies that include "\$1,000 merit pay for employees who missed less than 5% of assigned work days during the fiscal year; overtime after 40 hours; bereavement leave; the use of volunteers; the beginning of a merit raise system; [and] drug testing of employees suspected of working impaired." *AFSCME, Council 31 v. Ill. Dep't of CMS*, 2016 IL App (5th) 160510-U, ¶ 7, 2016 WL 7399614 (Ill. App. Ct. Dec. 16, 2016). AFSCME, however, has resorted to litigation to thwart the Governor's desired reforms. *Id.* at ¶ 2.

Regardless of their personal views concerning these policies and AFSCME's conduct, Janus and other employees subject to AFSCME's representation are required to subsidize the advocacy group's efforts to compel the State to bend to its will. Pet.App.14–15. Janus, for example, had \$44.58 in compulsory fees seized from his paycheck each month as of July 2016. *Id.* at 14. AFSCME's *Hudson* notice indicates that its agency fee is 78.06% of full union dues, and was calculated based on union expenditures made in calendar year 2009. *Id.* at 16, 34.

C. Proceedings Below

Shortly after Governor Rauner filed his lawsuit challenging Illinois' agency fee requirement, three Illinois state employees—Mark Janus, Brian Trygg, and Marie Quigley—moved either to intervene or file

a complaint in intervention. *Id.* at 3. The district court granted the employees’ motion to file their complaint in intervention and, in the same order, dismissed Governor Rauner from the case on jurisdictional and standing grounds. *Id.* This left the employees as the only plaintiffs in the case.

Janus and Trygg—without Quigley, who withdrew from the case—filed a Second Amended Complaint alleging that forcing them to pay fees violates their First Amendment rights. *Id.* at 9. Defendants moved to dismiss, arguing, among other things, that *Abood* precluded Plaintiffs’ claim. *Id.* at 7. On September 13, 2016, the district court granted the motion to dismiss based on *Abood*. *Id.*

Janus and Trygg appealed to the United States Court of Appeals for the Seventh Circuit. On March 21, 2017, the Seventh Circuit, relying on *Abood*, affirmed the dismissal of Janus’ claim, but dismissed Trygg’s claim on an alternative ground. *Id.* at 4–5. Janus, but not Trygg, then petitioned this Court for certiorari.

SUMMARY OF ARGUMENT

The “Court has not hesitated to overrule decisions offensive to the First Amendment.” *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)). *Abood* is offensive to the First Amendment. It permits the government to compel employees to subsidize an advocacy group’s political

activity: namely, speaking to the government to influence governmental policies.

Abood should be overruled for the reasons stated in *Harris*, 134 S. Ct. at 2632–34. *Abood* was wrongly decided because bargaining with the government is political speech indistinguishable from lobbying the government; *Abood* is inconsistent with this Court’s precedents that subject instances of compelled speech and association to heightened constitutional scrutiny; *Abood*’s framework is unworkable and does not protect employee rights; and no reliance interests justify retaining *Abood*. The Court should abandon *Abood* and instead follow its precedents that subject compelled speech and association to heightened First Amendment scrutiny.

Agency fee requirements cannot survive that scrutiny because they are not the least restrictive means to achieve any compelling government interest. Even if the government had a compelling need to bargain with unions—which it does not—the government does not need to force employees to subsidize those unions to engage in that bargaining. The valuable powers, privileges, and membership-recruitment advantages that come with exclusive representative status are more than sufficient to induce unions to seek and retain the exclusive representative mantle. This especially is true given that any unwanted obligations that come with that status are minimal. And far from being a least restrictive means, agency fees exacerbate the injury nonconsenting employees suffer from being forced to accept an unwanted bargain-

ing agent whose advocacy may be both contrary and harmful to the employees' interests.

Abood's "free rider" rationale for agency fees gets it backwards by presuming that exclusive representation burdens unions and benefits nonmembers. The opposite is true. Consequently, *Abood's* rationale falls short of what the First Amendment demands. The Court should hold the First Amendment prohibits the government from taking agency fees from public employees without their consent.

ARGUMENT

I. The Court Should Overrule *Abood*.

Stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The Court will overturn a constitutional decision if it is badly reasoned and wrongly decided, conflicts with other precedents, has proven unworkable, or is not supported by valid reliance interests. See *Citizens United*, 558 U.S. at 362–65; *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). *Abood* should be overruled for all of these reasons.

A. *Abood* Was Wrongly Decided Because There Is No Distinction Between Bargaining with the Government and Lobbying the Government: Both Are Political Speech.

1. *Harris* pinpointed the principal reason *Abood* was wrongly decided: bargaining with the government is political speech indistinguishable from lobby-

ing the government.³ “[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government,” and bargaining subjects, “such as wages, pensions, and benefits are important political issues.” 134 S. Ct. at 2632–33.

The Court recognized even prior to *Harris* that “[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one.” *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 520 (1991) (plurality opinion). Justice Marshall saw no distinction at all. *Id.* at 537 (Marshall, J., dissenting). And there is no distinction. An exclusive representative’s function under the IPLRA and other public sector labor statutes is quintessential lobbying: meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those parties.⁴

³ *Abood* also is poorly reasoned because it failed to apply the requisite level of scrutiny and its justifications for agency fees are inadequate. Those flaws are discussed below in Sections I.B and II, respectively.

⁴ See *Merriam-Webster’s Collegiate Dictionary* 730 (11th ed. 2011) (to “lobby” means “to conduct activities aimed at influencing public officials”; and a “lobby” is “a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group”); 25 ILL. COMP. STAT. 170/2 (defining “lobbying” as “any communication with an official of the executive or legislative branch of State government . . . for the ultimate purpose of influencing any executive, legislative, or administrative action” and defining “executive action” to include, among other

Agency fees thus inflict the same grievous First Amendment injury as would the government forcing individuals to support a mandatory lobbyist or political advocacy group. “Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . compulsory fees constitute a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights.’” *Knox*, 567 U.S. at 310–11 (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 455 (1984)).

2. AFSCME’s negotiations with Governor Rauner illustrate the political nature of bargaining with the government. During the negotiations, “[t]he State consistently indicated its need to save hundreds of millions of dollars in health insurance costs” and “that it could not afford to pay step increases or across the board wage increases and was opposed to increases that were unrelated to performance.” *Ill. Dep’t of CMS*, ALJD at 154. AFSCME took opposite positions. *Id.* For example, “the Union had, over two proposals, offered [health insurance] savings that essentially had a net savings of zero dollars due to the increased benefits it still sought.” *Id.* at 224. This

things, “consideration, amendment, adoption, [or] approval . . . of a . . . contractual arrangement”); 2 U.S.C. § 1602(8)(A) (defining “lobbying contact” as “any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy”).

dispute, among others,⁵ evinces that “unlike in a labor dispute between a private company and its unionized workforce, the issues being negotiated are matters of an inherently public and political nature.” *Id.* at 172.

AFSCME’s conduct during bargaining illustrates the same point, as its advocacy extended to the legislature, the public, and the courts. AFSCME proposed, during bargaining, that the state executive branch commit to “jointly advocate for amending the pension code” and increasing state taxes. *Id.* at 26–27. “AFSCME sponsored rallies in various regions of the state” that “were organized to educate the public and to put pressure on the Governor to change his position at the bargaining table.” *Id.* at 135. AFSCME used similar tactics “[d]uring the course of the 2012-2013 negotiations,” in which “the Union communicated its displeasure in the State’s proposals and bargaining positions in a very public manner.” *Id.* at 14. This included having union agents “appear [at] and disrupt [former] Governor Quinn’s public speaking engagements, political events, and even his private birthday party/fundraiser.” *Id.* AFSCME is petitioning state courts to stop Governor Rauner from implementing his desired reforms, contending

⁵ Other examples include the State’s claim that its preferred holiday and overtime policies would save taxpayers an estimated \$180 and \$80 million, respectively, *Ill. Dep’t of CMS*, ALJD at 63-64, and that AFSCME’s semi-automatic promotion demand would cost taxpayers \$20-30 million, *id.* at 97.

that the Governor failed to adequately bargain with the union. *AFSCME, Council 31*, 2016 WL 7399614.

The political nature of bargaining in Illinois is not unusual. In 2016, the nationwide cost of state and local workers' wages and benefits was over \$1.4 trillion, which was more than half of state and local governments' \$2.7 trillion in total expenditures.⁶ It is clear that "payments made to public-sector bargaining units may have massive implications for government spending" and "affect[] statewide budgeting decisions." *Harris*, 134 S. Ct. at 2642 n.28.

Bargaining with the government over non-financial policies is equally political. Union demands for policies that restrict how the government can retain, place, manage, promote, and discipline employees can affect the quality of services the government provides to the public.⁷

3. Enforcement of a collective bargaining agreement, such as through the grievance process, is just as political an act as bargaining for that deal. There is no difference between petitioning the government to adopt a policy and petitioning the government to follow that policy. The actions are complementary

⁶ U.S. Bureau of Econ. Analysis, Nat'l Data, GDP & Pers. Income, tbl. 6.2D, line 92 & tbl. 3.3, line 37, https://www.bea.gov/iTable/index_nipa.cfm (last visited Nov. 15, 2017).

⁷ See Terry M. Moe, *Special Interest: Teacher Unions and America's Public Schools*, 181–92 (2011) (discussing how union leave, absence, tenure, discipline, and seniority policies affect public school operations).

aspects of the same expressive conduct. *Cf. ALPA v. O'Neill*, 499 U.S. 65, 77 (1991) (“doubt[ing] . . . that a bright line could be drawn between contract administration and contract negotiation”).

A grievance resolution can also have a broad effect by setting a precedent applicable to other employees. If a union grievance establishes that one employee is contractually entitled to a particular benefit, then similarly situated employees will be entitled to that same benefit.

4. *Abood* itself recognized that “[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political.” 431 U.S. at 231. *Abood* also acknowledged the unconstitutionality of forcing employees to subsidize advocacy that is political and ideological in nature. *Id.* at 235. Taken together, these incontrovertible premises should have led the *Abood* Court to one conclusion: it is unconstitutional to force employees to subsidize bargaining with the government.

The *Abood* majority avoided that conclusion in two ways. *First*, the majority reasoned that, even though political in many ways, public sector bargaining also shares similarities with private sector bargaining. *Id.* at 229–32. That is a non sequitur because, once it is recognized that bargaining with government is political advocacy, it does not matter what similarities it may share with other types of speech. Agency fees have touched the third rail of the First Amendment.

Abood's heavy reliance on two cases addressing private sector union fees—*Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961)—was misplaced for the same reason, and for others. “*Street* was not a constitutional decision at all.” *Harris*, 134 S. Ct. 2632. *Hanson* barely addressed the constitutional issue. *Id.* Neither case concerned government imposed compulsory fees. *Id.* Neither case applied heightened First Amendment scrutiny to a compulsory fee. “The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.” *Id.*

Second, the *Abood* majority asserted that the political nature of bargaining with the government is not dispositive because the First Amendment protects both political and non-political speech. 431 U.S. at 231–32. That also is a non sequitur; if anything, it suggests compelled support for union speech should be subjected to First Amendment scrutiny irrespective of whether it is political in nature. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410–11 (2001). The assertion is also inconsistent with the next three pages of the decision, which expound on how freedom to associate for political purposes is “at the heart of the First Amendment” and conclude that it is unconstitutional to compel a teacher “to contribute to the support of an ideological cause he may oppose.” *Abood*, 431 U.S. at 233–35.

The political nature of bargaining with the government is constitutionally significant. “[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). The reason is that such speech constitutes “more than self-expression; it is the essence of self-government.” *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). Compelling employees to subsidize union political expression not only impinges on their individual liberties, *see Knox*, 567 U.S. at 310–11, but also interferes with the political process that the First Amendment protects.

Mandatory advocacy groups that individuals are forced to subsidize, and that enjoy special privileges in dealing with the government enjoyed by no others, will have political influence far exceeding citizens’ actual support for those groups and their agendas. Agency fees transform employee advocacy groups into artificially powerful factions, skewing the “marketplace for the clash of different views and conflicting ideas” that the “Court has long viewed the First Amendment as protecting.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981). This distorting effect is why “First Amendment values are at serious risk [when] the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.” *United Foods*, 533 U.S. at 411.

Abood's lack of concern over the political nature of public sector bargaining is untenable, even under the opinion's own logic. *See* 431 U.S. at 235. The political nature of bargaining with the government dictates that compulsory fees to subsidize that speech should have been subjected to the highest form of First Amendment scrutiny.

B. *Abood* Conflicts with *Harris*, *Knox*, and Other Precedents That Subject Compelled Association and Speech to Heightened Scrutiny.

1. *Abood* is remarkable in that it did not subject a compulsory fee for speech to influence governmental policies—i.e., an agency fee—to heightened First Amendment scrutiny. Most notably, *Abood* never considered whether agency fees are a narrowly tailored or least restrictive means to achieve any compelling state interest. Rather, the Court declared that its “province is not to judge the wisdom of Michigan’s decision to authorize the agency shop in public employment.” 431 U.S. at 224–25. This lack of judicial scrutiny was sharply criticized at the time, and rightfully so. *See id.* at 259–64 (Powell, J., concurring in the judgment).

Abood's failure to apply heightened scrutiny to agency fees places it at odds with *Harris* and *Knox*. The Court “explained in *Knox* that an agency-fee provision imposes ‘a significant impingement on First Amendment rights,’ and this cannot be tolerated unless it passes ‘exacting First Amendment scru-

tiny.” *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310–11). This requires that the agency fee provision “serve a ‘compelling state interest[] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* (quoting *Knox*, 567 U.S. at 310). The *Harris* Court found it “arguable” that even that “standard is too permissive” for agency fees. *Id.*

Harris and *Knox* rest on a solid jurisprudential foundation. Their holdings are consistent with lines of constitutional precedent that apply exacting scrutiny to instances of compelled expressive and political association, and apply strict scrutiny to instances of compelled speech and regulations of expenditures for political speech. *Abood*, in contrast, is inconsistent with these lines of precedent.

Compelled association. The Court has long held that infringements on the “right to associate for expressive purposes” must be justified by “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts*, 468 U.S. at 623 (citing seven cases). This standard applies where the government compels expressive organizations to associate with unwanted individuals. *See id.*; *Dale*, 530 U.S. at 658–59; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577–78 (1995). Logically, at least the same standard should apply to the converse situation: where, as here, the government forces individuals to associate with unwanted expressive organizations.

Compelled political association. Exacting scrutiny also governs state requirements that public employees contribute money to, or otherwise associate with, political parties. *Rutan*, 497 U.S. at 74; *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980); *Elrod*, 427 U.S. at 362–63. The same standard should govern requirements that public employees contribute money to union advocates. Apart from its relative novelty,⁸ a “public-sector union is indistinguishable from the traditional political party in this country,” for “[t]he ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership.” *Abood*, 431 U.S. at 256–57 (Powell, J., concurring in the judgment).

Compelled speech. The Court subjects government-compelled speech to strict scrutiny, under which the “government [can]not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored.” *Riley*, 487 U.S. at 800. In other words, the state action must be “narrowly tailored” to serve a compelling state interest. *Id.*⁹; see

⁸ Unlike political patronage requirements, which existed before and after the First Amendment’s adoption and thus arguably might be sanctioned by historical practice, the vast majority of public sector labor laws were enacted in the 1960s and 1970s. See Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 *Cato J.* 87, 96–99 (2010).

⁹ The Court called the scrutiny it applied in *Riley* “exacting,” 487 U.S. at 798, but narrow tailoring is consistent with strict scrutiny. See *Citizens United*, 558 U.S. at 340.

Wooley, 430 U.S. at 716–17 (requiring a “compelling” interest and “less drastic means”). Compelled subsidization of speech deserves the same scrutiny, for “compelled funding of the speech of other private speakers or groups” presents the same dangers as compelled speech.” *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 309).

Expenditures for speech. Laws regulating expenditures and contributions for political speech are subject to heightened First Amendment scrutiny. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444–46 (2014). This includes laws that restrict union and corporate expenditures for political speech. Such laws are subject “to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Citizens United*, 558 U.S. at 340 (quoting *Wis. Right to Life*, 551 U.S. at 464). It also includes laws that restrict expenditures for “issue advocacy,” speech concerning public issues that does not mention a political candidate. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976). The same scrutiny should apply to agency fee laws, which compel employees to pay for union expenditures for issue advocacy. “[T]hat [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.” *Abood*, 431 U.S. at 234 (footnote omitted).

Harris and *Knox* are consistent with these interrelated lines of precedent. So too is *Abood*'s analysis of compulsory fees for union political and ideological activities. *Id.* at 233-35. The *Abood* Court relied on cases from all four lines of precedent when holding that fees for such activities fail First Amendment scrutiny. *Id.* The Court, however, erred by not treating bargaining with the government as a political and ideological activity. *See supra* Section I(A). Absent that critical error, agency fees would be subject to heightened scrutiny even under *Abood*.

2. Respondents argue that *Abood* is consistent with *Pickering v. Board of Education*, 391 U.S. 563 (1968), and subsequent cases evaluating when government employers can discipline employees for engaging in speech.¹⁰ “[T]he argument represents an effort to find a new justification for the decision in *Abood*, because neither in that case nor in any subsequent related case [has the Court] seen *Abood* as based on *Pickering* balancing.” *Harris*, 134 S. Ct. at 2641. A new purported justification for *Abood* diminishes any *stare decisis* value in adhering to that case. *See Citizens United*, 558 U.S. at 362–63. “*Stare decisis* is a doctrine of preservation, not transformation.” *Id.* at 384 (Roberts, C.J., concurring).

This Court’s decisions foreclose the contention that agency fee requirements are subject to the *Pickering* test. The Court rejected this same argument in *Har-*

¹⁰ State Opp. to Cert. 12–13; AFSCME Opp. to Cert. 18.

ris and held that agency fee requirements are subject to at least exacting scrutiny. 134 S. Ct. at 2639. In *O'Hare Truck Service, Inc. v. City of Northlake*, the Court similarly held that exacting scrutiny, and not the *Pickering* test, governs instances of compelled association. 518 U.S. 712, 719–20 (1996).

The *Pickering* test was developed to evaluate an issue not presented here: “the constitutionality of restrictions on speech by public employees.” *Harris*, 134 S. Ct. at 2642. The test weighs the employee’s interest in speaking against the government’s managerial interests in restricting that speech. *Id.* Importantly, the test is premised on the government having an interest, sufficient to override employees’ First Amendment rights, in restricting employee speech that interferes with government operations. See *Connick*, 461 U.S. at 151.

That premise is absent here. The threshold question is *whether* the government has an interest that could justify forcing unwilling employees to subsidize a union advocate. If it does not, there is nothing to balance. That question calls for at least an exacting scrutiny analysis, just as it did in *Elrod*. There, the Court used exacting scrutiny to determine whether the government’s managerial interests could justify forcing employees to subsidize or affiliate with a political party. 427 U.S. at 362–67. With one exception inapplicable here, the Court held those interests to be insufficient. *Id.*; see *Rutan*, 497 U.S. at 69–71. The same analysis is appropriate here.

So is the same result. The government's interest as an employer in *preventing* employee expressive activities from interfering with workplace operations cannot justify forcing employees to *support* expressive activities. The proposition would turn *Pickering* on its head.

In other words, the governmental interest that underlies the *Pickering* test weighs against punishing employees who do not want to subsidize union advocacy, but rather just want to do their jobs. The “demonstrated interest in this country [is] that government service should depend upon meritorious performance rather than political service.” *Connick*, 461 U.S. at 149. Consistent with that interest, the Court upheld the Hatch Act's restrictions on federal employee political activities because they “aimed to *protect* employees' rights, notably their right to free expression, rather than to restrict those rights,” by: (1) insulating employees from work place pressure to support partisan activities, and (2) ensuring “that the rapidly expanding Government workforce should not be employed to build a powerful, invincible, and perhaps corrupt political machine.” *United States v. NTEU*, 513 U.S. 454, 470–71 (1995) (quoting *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)). The government acts *contrary* to both interests when it requires employees to subsidize a political organization to keep their jobs, see *Elrod*, 427 U.S. at 369, whether it be a political party, *id.*, or an advocacy group like AFSCME. No *Pickering* balanc-

ing can take place where, as here, both weights are on the same side of the scale.¹¹

3. The Court was thus correct to hold in *Harris* and *Knox* that agency fee requirements are subject to at least exacting scrutiny. That holding is consistent with four lines of precedent. *Abood* is not. *Abood*'s failure to properly scrutinize agency fees cannot be reconciled with those precedents, and directly conflicts with *Harris* and *Knox*.

This is a situation where, as in *Agostini* and cases it discussed, a decision should be overruled because it conflicts with subsequent constitutional decisions. 521 U.S. at 235–36; *see also* *Hudgens v. NLRB*, 424 U.S. 507, 517–19 (1976). It is also a situation where,

¹¹ For this reason, even if the *Pickering* test applied, agency-fee requirements would fail it. AFSCME's bargaining with the State addresses matters of public concern. *See supra* Section I(A). Turning to the balancing test, "[a]gency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees." *Harris*, 134 S. Ct. at 2643. There is nothing to balance against employees' First Amendment interests in this instance because the State lacks an interest sufficient to justify the constitutional injury that agency fees inflict. As discussed, the government interest in protecting its operations from employees' expressive activities argues against forcing employees to support union expressive activities. And as will be discussed below, the State's ostensible interests in avoiding free-riders and labor peace cannot justify the First Amendment injury agency fees inflict. *See infra* Sections II & III. As in *Harris*, Illinois' agency fee requirement would be unconstitutional under *Pickering*. 134 S. Ct. at 2642–43.

as in *Citizens United*, a decision should be overruled because it departed from preexisting constitutional precedents. 558 U.S. at 319. As in those cases, “[a]brogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.” *Id.* at 921 (Roberts, C.J., concurring). *Abood* should be overruled, and agency fees subjected to the First Amendment scrutiny required by this Court’s jurisprudence.

C. *Abood* Is Unworkable.

1. *Abood*’s “practical administrative problems” stem from its conceptual flaw: it is difficult to distinguish chargeable from nonchargeable expenses under the *Abood* framework. *Harris*, 134 S. Ct. at 2633. The three-prong test a plurality of this Court adopted for that task in *Lehnert*, 500 U.S. at 522, is as subjective as it is vague.

The same is true of the additional test formulated in *Locke v. Karass*, 555 U.S. 207 (2009), under which extra-unit union affiliate expenses are chargeable to nonmembers if (1) they “bear[] an appropriate relation to collective bargaining, and (2) the arrangement is reciprocal—that is, the local’s payment to the national affiliate is for ‘services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.’” *Id.* at 218 (quoting *Lehnert*, 500 U.S. at 524). The Court did not “address what [it] meant by a charge being ‘reciprocal in nature,’ or what show-

ing is required to establish that services ‘may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.’” *Id.* at 221 (Alito, J., concurring). Nor did *Locke* resolve what accounting method could calculate the percentage of each affiliate’s services that are available to each local union in a given year.

Unsurprisingly, “[i]n the years since *Abood*, the Court has struggled repeatedly with” classifying union expenditures under *Abood*’s framework. *Harris*, 134 S. Ct. at 2633 (citing examples); see *Bd. of Regents v. Southworth*, 529 U.S. 217, 231-32 (2000) (recognizing the Court “ha[s] encountered difficulties in deciding what is germane and what is not” under *Abood*). So too have the lower courts.¹²

2. The problems *Abood* causes for employees are worse. The amorphous *Lehnert* and *Locke* tests invite abuse of employee First Amendment rights by granting unions wide discretion to determine the fees that nonmembers must pay. AFSCME’s use of the *Lehnert* agency fee test is illustrative. AFSCME’s “Fair Share Notice” states:

¹² *E.g.*, *Knox*, 567 U.S. at 319-21 (reversing appellate court decision that union could charge nonmembers for “lobbying . . . the electorate”); *Scheffer v. Civil Serv. Emps. Ass’n*, 610 F.3d 782, 790–91 (2d Cir. 2010) (dispute concerning union charge for organizing expenses); *Miller v. ALPA*, 108 F.3d 1415, 1422–23 (D.C. Cir. 1997) (dispute concerning union charge for lobbying expenses).

In addition your Fair Share fee includes your pro rata share of the expenses associated with the following activities which are chargeable to the extent that they are germane to collective bargaining activity, are justified by the government's vital policy interest in labor peace and avoiding free-riders, and do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Pet.App.30-31. The listed "activities" include, among other things, affiliate activities, membership meetings, internal communications, organizing, litigation, lobbying, recreational activities, and benefits for union officers and employees. *Id.* AFSCME can charge nonmembers for almost anything it wants under this nebulous standard.¹³

This particularly is true given that, like most unions, the bulk of AFSCME's expenditures are for its officers and employees' salaries and benefits (71% in 2009). *Id.* at 35–36. Agency fee amounts thus turn, to a large degree, on self-interested judgments by union officials about how they and other union employees spend their time.

The required audit of union financial notices places no restraint on union discretion, as the auditors "do not themselves review the correctness of a union's

¹³ AFSCME's use of this standard is not unusual. Teamsters Local 916 uses a similar standard. J.A. 338–41.

categorization” of expenses. *Harris*, 134 S. Ct. at 2633. The auditors “take the union’s characterization for granted and perform the simple accounting function of ensur[ing] that the expenditures which the union claims it made for certain expenses were actually made for those expenses.” *Knox*, 567 U.S. at 318.

Nor is union discretion constrained by the prospect of employee fee challenges. It is difficult for employees to determine whether they are being overcharged because a union “need not provide nonmembers with an exhaustive and detailed list of all its expenditures,” but only “the major categories of expenses.” *Hudson*, 475 U.S. at 307 n.18. AFSCME’s notice, for example, states that \$11,830,230 of its \$14,718,708 in expenditures for “salary and benefits” is chargeable, and that \$4,487,581 of AFSCME International’s \$8,265,699 in expenditures for “Public Affairs” is chargeable. Pet.App.35,37. Such broad descriptions, coupled with a vague chargeability test, provide nonmembers with little understanding about what they are being forced to subsidize.

Nonmembers who suspect they are being overcharged have little financial incentive to challenge a fee because the amount of money at stake for each employee is comparatively low, while the time and expense of litigation is high. Employees “bear a heavy burden if they wish to challenge” union fee determinations. *Harris*, 134 S. Ct. at 2633. This is true whether that challenge is done through arbitration, which is a “painful burden,” *Knox*, 567 U.S. at 319 n.8, or litigation. “[L]itigating such cases is expen-

sive” because whether an expense is chargeable “may not be straightforward.” *Harris*, 134 S. Ct. at 2633. In one such case, there were more than “six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions” in the district court alone. *Beck v. Commc’ns Workers*, 776 F.2d 1187, 1194 (1985), *aff’d on reh’g*, 800 F.2d 1280 (4th Cir. 1986), *aff’d*, 487 U.S. 735 (1988). And the “onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion.” *Knox*, 567 U.S. at 319.

That some employees may nevertheless step forward to protect their rights is insufficient to police the situation given its scale. There are thousands of public sector unions. AFSCME International “has approximately 3,400 local unions and 58 councils and affiliates in 46 states, the District of Columbia and Puerto Rico”; and, “[e]very local writes its own constitution, designs its own structure, elects its own officers and sets its own dues.”¹⁴ The National Education Association (NEA) has “affiliate organizations in every state and in more than 14,000 communities across the United States.”¹⁵ The American Federation of Teachers claims “more than 3,000 local affiliates nationwide.”¹⁶ Every union that receives agency

¹⁴ *About AFSCME*, <http://www.afscme.org/union/about>.

¹⁵ *About NEA*, <http://www.nea.org/home/2580.htm>.

¹⁶ *About Us*, <https://www.aft.org/about>.

fees is supposed to recalculate its fee amount every fiscal year. *See Hudson*, 475 U.S. at 307 n.18. It would be naïve to believe that individual employee challenges could keep honest thousands of union fee calculations generated each year.

The problem with unions having broad discretion under *Abood* to determine how much money they seize from nonmembers is self-evident: unions have strong incentives to push the envelope on chargeability to charge the highest fee possible. A higher fee not only results in greater revenues from nonmembers, but also incentivizes employees to be full dues-paying union members.

A system that entrusts the proverbial foxes with guarding the henhouses cannot adequately protect the latter. *Abood* establishes such a system, as it entrusts self-interested union officials to determine, under a vague and subjective standard, the fees their unions constitutionally can seize from nonmembers.

No amount of tinkering with *Abood* can fix this fundamental flaw. As Justice Black prophetically warned in his dissent in *Street* when addressing the futility of trying to separate union bargaining expenses from political expenses, this remedy “promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.” 367 U.S. at 796 (Black, J., dissenting).

Abood is thus unworkable in the sense that matters most: in safeguarding employee First Amend-

ment rights. And “the fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.” *Montejo*, 556 U.S. at 792 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

D. Reliance Interests Do Not Justify Retaining *Abood*.

1. Overruling *Abood* and holding agency fee provisions unconstitutional will end some “union[s] extraordinary *state* entitlement to acquire and spend *other people’s* money.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 187 (2007). That will not upset anyone’s valid reliance interests.

A “union has no constitutional right to receive any payment from . . . [nonmember] employees.” *Knox*, 567 U.S. at 321. And ending mandatory union fees will not deprive the government of anything: the fees are not the government’s money. Overruling *Abood* will make agency fee clauses unenforceable, but will otherwise not affect government collective bargaining agreements.

Employees will benefit. The First Amendment right of *all* employees to choose which advocacy groups to support will be honored. Those who believe a union is unworthy of their support will get to keep, and spend as they see fit, wages that would otherwise be seized from them. Moreover, unions’ newfound need to earn employees’ financial support, as opposed to being able to compel it, may make unions more responsive to employees’ needs.

2. Overruling *Abood* will not undermine other lines of precedent for the reasons stated in *Harris*, 134 S. Ct. at 2643. The Court’s bar association and student activities fee precedents do not depend on *Abood*; they can stand on their own. *Id.* In fact, the Court declined to apply *Abood* to activity fees partially because *Abood* was so difficult to administer. See *Southworth*, 529 U.S. at 231–32. The Court also declined to apply *Abood* to agricultural subsidy schemes in both *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 559–62 (2005), and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 n.14 (1997). *Abood* is “an anomaly,” *Knox*, 567 U.S. at 311, that can safely be excised from the body of this Court’s jurisprudence.

Excision will be consistent with private sector agency fee cases. To avoid First Amendment problems, the Court construed the agency fee provisions of the Railway Labor Act and National Labor Relations Act to preclude unions from charging employees for activities not germane to bargaining with private employers, including advocacy to influence the government (*i.e.*, lobbying and express advocacy). See *Harris*, 134 S. Ct. at 2629–30; *Beck*, 487 U.S. at 740–41, 745–46; *Street*, 367 U.S. at 768–69 & n.17. Holding it unconstitutional to compel public employees to subsidize union advocacy to influence governmental affairs will be consistent with those precedents. The cohesive result will be that no employee—whether private or public—can be forced to pay for union advocacy to influence governmental policies.

E. *Abood* Should Be Overruled.

The foregoing demonstrates that *stare decisis* principles do not require retaining *Abood*. The case should be overruled for the same reason the Court usually overrules a case: when it cannot be reconciled with other precedents. *See Citizens United*, 558 U.S. at 319; *Agostini*, 521 U.S. at 235–36 (citing cases). *Abood*’s failure to apply heightened First Amendment scrutiny to compulsory fees for advocacy directed at the government cannot be reconciled with the scrutiny required under *Harris*, 134 S. Ct. at 2639, *Knox*, 567 U.S. at 310–11, and four other lines of precedent. *See supra* Section I(B).

Abood’s reasons for not applying First Amendment scrutiny were recognized to be errors in *Harris*. There, the Court found that *Abood* “failed to appreciate” the significance of public sector bargaining being political in nature and “seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.” *Harris*, 134 S. Ct. at 2632; *see* Section I(A). Once these errors are corrected, agency fees should be subject to heightened scrutiny even under *Abood*’s analysis of forced fees for union political and ideological activities, 431 U.S. at 233–35.

The implications of *Abood*’s failure to apply the proper scrutiny have been momentous because agency fee laws cannot survive strict or exacting scrutiny. *See infra* Section II. *Abood*’s error has permitted state and local governments to violate millions of

public employees’ constitutional rights. *Abood* continues to sanction pervasive First Amendment violations to this day. This warrants overruling *Abood*, for “[t]he doctrine of *stare decisis* does not require [the Court] to approve routine constitutional violations.” *Arizona v. Gant*, 556 U.S. 332, 349 (2009).

No prudential concerns require retaining *Abood* notwithstanding its infirmities. *Abood*’s framework is unworkable because it is difficult to differentiate chargeable from nonchargeable union expenditures, and it is imprudent to entrust self-interested unions with that task. *See supra* Section I(C). No party has a legitimate interest in continuing to deprive employees of their First Amendment rights. *See supra* Section I(D). “If it is clear that a practice is unlawful,” as it is here, “individuals’ interest in its discontinuance clearly outweighs any . . . ‘entitlement’ to its persistence.” *Gant*, 556 U.S. at 349.

“This Court has not hesitated to overrule decisions offensive to the First Amendment . . . and to do so promptly where fundamental error was apparent.” *Wis. Right to Life*, 551 U.S. at 500 (opinion of Scalia, J.); *see Payne*, 501 U.S. at 828 n.1 (listing 33 constitutional decisions overruled between 1971 and 1991). The Court should overrule *Abood*, and subject agency fee requirements to the heightened scrutiny required under *Harris*, *Knox*, and other compelled speech and association precedents.

II. Agency Fee Requirements Fail Heightened Constitutional Scrutiny Because They Are Not Necessary for Exclusive Representation.

Illinois' agency fee law is unconstitutional unless Respondents can prove it is a narrowly tailored means (strict scrutiny), or alternatively the least restrictive means (exacting scrutiny), to achieve a compelling state interest. *See supra* pp. 19–21 (citing authorities). Agency fee laws should be subject to strict scrutiny, as opposed to exacting scrutiny, because the laws compel employees to pay for union political speech, in addition to forcibly associating employees with unions and their advocacy. Either analysis, however, leads to the same result.

In applying heightened scrutiny, “care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice.” *Elrod*, 427 U.S. at 362. Respondents thus cannot meet their burden by showing that compulsory fees serve union interests, or even employee interests. *See Harris*, 134 S. Ct. at 2636 (“The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee . . .”). Respondents must prove compulsory fees are necessary to achieve a compelling state interest.

Abood's justification for agency fees was that (1) the government has “labor peace” interests in bargaining with exclusive representatives, and (2) agency fees to fund that representative are permissible due to a so-called “free rider” problem. 431

U.S. at 220–21, 224. The Court need not consider the first proposition because the second is erroneous. Agency fees are not a narrowly tailored or least restrictive means for the government to engage in collective bargaining because exclusive representation: (A) is valuable to unions; (B) carries with it only limited obligations; and (C) impinges on nonmembers’ constitutional rights and often harms their interests.

A. Exclusive Representatives Do Not Need Agency Fees Because the Status Provides Unions with Valuable Powers, Benefits, and Membership Recruitment Advantages.

“[A] critical pillar of the *Abood* Court’s analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop.” *Harris*, 134 S. Ct. at 2634. Even a cursory review of the nation’s labor laws makes clear that this assumption is false.

Exclusive representation functions without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, in the postal service, 39 U.S.C. § 1209(c), and in the private and/or public sectors in the twenty-seven states that have right to work laws in effect.¹⁷ Exclusive representation regimes applicable to non-employee Medicaid providers and daycare providers also persist after *Harris* held it unconstitu-

¹⁷ *Right to Work States*, Nat’l Right to Work Legal Def. Found., <http://www.nrtw.org/rtps.htm> (last visited Nov. 22, 2017).

tional to force those individuals to pay agency fees, 134 S. Ct. at 2644. In fact, “unions continue to thrive and assert significant influence in several right-to-work states . . . where provisions [prohibiting forced fees] have been in effect for *more than sixty-five years*.” *Sweeney v. Pence*, 767 F.3d 654, 664–65 (7th Cir. 2014) (emphasis added).

It is apparent that a “union’s status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.” *Id.* at 2640. The reason the former exists without the latter is simple: the valuable powers, benefits, and membership recruitment advantages that come with exclusive representative status are more than sufficient to induce unions to seek and retain that status.

1. The state-conferred powers that come with exclusive representative authority are extraordinarily valuable. The State gives a union the exclusive power to speak and contract for all employees in a unit, irrespective of whether individual employees desire that representation. *See* 5 ILL. COMP. STAT. 315/6(c-d); *Allis-Chalmers*, 388 U.S. at 180. These “powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.” *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944).

The State also gives exclusive representatives authority to compel state policymakers to listen and bargain in good faith with that representative. 5 ILL. COMP. STAT. 315/7. The State is prohibited from deal-

ing with employees and other employee associations over policies deemed mandatory subjects of bargaining. J.A. 120; see *Medo Photo*, 321 U.S. at 683–84. The State is also precluded from changing its policies unless it bargains to impasse with an exclusive representative. *Ill. Dep’t of CMS*, Bd. at 15–23; see *Litton Fin. Printing v. NLRB*, 501 U.S. 190, 203 (1991).

The power to speak for all employees in a unit, coupled with authority to compel policymakers to listen to its speech, dramatically increases a union’s ability to further its policy agenda. “The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union.” *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 401 (1950).

Compulsory fees are not necessary to induce unions to assume and exercise these valuable powers. Any union vested with exclusive representative authority is already “fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table.” *Sweeney*, 767 F.3d at 666; see *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (similar).

2. With power come privileges. This includes, among other things, so-called “official time” or “union business leave” privileges. This is where the government pays its employees to engage in union activities or grants its employees unpaid leave to engage in union activities, during which they continue to accrue seniority and creditable service. See J.A. 138–40, 278–79; 5 U.S.C. § 7131 (official time for federal em-

ployees); Thom Reilly and Akheil Singla, *Union Business Leave Practices in Large U.S. Municipalities: An Exploratory Study*, 46(4) Pub. Personnel Mgmt. 342, 359 (2017) (finding that 72% of large municipalities offered union business leave and 84% of those municipalities paid for that leave in whole or in part), <https://goo.gl/dMZxQo>.

These government conferred benefits can be considerable. In fiscal year 2014, the federal government granted union agents 3,468,170 hours of paid time to perform union business, which cost taxpayers \$162,522,763.¹⁸ Notably, the federal government sees no need for agency fee requirements. 5 U.S.C. § 7102.

3. Exclusive representative status “assists unions with recruiting and retaining members,” for “employees are more likely to join and support a union that has authority over their terms of employment, as opposed to a union that does not.” Pet.App.12. This especially is true given that only union members can vote on collective bargaining agreements. *See, e.g., Kidwell v. Transp. Commc’ns Int’l Union*, 946 F.2d 283, 294–97 (4th Cir. 1991).¹⁹

¹⁸ U.S. Office of Pers. Mgmt., *Official Time Usage in the Federal Government, Fiscal Year 2014*, at 3, 12 (Mar. 2017), <https://goo.gl/Q4R1c>.

¹⁹ AFSCME’s own experience is illustrative. In 2014, AFSCME International initiated a membership campaign among represented workers that it claimed resulted in 140,000 new members by July 2015. Lydia DePillis, *The Supreme Court’s Threat to Gut Unions Is Giving the Labor Movement New Life*, Wash. Post. (July 1, 2015), <https://goo.gl/d8b6RY>.

Empirical evidence confirms this. Union membership among public employees skyrocketed after states passed laws authorizing their exclusive representation. See Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 Cato J. 87, 96–99 (2010), <https://goo.gl/kXCg8Y>. Union membership rates are far higher in states that authorize exclusive representation than in states that do not. *Id.* at 106–07. The difference is considerable even where forced fees are banned.²⁰

Exclusive representatives are often granted special “union rights” that facilitate recruiting members. This includes: (1) information about employees; (2) rights to use workplace property and communication systems; and (3) rights to conduct union orientations for employees. See Pet.App.12; J.A. 139–43; ILL. COMP. STAT. 315/6(c) (information requirement); cf. Bureau of Nat’l Affairs, *Basic Patterns in Union Contracts* 82 (14th ed. 1995) (finding that 94% of sampled private sector contracts have “union rights” provisions). In fact, California recently enacted a law mandating that public employers provide exclusive representatives with access to employee orientations and with the “name, job title, department, work loca-

²⁰ In 2008, public sector union membership rates were 37.9% in Nevada, 31.6% in Iowa, 27.9% in Florida, and 27.2% in Nebraska, see Edwards, *supra*, at 106, each of which allows exclusive representation but bans agency fees. By contrast, public sector union membership rates were far lower in states that ban exclusive representation: 4.2% in Georgia, 5.2% in Virginia, 6.0% in Mississippi, and 8.2% in South and North Carolina. *Id.*

tion, work, home, and personal cellular telephone numbers, personal email addresses . . . and home address” of all represented employees. Cal. Gov. Code §§ 3555–58.

The government often also assists exclusive representatives with collecting money from employees. Illinois, like most government employers, deducts union membership dues and political contributions directly from employees’ paychecks upon their authorization. 5 ILL. COMP. STAT. 315/6(f); J.A. 122–23. This is a valuable benefit because unions “face substantial difficulties in collecting funds for political speech without using payroll deductions.” *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 359 (2009) (quoting *Pocatello Educ. Ass’n v. Heideman*, 504 F.3d 1053, 1058 (9th Cir. 2007)). It is an even more valuable benefit where the deduction is made irrevocable for one year, as with unionized federal employees. 5 U.S.C. § 7115(a). “At bottom, the use of the state payroll system to collect union dues is a state subsidy of speech.” *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013). And it is a subsidy that only exclusive representatives enjoy under the IPLRA. See 5 ILL. COMP. STAT. 315/6(f).

These types of government assistance with recruitment and dues collection are alternatives to agency fees that are “significantly less restrictive of associational freedoms.” *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). And they are alternatives that unions plan to utilize. The NEA, for example, recently released a document entitled “8 es-

sentials to a strong union contract without fair-share fees,” which advises unions to seek the following provisions:

1. Access to New-Hire Orientations
2. Access to Unit member Information
3. Access to Work Sites and Communication with Members
4. Release Time for Leaders & Activists
5. Payroll Deduction of Dues
6. Maintenance-of-Dues Payments
7. Payroll Deduction of PAC Contributions
8. Saving (Severability) Clause.²¹

These and other special government privileges, coupled with the valuable powers of exclusive representative authority, are the reasons why agency fees are not necessary to induce unions to become or remain exclusive representatives.

B. Agency Fees Are Unneeded Because the Obligations That Come with Exclusive Representative Authority Are Voluntarily Assumed and Are Limited.

1. *Abood* ignored the powers, benefits, and membership-recruitment advantages inherent in exclusive representative authority, and instead cast that privilege as a burden imposed on unions that “carries

²¹ Mike Antonucci, *Union Report: 8 Ways the NEA Plans to Keep Power, Money, Members If SCOTUS Ends Mandatory Dues*, The 74 (Oct. 25, 2017), <https://goo.gl/c9X8WY> (NEA document is available at <https://goo.gl/pkqjtY>).

with it great responsibilities.” 431 U.S. at 221. This inverts reality, as unions voluntarily seek exclusive representative status because of the benefits that come with it. “[I]t is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation.” Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol. & Econ. Stud. 163, 179 (1995). Union complaints about the heaviness of the crown they seized, and now jealously guard, cannot be taken seriously.

The actual burdens of exclusive representative status are slight to nonexistent because only actions that unions are compelled to engage in against their will constitute a burden or cost. As the Court explained in *Harris*, to show a “free rider” cost, a union must show it “is required by law to engage in certain activities that benefit nonmembers and that the union would not undertake if it did not have a legal obligation to do so.” 134 S. Ct. at 2637 n.18.

Unions bear no such costs because they choose to become and remain exclusive representatives and thus voluntarily assume the powers and corresponding duties that entails. Nothing in the law requires a union to do so. If the argument for “[w]hat justifies the agency fee . . . is the fact that the State compels the union to promote and protect the interests of nonmembers,” *id.* at 2636, there is no justification for agency fees. The State does not “compel” unions to be exclusive representatives.

Even if one ignores the union's free choice, any additional cost of representing nonmembers in addition to union members is minor. There is no reason why the expense of negotiating a contract for all employees should exceed the cost of negotiating a contract just for union members. If anything, the former is cheaper because it is simpler to negotiate for everyone and the union has greater bargaining leverage.

The duty of fair representation, which comes with exclusive representative authority, does not raise the cost of bargaining. "[T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Unions have wide latitude to agree to contract terms that favor some employees and disadvantage others. *See id.* at 79–81; *Huffman*, 345 U.S. at 338–39. Although unions cannot agree to contract terms that discriminate against employees solely based on their nonmembership in the union, that hardly is a significant restriction on a union's bargaining discretion. Indeed, it would be unconstitutional for a government employer to discriminate against employees based on their union membership status. *See State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 133 (2d Cir. 2013).

2. Unions sometimes complain of the ostensible burden of representing nonmembers in grievances. This complaint is hypocritical; unions generally com-

pel employees to have the union represent them in grievances, and not the other way around. Unions do so by contractually requiring that only the union, and not individual employees, can pursue a grievance to a formal adjustment or arbitration. *E.g.*, J.A. 127–30; see Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle*, 20 Comp. Lab. L. & Pol’y J. 47, 62 (1998). “The individual is not only barred from bargaining for better terms, but enforcement of the terms bargained by the union on his or her own behalf is only through the grievance procedure and arbitration which the union controls.” Summers, *supra*, 20 Comp. Lab. L. & Pol’y J. at 68–69. “No other system so subordinates the individual worker’s rights to collective control.” *Id.* at 69.

“Unions want unchallenged control over all aspects of the contract, including its grievance procedure and arbitration which they created,” and “prefer that the individual employee has no independent rights.” *Id.* at 63. The reason is that this grants the union singular control over the employer’s policies. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69–70 (1975). This control is a valuable power to a union, not an imposed burden.

Unions have wide discretion over whether to pursue grievances. See *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). “Nothing” in the IPLRA “limit[s] an exclusive representative’s right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.” 5 ILL. COMP. STAT. 315/6(d).

Exclusive representatives have discretion not to pursue even meritorious grievances. *See Humphrey v. Moore*, 375 U.S. 335, 348–49 (1964). When evaluating a grievance, a union can consider “such factors as the wise allocation of its own resources, its relationship with other employees, and its relationship with the employer.” *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). A union can decline to pursue meritorious grievances if it believes that doing so serves greater interests. *See Humphrey*, 375 U.S. at 349–50 (holding a union could favor one employee group over another in a grievance). Due to a “union’s exclusive control over the manner and extent to which an individual grievance is presented . . . the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

All told, unions are seldom, if ever, “required by law to engage in certain activities that benefit non-members . . . that the union would not undertake if it did not have a legal obligation to do so.” *Harris*, 134 S. Ct. at 2637 n.18. To the extent unions are required to act, those minor obligations pale in comparison to the valuable powers and benefits that come with exclusive representative authority. Consequently, agency fees are not necessary to induce unions to become or remain exclusive representatives.

C. Agency Fees Force Nonmembers to Pay for Compulsory Representation That Infringes on Their Rights and Often Harms Their Interests.

There is another reason compulsory fees cannot be a “means significantly less restrictive of associational freedoms” for the government to engage in collective bargaining. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). Compelled fees exacerbate the constitutional and other harms that employees suffer as a result of the government forcing them to accept an unwanted representative.

1. “The First Amendment protects [individuals] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Regimes of exclusive representation violate this right, as they strip unconsenting employees of their right to choose who speaks on their behalf and force those employees to accept a mandatory agent for speaking and contracting with the government. This, in turn, “extinguishes the individual employee’s power to order his own relations with his employer.” *Allis-Chalmers*, 388 U.S. at 180.

Because “an individual employee lacks direct control over a union’s actions,” *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives can (and do) engage in advocacy as the employees’ proxy that employees oppose. See *Knox*, 567 U.S. 310. *Abood* itself acknowledged that “[a]n em-

ployee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative” and cited several examples. 431 U.S. at 222.

Exclusive representatives also can (and do) enter into binding contracts as employees’ proxy that may harm some employees’ interests. *E.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (union waived employees’ right to bring discrimination claims against their employer by agreeing that employees must submit such claims to arbitration). Even in private sector bargaining, “[t]he complete satisfaction of all who are represented is hardly to be expected” because “inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees.” *Huffman*, 345 U.S. at 338. “Conflict between employees represented by the same union is a recurring fact.” *Humphrey*, 375 U.S. at 349–50. Even though a represented employee “may disagree with many of the union decisions,” he or she “is bound by them.” *Allis-Chalmers*, 388 U.S. at 180.

Unsurprisingly, given an exclusive representative’s power to speak and contract for nonconsenting individuals, the Court has long recognized “the sacrifice of individual liberty that this system necessarily demands,” *Pyett*, 556 U.S. at 271; that “individual employees are required by law to sacrifice rights which, in some cases, are valuable to them” under exclusive representation, *Douds*, 339 U.S. at 401; that exclusive representation results in a “corresponding re-

duction in the individual rights of the employees so represented,” *Vaca*, 386 U.S. at 182; and that “[t]he collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.” *Id.*

This subordination of individual rights to a collective implicates First Amendment rights in the public sector because the individuals are being collectivized for a political purpose: petitioning the government to influence its policies. *See supra* 11-12. An exclusive representative, in this context, is indistinguishable from a government-appointed lobbyist or mandatory faction. *Id.* Such political collectivization is antithetical to the First Amendment, which exists to protect individual speech and association rights from majority rule. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

2. Three conclusions flow from the fact that exclusive representatives engage in unwanted advocacy and contracting as the agents of nonconsenting employees. *First*, agency fees compound the First Amendment injury that being forced to associate with an unwanted representative already inflicts on employees. Nonconsenting employees are forced to pay a union for suppressing their own rights to speak for themselves. The employees are also forced to subsidize advocacy that they have not authorized and that may harm their interests. Consequently, agency fees cannot be considered a “means significantly less restrictive of associational freedoms.” *Harris*, 134 S.

Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). One constitutional injury cannot justify yet another.

Second, agency fee requirements violate the equitable principle that individuals do not have to pay for services they are forced to accept against their will. *See* Restatement (Third) of Restitution & Unjust Enrichment, § 2(4) (“Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse.”); *Force v. Haines*, 17 N.J.L. 385, 386–87 (N.J. 1840) (“Now the great and leading rule of law is, to deem an act done for the benefit of another, without his request, as a voluntary courtesy, for which, no action can be sustained.”). Employees should not be forced to pay for advocacy they are not free to refuse.

Third, *Abood*’s free rider rationale for agency fees rests on a false premise: that agency fees “distribute fairly the cost of [union] activities among those who *benefit*, and . . . 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.” 431 U.S. at 222 (emphasis added). This incorrectly presumes that non-member employees benefit from their representative’s advocacy. To the contrary, nonmembers suffer an associational injury by being forced to accept an unwanted representative, may oppose their representative’s advocacy, and may find themselves on the

short end of the deals their representative strikes with the government. *See supra* 48–50.

Nonmembers’ beliefs that they do not benefit from a union’s advocacy cannot be second guessed, for “one’s beliefs and allegiances ought not to be subject to probing or testing by the government.” *O’Hare*, 518 U.S. at 719. “The First Amendment mandate[s] that . . . speakers, not the government, know best both what they want to say and how to say it.” *Riley*, 487 U.S. at 799–91. Consequently, and contrary to *Abood*’s free rider rationale, the government cannot force nonmembers to pay for union advocacy based on the “paternalistic premise” that it is “for their own benefit.” *Riley*, 487 U.S. at 790.²²

D. *Abood*’s Free Rider Rationale Inverts Reality by Presuming That Exclusive Representation Burdens Unions and Benefits Nonmembers.

Taken together, the foregoing demonstrates that *Abood* got it backwards in finding that exclusive representation burdens unions and benefits nonmember employees. 431 U.S. at 222. Far from being a burden, exclusive representation provides unions with valuable powers, benefits, and advantages with recruiting

²² To be clear, even if nonmembers benefitted from their exclusive representative’s advocacy, that would not justify agency fees. *Harris*, 134 S. Ct. at 2636. The point is that, contrary to the premise of *Abood*’s free rider rationale, the Court cannot presume nonmembers benefit from union advocacy.

and retaining members. *See supra* Section II(A). Any costs incident to this power are voluntarily assumed and negligible in any case. *Id.* at II(B). And far from benefitting nonmember employees, exclusive representation forces them to accept an agent, advocacy, and contractual terms that they may oppose and that may not benefit them. *Id.* at III(C).

Abood's “free rider” epithet for nonmembers is doublespeak for the same reasons. 431 U.S. at 221. An accurate term would be “forced riders,” as nonmembers are being forced by the government to travel with a mandatory union advocate to policy destinations they may not wish to reach.

Abood's rationale for agency fees “falls far short of what the First Amendment demands.” *Harris*, 134 S. Ct. at 2641. Agency fee requirements are nowhere close to being narrowly tailored or the least restrictive means for collective bargaining. Hence, the requirements fail heightened scrutiny.

E. Alternatively, No Compelling State Interest Justifies Agency Fee Requirements.

1. The Court need not determine whether Illinois has a compelling interest in bargaining with exclusive representatives if the Court decides that agency fee provisions fail First Amendment scrutiny because the fees are not needed that purpose. If the Court does reach the issue, however, it will find that Illinois lacks a compelling interest that justifies the First Amendment injury that agency fees inflict on employees.

That it might be rational for Illinois to engage in collective bargaining is insufficient to demonstrate a compelling state interest. An “encroachment” on First Amendment rights “cannot be justified upon a mere showing of a legitimate state interest. . . . The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.” *Elrod*, 427 U.S. at 362 (internal marks and citation omitted). Even strong state interests, such as in remedying discrimination, can prove insufficient. *See Dale*, 530 U.S. at 658-59. Therefore, to prevail in this case, Illinois must prove it has such a compelling need to bargain with exclusive representatives that the need overrides employees’ First Amendment right not to subsidize those representatives’ advocacy.

Illinois cannot meet this daunting burden. Collective bargaining in the public sector is a relatively new phenomenon. In the first half of the twentieth century, President Franklin Roosevelt and AFL President George Meany considered it antithetical to representative government.²³ Not until the late 1950’s did some states begin to enact statutes authorizing collective bargaining with the government. *See Edwards*, *Cato J.* at 97–98.

Whatever the wisdom of this policy, it cannot be said that states have a paramount need to engage in

²³ *See* Andrew Buttarro, *Stalemate at the Supreme Court: Friedrichs v. California Teachers Ass’n, Public Unions, and Free Speech*, 20 *Tex. Rev. L. & Pol.* 341, 373 (2016).

it. Illinois and other governmental bodies can promulgate and enforce employment policies without haggling with union officials. That is the usual state of affairs, as 62% of government workers in 2016 were not subject to union representation.²⁴

Public officials necessarily have greater flexibility to operate their workplaces when not bound to the strictures of union contracts or required to bargain with unions. This includes greater flexibility to set compensation, adjust work rules, reward competent employees, discipline underperforming employees, and take other actions that the officials believe will improve public services. Unless the government has a compelling need to protect its operations from the public officials who manage them—which is absurd—the government cannot have a compelling need to restrict its own freedom of action.

Nor does the government have a compelling need to restrict its employees' freedoms. Forcing employees to accept and support a union *against their will* is unlikely to make them better employees. The political patronage cases are instructive. The Court held that the government's "interest in ensuring that it has effective and efficient employees" cannot justify forcing employees to contribute to or affiliate with political parties because it is doubtful the "mere difference of political persuasion motivates poor performance" and, "in any case, the government can en-

²⁴ U.S. Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 3, <http://www.bls.gov/news.release/union2.t03.htm>.

sure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate.” *Rutan*, 497 U.S. at 69–70 (quoting *Elrod*, 427 U.S. at 365–66). So too here, employees’ desires not to support union advocacy have no bearing on employees’ work performance. Even if it did, government employers can deal with any workplace issues simply by enforcing employee codes of conduct. Pet.App.11.

2. *Abood* found exclusive representation to be “presumptively” justified by the “labor peace” interest the Court cited in *Hanson* to support a private sector labor statute, the Railway Labor Act, 431 U.S. at 224–25. But that interest merely is a rational-basis justification for a regulation of interstate commerce under the Commerce Clause. *See Harris*, 134 S. Ct. at 2627–29. It was not a compelling interest found to justify First Amendment infringements. *Id.* at 2629, 2632. “The [*Hanson*] Court did not suggest that ‘industrial peace’ could justify a law that ‘forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought.’” *Id.* at 2629 (quoting *Hanson*, 351 U.S. at 236–37).

Nor could the interest justify such a law. As shown below, *Abood*’s three conceptions of the labor peace interest are not compelling interests that could justify public sector agency fees.

a. *Abood* framed the labor peace interest as one in “free[ing] the employer from the possibility of facing

conflicting demands from different unions,” 431 U.S. at 221, and avoiding “[t]he confusion and conflict that could arise if rival teachers’ unions, holding quite different views . . . each sought to obtain the employer’s agreement,” *id.* at 224. Whatever its merits in the private sector, there is no legitimate interest in suppressing diverse expression to influence the government. That is the very essence of democratic pluralism. As Justice Powell stated in *Abood*: “I would have thought the ‘conflict’ in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment.” *Id.* at 261.

Justice Powell was right. “The First Amendment creates ‘an open marketplace’ in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.” *Knox*, 567 U.S. at 309 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). The First Amendment also guarantees freedom to associate to influence governmental policies. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–09 (1982). Consequently, the proposition that multiple employee advocacy groups may petition the government for different employment policies is not a “problem” to be solved. It exemplifies the pluralism and diverse expression the First Amendment protects.

Even if it were a problem, forced fees are not its solution. “State officials must deal on a daily basis with conflicting pleas for funding in many contexts.” *Har-*

ris, 134 S.Ct. at 2640. If state officials only want to listen to the pleas of one union on certain issues, then, at most, that justifies them only listening to that union. It does not require that the state compel nonconsenting employees to associate with that interest group and pay for its advocacy.

b. *Abood* stated that, in the private sector, “[t]he 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.” 431 U.S. at 220. The government does not need to set and enforce its employment policies pursuant to union agreements. Nor does the government need to force its employees into unions to pay them the same wages and benefits. The government can set uniform employment terms irrespective of whether it formulates those terms based on inputs from one, two, several, or no unions. The reason, quite simply, is that the government *controls* its employment terms.

c. *Abood* averred that exclusive representation in the private sector “prevents inter-union rivalries from creating dissension within the work force and eliminating *the advantages to the employee* of collectivization.” 431 U.S. at 220–21 (emphasis added). But collectivization does not necessarily benefit employees. *See supra* pp. 48–50. And even if it did, that is not a “governmental interest,” which is what exacting scrutiny requires. *Elrod*, 427 U.S. at 362.

This rationale makes no sense when the government is the employer because the government can change its employment terms without a union petitioning it to do so. For example, if Illinois believes its employees should have higher wages, Illinois simply can pay higher wages. It does not need to force employees to subsidize AFSCME to ask the State to implement policies the State believes should be implemented. The proposition that a state must collectivize its employees in order for that state to provide them with greater benefits is logically untenable.

The Court rejected a similar proposition in *Harris*. 134 S. Ct. at 2640–41. There, Illinois and a union argued that the union’s alleged prowess in securing more state benefits for personal assistants justified compulsory fees. *Id.* The Court held that “in order to pass exacting scrutiny, more must be shown,” namely that the State could not provide those benefits without agency fees. *Id.* at 2641. No such showing was made there. *Id.* Nor could it be made here.

3. While not stated in *Abood*, AFSCME suggests that bargaining with an exclusive representative leads to better public policies. Opp. to Cert. 23. That argument is counterintuitive, as “[t]he First Amendment . . . ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.’” *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

The argument is also at odds with the fact that an exclusive representative's role is to represent not public interests, but employee interests, *see* 5 ILL. COMP. STAT. 315/7; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984) ("A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit."). Collective bargaining thus "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960). It is, rather, a process that pits a union, representing what it perceives to be employee self-interests, against the government, representing the public's interests.

In any case, government officials certainly do not have such a compelling need for union policy advice that it could override employees' First Amendment rights. That particularly is true given those officials can obtain that advice through means other than collective bargaining. In fact, government officials are likely to receive union input on employment related policies whether they desire it or not.

4. The *Harris* dissent posited that there is a governmental "interest in bargaining with an adequately funded exclusive bargaining agent." 134 S. Ct. at 2648 (Kagan, J., dissenting). Even if the government had a compelling interest in bargaining with unions—which it does not—it certainly does not have an interest in having to deal with well-funded negotiating opponents. As AFSCME's contentious bar-

gaining with Governor Rauner illustrates, collective bargaining is an adversarial process that “proceed[s] from contrary and to an extent antagonistic viewpoints and concepts of self-interest.” *Ins. Agents’ Int’l Union*, 361 U.S. at 488. No rational actor wants to deal with a powerful negotiating opponent. To the extent government has any interest in dealing with a designated employee representative, it would be with a weak and submissive one.

In summary, any interest Illinois may have in bargaining with exclusive representatives cannot justify its agency fee requirement. That is not to say it is unlawful or irrational for Illinois to bargain with unions. Rather, the point is that Illinois lacks a *compelling* interest sufficient to override employees’ First Amendment rights not to subsidize advocacy that they may oppose. Agency fee requirements, if not struck down on other grounds, fail heightened scrutiny for this reason.

III. The Court Should Hold That No Union Fees Can Be Seized from Nonmembers Without Their Consent.

If the Court overrules *Abood* and finds that agency fees fail First Amendment scrutiny, the Court should hold that the First Amendment prohibits unions from seizing any fees from public employees without their consent.

First, the Court’s holding should make explicit that public employees cannot be forced to pay any union fees whatsoever. Allowing unions to compel employ-

ees to subsidize any union activity will lead to the same workability problems that bedevil *Abood*—policing the proper calculation of the compulsory fee and union methods for exacting it—and to the same abuses of employee rights.

Second, the Court’s holding should make clear that unions “may not exact any funds from nonmembers without their affirmative consent.” *Knox*, 567 U.S. at 322 (footnote omitted). The First Amendment guarantees “each person” the right to “decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). That right is infringed upon if the government requires an individual to subsidize speech without his or her consent.

That is true irrespective of whether that individual opposes the content of that speech. As Justice Scalia recognized during oral argument in *Friedrichs v. California Teachers Ass’n*, it would be wrongful for the government to “force somebody to contribute to a cause that he does believe in.” Transcript of Oral Arg. at 4–5, *Friedrichs*, No. 14-915 (U.S. Jan. 11, 2016). For example, it would be just as unconstitutional for the government to seize money from Republicans for the Republican Party as it would be to seize money from Democrats for that cause. In either case, the government is depriving individuals of their right to choose whether, and to what degree, they financially support an expressive organization and its

message. A nonconsensual agency fee seizure works the same First Amendment injury.

CONCLUSION

Thomas Jefferson believed that to “compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” I. Brant, *James Madison: The Nationalist* 354 (1948). Jefferson was right. *Abood* was wrong. *Abood* should be overruled and public employees freed from compulsory union fee requirements.

The judgment below should be reversed.

Respectfully submitted,

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November 29, 2017

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MARK JANUS,)
)
Petitioner,)
)
v.) No. 16-1466
)
AMERICAN FEDERATION OF STATE,)
)
COUNTY, AND MUNICIPAL EMPLOYEES,)
)
COUNCIL 31, ET AL.,)
)
Respondents.)
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Pages: 1 through 71

Place: Washington, D.C.

Date: February 26, 2018

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1 APPEARANCES:

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	WILLIAM L. MESSENGER	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	GEN. NOEL J. FRANCISCO	
7	On behalf of the United States,	
8	as amicus curiae, in support of	
9	the Petitioner	22
10	ORAL ARGUMENT OF:	
11	DAVID L. FRANKLIN	
12	On behalf of the State Respondents	35
13	ORAL ARGUMENT OF:	
14	DAVID C. FREDERICK	
15	On behalf of Respondent	
16	AFSCME Council 31	51
17	REBUTTAL ARGUMENT OF:	
18	WILLIAM L. MESSENGER	
19	On behalf of the Petitioner	68
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1466,
5 Janus versus the American Federation of State,
6 County, and Municipal Employees.

7 Mr. Messenger.

8 ORAL ARGUMENT OF WILLIAM L. MESSENGER

9 ON BEHALF OF THE PETITIONER

10 MR. MESSENGER: Mr. Chief Justice, and
11 may it please the Court:

12 Abood should be overruled because it
13 failed to apply heightened First Amendment
14 scrutiny to a compulsory fee for speech to
15 influence governmental policies. Abood's
16 failure places it at odds with Harris, with
17 Knox, and a slew of other speech and
18 association precedents.

19 Now Respondents attempt to justify
20 Abood's results with rationales found nowhere
21 in that decision, which undercuts any stare
22 decisis value in retaining Abood.

23 JUSTICE GINSBURG: May I ask,
24 Mr. Messenger, if you are right about agency
25 fees, what about three things: One is student

1 activities fees. Are they different and, if
2 so, why? Another is mandatory bar association
3 payments. And the third is you have a public
4 sector case. What about the private sector,
5 agency fees compelled by state law in the
6 private sector?

7 MR. MESSENGER: Yes, Your Honor. With
8 respect to the first two instances, the student
9 association or student fees and the bar
10 association fees, those cases are
11 distinguishable for reasons stated in Harris.
12 They're justified by different interests.

13 The state bar associations are
14 justified by the state's compelling government
15 interest in regulating the practice of law
16 before its courts. The student association
17 fees are justified by the government's or what
18 -- a university's compelling interest in
19 setting up a viewpoint-neutral forum for
20 speech.

21 And then, with respect to the private
22 sector cases, they hinge on a question of state
23 action. So, in this case, only public sector
24 union fees are being challenged. In the
25 private sector, you'd have a question of

1 whether state action applied, and, therefore,
2 the rule of Janus would apply to that case.

3 JUSTICE SOTOMAYOR: I'm sorry, I
4 thought that we had always recognized that the
5 government as employer had a compelling
6 interest in regulating its employment
7 decisions.

8 We permit the government to fire
9 people, deprive them of all money, not just a
10 fair share fee, but deprive them of any income
11 if they speak outside of the government's
12 approved policy messages or messages generally.

13 So, if we can permit the government as
14 employer to have a compelling interest to do
15 something as dramatic as firing someone, why
16 can't that interest in having workplace peace,
17 workplace routine in which issues are decided
18 in a -- in a collective way, why isn't that a
19 compelling interest comparable to the others?

20 MR. MESSENGER: Well, the government's
21 interests in restricting speech don't apply to
22 compelling support for speech. In fact,
23 oftentimes they cut the opposite way.

24 So the government's interest in
25 restricting speech, for example, in the Hatch

1 Act, restricting political activities, was in
2 preventing the politicalization of the
3 workforce and preventing government employees
4 from being organized into a political machine.

5 Of course, those same interests don't
6 justify forcing individuals to support the
7 speech of an advocacy group.

8 JUSTICE SOTOMAYOR: But that's no
9 different than forcing student -- student
10 participation in fees to provide a public
11 forum, to have a bar association regulated.
12 These are all forcing the subsidization of
13 private interests for a government purpose.
14 And the government purpose here is labor
15 relations and labor peace. Why isn't -- you
16 still haven't told me why that's not a
17 compelling state interest.

18 MR. MESSENGER: Well, irrespective of
19 whether --

20 JUSTICE SOTOMAYOR: Or -- I shouldn't
21 say state. A compelling federal -- government
22 interest.

23 MR. MESSENGER: Yes, Your Honor.

24 The Court doesn't need to reach
25 whether or not labor peace into that -- such

1 interests are compelling because agency fees
2 are not a least restrictive means to satisfy
3 any labor peace interest the government may
4 have in listening to one union.

5 So the labor peace interest, as this
6 Court has explained in Abood, is the
7 government's interest in listening only to one
8 union so it doesn't have to listen to multiple
9 unions.

10 JUSTICE SOTOMAYOR: Well, there's
11 another way of doing student fees. You can
12 have students who don't pay not participate in
13 any student activity because the price of -- of
14 being permitted to participate. You can have
15 bar associations that the state runs. You can
16 have alternatives of all kinds, but the
17 question is, is the alternative that the state
18 has chosen one that is well-fitted to the -- to
19 its need? Is it well-tailored, narrowly
20 tailored?

21 I don't see how you can do that given
22 the interests of the government in ensuring
23 that unions represent everybody.

24 MR. MESSENGER: Well, an agency fee
25 isn't necessary for exclusive representation.

1 JUSTICE SOTOMAYOR: Why not? You have
2 free riding.

3 MR. MESSENGER: Well, the reason, Your
4 Honor, is exclusive representation in and of
5 itself is a valuable benefit for a union. It
6 provides unions with extraordinary powers to
7 compel the government to listen to it at the
8 bargaining table, to not listen to other
9 advocacy groups.

10 JUSTICE GINSBURG: But it drains it of
11 resources that make it an equal partner in the
12 marketing setting. If you are right, that it's
13 not only the people who are opposed to the
14 union but also union supporters who may think
15 I'd rather keep the money in my own pocket, and
16 then you'll have a union with diminished
17 resources, not able to investigate what it
18 should demand at the bargaining table, not
19 equal to the employer that it faces.

20 MR. MESSENGER: Well, I think there's
21 two things in that question, Your Honor.

22 The first, the question is, does the
23 duty to represent non-members raise union
24 bargaining costs? And I submit that it does
25 not. The union -- there's no reason why

1 negotiating a contract for all employees in a
2 unit would be more expensive than negotiating a
3 contract just for the union members, because
4 the union's discretion in bargaining is
5 incredibly wide. And so the duty that the
6 union has to the non-members, which it assumes
7 over them by assuming exclusive representative
8 authority, doesn't necessarily add any costs
9 above and beyond what the union would already
10 confer.

11 JUSTICE GINSBURG: But you're not
12 taking into account what I --

13 JUSTICE KENNEDY: Have unions --

14 JUSTICE GINSBURG: -- I suggested,
15 that it's not just the people who oppose the
16 union but the people who support the union but
17 say we have a chance to get out of paying fees
18 to the union, and so, although not for
19 ideological reasons, we're going to pass and
20 we're not going to pay dues either.

21 MR. MESSENGER: Well, I submit, Your
22 Honor, it's immaterial why an individual does
23 not wish to support union advocacy. The First
24 Amendment prohibits the government from probing
25 into individuals' subjective belief.

1 JUSTICE GINSBURG: So you're saying
2 that you do then recognize that the unions can
3 be in a position where they will be -- that the
4 resources available to them could be
5 substantially diminished?

6 MR. MESSENGER: Well, to -- to the
7 degree to which the union resources are
8 diminished by individuals exercising their
9 First Amendment right not to subsidize that
10 union, I submit that's a perfectly acceptable
11 result. The --

12 JUSTICE ALITO: Does -- does the
13 Constitution require states to demand that
14 unions provide services for non-members?

15 For example, is there a constitutional
16 requirement for a union to handle the
17 grievances of non-members, or is that something
18 that's imposed by state law?

19 MR. MESSENGER: It varies, Your Honor.
20 In the federal law, this Court implied the duty
21 of --

22 JUSTICE ALITO: Well, no, we're
23 talking about state law.

24 MR. MESSENGER: Yes. In state law,
25 for example, in Illinois state law, there is a

1 provision in the Illinois Labor Relations Act
2 that expressly provides a duty of fair
3 representation.

4 JUSTICE ALITO: Yeah, I understand
5 that. Are they -- is that constitutionally
6 required?

7 MR. MESSENGER: No, Your Honor.

8 JUSTICE KENNEDY: With reference to
9 some of the other cases they've discussed, have
10 the unions at any point in this litigation or
11 any point in their history ever said that
12 they're committed to the -- to the idea of
13 viewpoint neutrality?

14 MR. MESSENGER: No, Your Honor.

15 JUSTICE BREYER: I wonder, since your
16 time is limited, let me say three -- three
17 quick questions.

18 What you're doing basically is trying
19 to apply a more modern framework to some older
20 cases. This has been the law for 50 years just
21 about. Okay?

22 Holmes and Brandeis didn't know about
23 these modern framework. How many cases should
24 we go back? Do you think we should apply
25 modern frameworks to all old cases, begin with

1 Marbury versus Madison? There are lots of very
2 good lawyers in this room. They will think of
3 all kinds of older cases where we haven't
4 applied modern frameworks.

5 So, one, what's your limiting
6 principle there? Two, what is your limiting
7 principle on the matter that we're talking
8 about?

9 I mean, Stewart, Justice Stewart, who
10 wrote Abood in the '70s, thought the case is
11 identical or near identical to the Railway
12 Labor Act cases. Railway Labor Act, that's a
13 railroad, they're regulated, government's
14 involved, just as your clients are involved,
15 you know, just as the unions here.

16 What's the distinction, if you're
17 going to try to make one?

18 And -- and -- and -- and really,
19 three, and this is for all of you, all the
20 lawyers here, what do you think of the -- what
21 I think of as a compromise put forth by
22 Justices Kennedy, Scalia, Souter, and O'Connor
23 in Lerner, called to our attention specifically
24 by the brief of Professor Freed and Professor
25 Post? Does that solve most of your problem for

1 any side?

2 Those are the three. You see? Stare
3 decisis, even if it weren't there, how do you
4 distinguish all the other unions, particularly
5 those in regulated industries, and, three, what
6 about the compromise?

7 MR. MESSENGER: Yes. So, to address
8 your questions in order, Justice Breyer, on the
9 first point, Abood is not only inconsistent
10 with cases that came after it; it was
11 inconsistent with cases that came before it,
12 such as Elrod. Even the dissent in Elrod,
13 Justice Powell would have applied exacting
14 First Amendment scrutiny to patronage.

15 So Abood wasn't just a departure or
16 isn't just inconsistent with prior precedent or
17 -- sorry, subsequent precedents, but with the
18 precedents that came before it. So this would
19 not necessarily be solely applying a new
20 doctrine to Abood but applying what the law was
21 even prior to Abood.

22 With the Railway Labor Act, as this
23 Court explained in Harris, there you have the
24 private sector. You don't have the union in
25 dealing with government, which, of course, is

1 political advocacy, and that political advocacy
2 is subject to heightened First Amendment
3 protection, which you don't necessarily have in
4 the private sector.

5 And then, with respect to the third
6 point, the test suggested in the dissent in
7 Leonard, the problem with that is that it
8 allows for charging of collective bargaining
9 and anything else that the government decided
10 that the union had a duty to bargain over.

11 So, in other words, that test, the
12 statutory duties test, allows the government to
13 decide what is constitutionally chargeable
14 under the First Amendment.

15 So that test would, of course, among
16 other things, allow for charging of collective
17 bargaining. But here collective bargaining is
18 the core political activity, which we submit
19 individuals cannot be compelled to support.

20 JUSTICE SOTOMAYOR: Is it just the
21 collective nature of the union? You're not
22 suggesting that if an employee goes to the
23 state and tries to negotiate his or her wages
24 that that's a First Amendment activity. We've
25 said it's not, right?

1 MR. MESSENGER: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: That
3 employment-related issues are not entitled to
4 First Amendment protection, correct?

5 MR. MESSENGER: Yes, Your Honor,
6 generally speaking.

7 JUSTICE SOTOMAYOR: So, if an employee
8 is disciplined by the state for some
9 malfeasance, that's an employment-related issue
10 not entitled to First Amendment protection?

11 MR. MESSENGER: Oftentimes.

12 JUSTICE SOTOMAYOR: Oftentimes. If
13 employees come to the union -- come to the
14 state and want greater training, employment
15 issue, correct?

16 MR. MESSENGER: Generally, yes.

17 JUSTICE SOTOMAYOR: So why does it
18 transform into some entitlement to First
19 Amendment protection merely because a
20 collective body of employees are coming to the
21 table at once? What's the transformative
22 nature now of making these substantive
23 questions matters of public policy?

24 MR. MESSENGER: As this Court
25 recognized in Harris, it's the scale. So here

1 you have AFSCME bargaining over issues that
2 affect hundreds of millions of dollars and
3 affect thousands of employees across the board.
4 The scale of that is what makes it a political
5 --

6 JUSTICE SOTOMAYOR: It's not going to
7 change whether the union asks for it or the
8 employees come -- what you're now saying is if
9 the employees came into an auditorium at a
10 business site of the state and every one of
11 them got up and said, I want higher wages, the
12 scale of that demand makes it protected by the
13 First Amendment? It's still a work-related
14 demand.

15 MR. MESSENGER: Well, in that
16 hypothetical, it would arguably be a matter of
17 public concern if there was a stage-in, you
18 know, at a public auditorium in which employees
19 stood up.

20 JUSTICE SOTOMAYOR: Well, let's --
21 let's not -- don't put in facts. They have
22 permission to be in the auditorium. They walk
23 in as a group. Every one of them gets up and
24 says, I want higher wages.

25 Is that an employment issue, or does

1 that now become public policy because,
2 something that every employee wants, they've
3 now articulated?

4 MR. MESSENGER: I would submit that it
5 starts to move towards a matter of public
6 policy if it isn't entirely.

7 JUSTICE SOTOMAYOR: So it's now scale,
8 not subject?

9 MR. MESSENGER: Well, it's both scale
10 and subject. I mean, here the subject are
11 wages, health insurance, many ways in which the
12 government operates which are very important
13 both to the public fisc and to the operation
14 and delivery of services.

15 JUSTICE SOTOMAYOR: Scale --

16 JUSTICE KAGAN: Mr. Messenger, may I
17 ask you about reliance interests here? I don't
18 think that we have ever overruled a case where
19 reliance interests are remotely as strong as
20 they are here.

21 So just a few things to put on the
22 table. Twenty-three states, the District of
23 Columbia, Puerto Rico, all would have their
24 statutes declared unconstitutional at once.
25 Thousands of municipalities would have

1 contracts invalidated. Those contracts
2 probably cover millions, maybe up to over 10
3 million, workers.

4 So property and contract rights, the
5 -- the -- the -- the statutes of many states
6 and the livelihoods of millions of individuals
7 affected all at once.

8 When have we ever done something like
9 that? What would be the justification for
10 doing something like that?

11 MR. MESSENGER: Well, I'd say two
12 things, Justice Kagan.

13 The first is that the prevalence of
14 these compulsory unionism provisions isn't
15 reason for retaining Abood; it's reason for
16 reversing Abood. You have wide-scale First
17 Amendment violations, as you said, in 23 states
18 affected.

19 JUSTICE KAGAN: But that would be to
20 flip our usual stare decisis doctrine. Our
21 usual stare decisis doctrine makes it quite
22 clear that reliance is an important
23 consideration on the scales.

24 MR. MESSENGER: Reliance on something
25 that's constitutional. Reliance on an illegal

1 practice, no. For example, in Arizona v. Gant,
2 which involved searches of cars under the
3 Fourth Amendment, the Court said the fact this
4 was occurring in many places across the board
5 is a reason for reversing it, and many
6 individuals' Fourth Amendment rights were being
7 violated.

8 And so, in that instance, the
9 prevalence of compulsory unionism in the states
10 is a reason for reversing it.

11 And then, in terms of contracts in
12 general, I submit the contracts will survive,
13 except for the excision of the compulsory
14 unionism provisions due to severability.

15 JUSTICE KAGAN: Well, why is that?
16 How many of these contracts have severability
17 clauses, do you know?

18 MR. MESSENGER: I couldn't find a
19 number for the public sector, Your Honor, but
20 the general -- most contracts at least I have
21 seen for anecdotal do have severability clauses
22 and the general rule under the Restatement of
23 Contracts, I think it's 184.

24 JUSTICE BREYER: California says the
25 opposite. I mean, California has a whole brief

1 there. You've read that.

2 MR. MESSENGER: Of course, yes, Your
3 Honor.

4 JUSTICE BREYER: So what's the answer
5 to that?

6 MR. MESSENGER: The answer, Your
7 Honor, is that I submit they're severable in
8 California because they're not an essential
9 provision of the contract that would require
10 the excision of anything more than the clause.

11 JUSTICE KAGAN: Of course, even if
12 that's true, presumably they're bargained-for
13 provisions. The contract would have been
14 different if the unions and the employers had
15 known that this was going to be declared
16 unconstitutional.

17 So to leave the contract as is, except
18 for one particular bargained-for provision, is
19 to do something that's inequitable for the
20 union.

21 MR. MESSENGER: Well, I don't think
22 that's necessarily always true as a legal
23 matter. Foremost in some states, compulsory
24 unionism is mandated by the statute, for
25 example, in California. And in other states,

1 once the provision is there, it stays there, so
2 it's not even a subject of bargaining usually.
3 It's something that was always there from the
4 prior contract. It's taken as an assumption.

5 And even to the extent it was a
6 bargained-for issue in a recent contract, these
7 contracts will expire the next one to three
8 years and need to be renegotiated anyways. So
9 I don't think that really changes the reliance
10 interests.

11 Mr. Chief Justice, if I can reserve
12 the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 General Francisco.

16 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 IN SUPPORT OF THE PETITIONER

19 GENERAL FRANCISCO: Mr. Chief Justice,
20 and may it please the Court:

21 I'd like to focus on three basic
22 issues. The first is the government's interest
23 in having a necessity of agency fees. The
24 second is the stare decisis question that we've
25 been talking about, and then the third is the

1 Lehnert issue.

2 In terms of whether agency fees are
3 necessary to further the compelling interest in
4 having an exclusive bargaining representative
5 on the other side of the table, I don't think
6 there's really any basis for concluding that.
7 For example, in the federal government, we
8 don't have agency fees either in the government
9 generally or under the --

10 JUSTICE SOTOMAYOR: We also have more
11 benefits that are given without unions.

12 GENERAL FRANCISCO: Not in the Postal
13 Service, Your Honor. The Postal Service --

14 JUSTICE SOTOMAYOR: Well, that may be
15 a different one, but doesn't that beg the
16 question, Mr. General, about not having a
17 record here? It's an awful lot of assumptions
18 that have been bandied back and forth by both
19 sides on the actual effects of this. You're
20 saying it's okay because the federal
21 government's the same, the Postal Service is
22 like other jobs, but that's a whole lot of
23 allegations about the reality, factual
24 reality --

25 GENERAL FRANCISCO: Right.

1 JUSTICE SOTOMAYOR: -- of things that
2 have not been tested anywhere.

3 GENERAL FRANCISCO: Right. Well, two
4 responses, Your Honor. First, the Postal
5 Service does have the full range of
6 negotiation. And in the rest of the federal
7 government, I would submit that the more
8 limited bargaining range should make it harder
9 for them to recruit members into the union.

10 And, In fact, in the Postal Service,
11 according to Bureau of Labor Statistics data,
12 we find that about 94 percent of employees who
13 are subject to collective bargaining agreements
14 are members of the union even though you don't
15 have agency fees. In the federal government
16 generally, including the Postal Service, that
17 number is about 80 percent, and if you just
18 take the -- the Postal Service out and look at
19 the federal government, it's still north of
20 80 percent.

21 JUSTICE SOTOMAYOR: How much of the
22 workplace --

23 GENERAL FRANCISCO: That's according
24 to Bureau of Labor Statistics data.

25 JUSTICE SOTOMAYOR: How much of the

1 workplace is unionized for the federal
2 government?

3 GENERAL FRANCISCO: I believe that in
4 the federal government generally, about a
5 quarter of the workplace, a quarter to a third
6 of the workplace is unionized.

7 JUSTICE SOTOMAYOR: And how much is
8 their unionization in the general corporate
9 sector?

10 GENERAL FRANCISCO: I think --

11 JUSTICE SOTOMAYOR: Or private sector?

12 GENERAL FRANCISCO: My -- I -- I don't
13 know for sure. I think it's on the order of --
14 I think it's less than that, but I'm not
15 exactly sure what the private sector rate is.

16 JUSTICE SOTOMAYOR: In the mechanical
17 industry, in the printing industry, in -- I
18 know a lot of industries --

19 GENERAL FRANCISCO: Yeah.

20 JUSTICE SOTOMAYOR: -- that are
21 controlled by union.

22 GENERAL FRANCISCO: I don't have that
23 number.

24 JUSTICE SOTOMAYOR: I don't mean that
25 in a negative sense.

1 GENERAL FRANCISCO: No, no.

2 JUSTICE SOTOMAYOR: Meaning that
3 almost all work --

4 GENERAL FRANCISCO: And I -- and I
5 don't have that number at the top of my head,
6 Your Honor.

7 JUSTICE KENNEDY: You -- you were
8 trying to get to two other points.

9 GENERAL FRANCISCO: Yes. So my other
10 point was on the motion to dismiss issue, the
11 need for a record, this case came up on a
12 motion to dismiss. So I think the appropriate
13 course is, as in Harris, you reverse the motion
14 to dismiss and you send it back.

15 Turning to the stare decisis point and
16 particularly the reliance interests, collective
17 bargaining agreements are generally two- to
18 four-year contracts. So that means that almost
19 all of them were negotiated under the shadow of
20 Harris and Knox. So I don't think that there
21 was an enormous amount of reliance on the
22 continued vitality of Abood.

23 But even if there were some reliance,
24 I think it would be very short-lived, until the
25 next negotiating session, where any new

1 decisions from this Court would be factored in.
2 And I do agree that there also probably
3 wouldn't be much disruption at all since you
4 would simply invalidate individual agency fee
5 provisions. Now --

6 JUSTICE GINSBURG: General Francisco,
7 I would like to get your answer to the question
8 I asked Mr. Messenger and didn't have time to
9 ask him a follow-up.

10 Let's say you prevail in this case.
11 What happens in the private sector? We have a
12 doctrine you know well, Shelley against
13 Kraemer, that says if a contract is illegal,
14 the court can't enforce it.

15 GENERAL FRANCISCO: Uh-huh.
16 Respectfully, Your Honor, I don't think
17 anything would happen in the private sector for
18 largely the reasons that Justice Alito
19 identified in his Third Circuit opinion on the
20 issue and the D.C. Circuit identified in an
21 opinion that I -- I believe you were part of,
22 which held that in the private sector, there
23 simply is no state action when it comes to
24 collective bargaining agreements.

25 JUSTICE BREYER: Look, the --

1 GENERAL FRANCISCO: That's also what
2 the United States argued in its Beck amicus
3 brief here a few -- a few years ago.

4 JUSTICE BREYER: Labor peace, I once
5 heard Archie Cox, maybe it was in your position
6 right here, say the greatest instrument for
7 labor peace and prosperity from the years 1945
8 to 1970 was grievance arbitration in the
9 unions.

10 GENERAL FRANCISCO: Uh-huh.

11 JUSTICE BREYER: So suddenly we're
12 changing the method of financing that. You
13 say, well, it's just public unions.

14 But if I were in a regulated industry,
15 and I read the Court's opinion siding with you,
16 I would wonder if it didn't apply to me.

17 GENERAL FRANCISCO: Uh-huh.

18 JUSTICE BREYER: And not all workers
19 are lawyers. And all they've seen is that this
20 Court has suddenly cut legs, at least one, out
21 of the financing of a system that at least in
22 some aspects, though it's debatable, some
23 people think it brought labor peace.

24 GENERAL FRANCISCO: Right.

25 JUSTICE BREYER: Now you are the

1 government of the United States. What do you
2 think about that?

3 GENERAL FRANCISCO: Well, Your Honor,
4 I think that the core of this issue goes to --
5 and I'm reading from the agency brief -- the
6 agency fee provision itself, the cost of the
7 collective bargaining process.

8 And that's separate from the grievance
9 process. I actually think the grievance
10 process raises serious First Amendment concerns
11 as well, but for purposes of this case, the
12 focus is on the cost of collective bargaining,
13 and I don't think you necessarily have to go
14 any further than that to resolve this case,
15 since the whole --

16 JUSTICE KAGAN: Please.

17 GENERAL FRANCISCO: -- since the whole
18 idea of agency fees, their justification and
19 their purpose, has been predicated on the need
20 to compel support for the collective bargaining
21 process.

22 JUSTICE KAGAN: General, an important
23 part of Mr. Messenger's argument is the idea
24 that all speech about employment conditions,
25 about pay, about vacation, you know, about all

1 of the various employee benefits that -- that
2 are subjects of collective bargaining, that are
3 really the heart of collective bargaining, that
4 all speech about that is -- are matters of
5 public concern when it happens in the public
6 workplace because they all cost money and, as
7 taxpayers, we would be interested in things
8 that cost money. Is that the government's
9 position as well, that all of that speech is a
10 matter of public concern?

11 GENERAL FRANCISCO: Yes, Your Honor.
12 I think in the public bargaining context, all
13 of it goes to the size, structure, cost of
14 government, and the delivery of public
15 services, although I would agree that there are
16 some things that more vividly implicate public
17 policy than others.

18 JUSTICE KAGAN: Can I ask -- and it
19 strikes me as a very unusual position for the
20 government to be taking, looking after the
21 long-term interests of the United States
22 Government, because essentially what that means
23 is that you will have to litigate all
24 employee/employer disputes under the --

25 GENERAL FRANCISCO: Yeah.

1 JUSTICE KAGAN: -- second step of
2 Pickering rather than under the first --

3 GENERAL FRANCISCO: Well --

4 JUSTICE KAGAN: -- which is quite a
5 striking thing for the government to be saying
6 that it agrees with.

7 GENERAL FRANCISCO: Yeah. Well, I --
8 I very much disagree with that, Your Honor. I
9 think the Pickering framework is an established
10 framework that works very well, and the nature
11 of individual wage disputes, the reason it
12 rises to the level of public interest when it
13 comes to collective bargaining agreements is
14 because it really does all go to the overall
15 size, structure, and the cost of the
16 government. Pickering is very different.

17 JUSTICE KAGAN: So you're saying that
18 when a union collectively bargains, it's a
19 matter of public concern but that if employees
20 in their workplace, 10 or 20 of them, get
21 together without the formal collective
22 bargaining that a union does, that that's not a
23 matter of public concern?

24 GENERAL FRANCISCO: Very much so, Your
25 Honor, because when an individual employee is

1 negotiating with his employer over his
2 particular wage, that's a negotiation that's
3 taking place between the employee and the
4 employer.

5 In the public sector collective
6 bargaining context, it's taking place between a
7 private third-party organization, a union, and
8 the government in order to set the overall
9 size, scope, and structure of government.

10 JUSTICE KAGAN: Well, that union is a
11 representative of the employees and has been
12 chosen to represent the employees so that the
13 employees can better wield their power --

14 GENERAL FRANCISCO: Right. And --

15 JUSTICE KAGAN: -- over terms and
16 conditions of employment. So why should it
17 matter -- I mean, that's -- I'm -- I'm trying
18 to understand this because it struck me as a
19 quite amazing thing --

20 GENERAL FRANCISCO: Yeah.

21 JUSTICE KAGAN: -- for the government
22 to be saying that these were matters of public
23 concern. Why should it matter if 50 employees
24 get together and say we want higher wages and
25 then, on the other hand, if employees get

1 together and say, you know what, we think it's
2 right to elect a union so that the union can
3 say that, it's the exact same subjects and the
4 exact same speech that's going to be involved.

5 GENERAL FRANCISCO: And I think it
6 matters for two reasons: One is the scope of
7 the issue. But, two, and more importantly,
8 it's the nature of Pickering.

9 Even in Pickering, the government is
10 allowed to prohibit core political speech when
11 it interferes with the employee's ability to do
12 their job.

13 JUSTICE SOTOMAYOR: I'm sorry.

14 GENERAL FRANCISCO: And that's the --

15 JUSTICE SOTOMAYOR: If we're going to
16 get into scope under the Pickering test, then
17 the employee who, contrary to the chain of
18 command, talks about rampant corruption in a
19 government agency, then we're not going to
20 permit, as we already have, that employee to be
21 fired because the scope of that affects the
22 public fisc in a huge way.

23 GENERAL FRANCISCO: I very much
24 disagree with that, Your Honor.

25 JUSTICE SOTOMAYOR: I -- I -- I don't

1 understand what you're arguing. This is such a
2 radical new position on your part.

3 GENERAL FRANCISCO: I don't -- I don't
4 think --

5 JUSTICE SOTOMAYOR: Mr. -- Mr.
6 General, by the way, how many times this term
7 already have you flipped positions from prior
8 administrations?

9 GENERAL FRANCISCO: Your Honor, I
10 believe --

11 JUSTICE SOTOMAYOR: This may be -- how
12 many?

13 GENERAL FRANCISCO: Your Honor, I
14 think that we have revised the position in so
15 far three cases.

16 JUSTICE BREYER: That's fair.
17 Regardless, what is -- what is the answer to
18 Justice Kagan's question?

19 GENERAL FRANCISCO: Yeah. The answer
20 to the question goes to the nature of the
21 Pickering inquiry itself. Pickering reflects
22 the government's interest in controlling the
23 words and actions of its employees in order to
24 make sure they're doing their jobs.

25 And Pickering reflects the teaching

1 that heightened scrutiny is fundamentally
2 incompatible with that interest, since if you
3 apply heightened scrutiny to it, you basically
4 prohibit employee -- employers from controlling
5 their words and actions. But there's no
6 corresponding interest when it comes to
7 compelling employees to subsidize third-party
8 advocacy.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 General.

11 Mr. Franklin.

12 ORAL ARGUMENT OF DAVID L. FRANKLIN,
13 SOLICITOR GENERAL OF ILLINOIS,
14 ON BEHALF OF THE STATE RESPONDENTS

15 MR. FRANKLIN: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 This Court's cases uniformly recognize
18 that the state has a much freer hand when it
19 manages its personnel as an employer than when
20 it regulates its citizens as a sovereign, and
21 this has come up already today, that freer hand
22 includes broad authority to put conditions on
23 employees' speech.

24 Now my friends on the other side this
25 morning argue that that deference to the

1 employer's prerogatives somehow depends on the
2 scale or the scope of the speech in question.
3 That has never been the law.

4 The government is still acting as an
5 employer when it treats with its employees as a
6 group or as a whole. That's why this Court has
7 repeatedly used the Pickering framework and
8 other deferential public employee tests to
9 uphold generally applicable workplace policies.

10 You see that in the Letter Carriers
11 case, upholding the Hatch Act. You see that in
12 San Diego versus Roe, the rule in Garcetti
13 applies to millions of public employees around
14 the country.

15 JUSTICE KENNEDY: Garcetti involved
16 government speech. What we're talking about
17 here is compelled justification and compelled
18 subsidization of a private party, a private
19 party that expresses political views
20 constantly.

21 MR. FRANKLIN: I'm happy to speak to
22 that, Justice Kennedy. You're right. The
23 Garcetti case is an official duties case, and
24 we're not arguing this case as an official
25 duties case.

1 However, agency fees are a condition
2 of public employment because they pay for the
3 workplace services -- not just collective
4 bargaining -- but as Justice Breyer pointed out
5 referencing General Cox, day-to-day workplace
6 grievance resolution under an employment
7 contract. All of those activities involve
8 speech by an employee representative to an
9 employer in an employment --

10 JUSTICE KENNEDY: Suppose that --
11 suppose that 80 percent of the fees of the
12 union dues went to matters that were highly
13 political in nature and 20 percent to wage and
14 grievance -- wage hour -- wage negotiations and
15 grievances. Would that change your view?

16 MR. FRANKLIN: I -- I don't know that
17 it would, Your Honor. You know, the Abood
18 case, the Keller case, Beck, Ellis, all of them
19 --

20 JUSTICE KENNEDY: Then -- then it
21 seems -- then it seems to me your argument
22 doesn't have much weight.

23 MR. FRANKLIN: Well, first of all, we
24 don't know what percentage of the union's
25 activities are wrapped up with grievances. If

1 you -- you know, we don't have a record here.

2 We're on a motion to dismiss.

3 But if you look at publicly available
4 Hudson notices that do break out categories of
5 chargeable expenses in this way, which ours in
6 the record doesn't happen to do, you'll find
7 that in many cases, especially in the out-years
8 when the CBA is not being renegotiated, charges
9 for field representatives -- those are the
10 people in -- day in and day out who are doing
11 workplace grievance work, advising employees,
12 et cetera -- can be three times, six times,
13 seven times as much on the chargeable expenses
14 line than the line for collective bargaining.

15 So to decide this case in an
16 evidentiary vacuum on the basis of assumptions
17 about how that speech breaks down or how those
18 expenses break down would in our view be
19 irresponsible, frankly, because what you've got
20 --

21 JUSTICE ALITO: There are -- there are
22 numerous differences between Pickering and the
23 situation here, but let me just ask you about
24 one. Do you think there are any limitations on
25 the authority of the State of Illinois to

1 compel its employees to say what the state
2 wants them to say? And if there are
3 limitations, what are they?

4 MR. FRANKLIN: If the -- if what the
5 state wants them to say is a function of their
6 official duties in the workplace, that's
7 Garcetti --

8 JUSTICE ALITO: No, if it's not a
9 function of their official duties. I
10 understand you could not -- you probably agree
11 with the position you're arguing, but if you
12 didn't, coming here representing the State of
13 Illinois, you couldn't just argue what you
14 like.

15 MR. FRANKLIN: No, my boss is right
16 behind me.

17 JUSTICE ALITO: That's right.

18 (Laughter.)

19 MR. FRANKLIN: I -- I -- I -- I'm
20 acting pursuant to official duties, Your Honor.

21 JUSTICE ALITO: I know. I understand
22 that and in that situation.

23 MR. FRANKLIN: Right. No, but, I
24 understand you're not --

25 JUSTICE ALITO: But aside from your

1 official duties, are there any limitations?

2 MR. FRANKLIN: Yes.

3 JUSTICE ALITO: What are they?

4 MR. FRANKLIN: What the Garcetti case
5 underlines is that when the state takes the
6 employment relationship and exploits or
7 leverages that relationship in such a way as to
8 have an effect on the broader marketplace of
9 citizen speech, so that the employer interest
10 is really pretextual, then we're --- we've got
11 a different story.

12 Pickering accounts for this, Justice
13 Alito.

14 JUSTICE ALITO: Well, let me ask you,
15 I'll give you a concrete situation. In
16 Connick, an assistant district attorney -- the
17 Court held that an assistant district attorney
18 could be fired for circulating a writing that
19 suggested that there was a lack of confidence
20 in the supervisors in the office. Okay? It
21 was a limitation on what she could say.

22 Do you think the case would have been
23 the same if the district attorney required the
24 assistant district attorney to appear before a
25 meeting of everybody in the office and say: I

1 love my supervisors; they are the best
2 supervisors anybody could possibly want?

3 MR. FRANKLIN: It would -- I'll answer
4 your question. But the preface to my answer
5 has to be, though, because I want to lay this
6 marker down, that would still be analyzed under
7 Pickering, step 2. Okay?

8 Under Pickering, step 2, we -- we'd
9 assess the strength of the state's --

10 JUSTICE ALITO: No, the Court said
11 that that was a matter of -- that was a -- that
12 was a subject of private concern.

13 MR. FRANKLIN: Well, it's possible
14 that if you've got an Orwellian scenario where
15 the employee is being required in the workplace
16 to speak about matters of public concern, we
17 would get to step 2.

18 JUSTICE ALITO: Private concern.
19 Private concern.

20 MR. FRANKLIN: What we wouldn't get to
21 is strict scrutiny then. The -- the -- the --
22 the Petitioner wants to vault over all of the
23 break points in this Court's First Amendment
24 law with respect to public employees and go
25 straight to strict scrutiny.

1 And the fact is this Court has never
2 applied strict scrutiny to a condition of
3 public employment that was backed by a bona
4 fide interest that the state has as an
5 employer. Never, not once.

6 And I'm happy to talk about the -- the
7 political affiliation cases, because I don't
8 think they are to the contrary.

9 So, you know, implicit I think in your
10 question, Justice Alito, was the distinction
11 that my friend tried to draw between compulsion
12 and restriction. But this Court has said again
13 and again in Wooley, in Riley, and elsewhere,
14 that compulsion and restriction of speech are
15 two sides of the same coin.

16 JUSTICE ALITO: Then why won't you
17 answer my question about what the assistant
18 district attorney could be required to do?

19 Throughout history, many people have
20 drawn a line between a restriction on their
21 speech and compelled speech.

22 I'll give you an example that's only
23 -- that's quite different given the nature of
24 the -- of the subject from what's involved
25 here.

1 Do you remember the -- the -- the
2 movie and the play "A Man For All Seasons"? So
3 Thomas Moore didn't insist on saying that he
4 thought the act of supremacy was wrong, but he
5 drew a line and paid for it with his life
6 because he would not affirmatively say that it
7 was wrong.

8 When you compel somebody to speak,
9 don't you infringe that person's dignity and
10 conscience in a way that you do not when you
11 restrict what the person says?

12 MR. FRANKLIN: You do, Your Honor, in
13 some circumstances. But what we're talking
14 about here is a compelled payment of a fee. So
15 it's one step removed from compelled speech.

16 And I don't want to disparage the
17 First Amendment interests that are at issue
18 here. Aboud recognized them. We take them
19 seriously. But it's important to recognize
20 that agency fees are not a man for all seasons
21 scenario by any stretch. They don't --

22 JUSTICE ALITO: No, they're not a --
23 it's not a man for all seasons scenario.

24 MR. FRANKLIN: Right.

25 JUSTICE ALITO: But I'm just asking

1 you about the point whether you think that
2 compelling somebody to speak is exactly the
3 same thing as saying you may not speak?

4 MR. FRANKLIN: No, it's not exactly
5 the same, Your Honor.

6 JUSTICE ALITO: No.

7 MR. FRANKLIN: The Pickering balance
8 could come out differently in certain
9 instances. I would grant you that.

10 I do think, not to use Garcetti again,
11 but if Mr. Ceballos had been required to write
12 a disposition memo and has said I won't do it,
13 as opposed to what actually happened, which was
14 that he wrote one and was disciplined for what
15 was in it, nothing about the logic or the
16 outcome would change.

17 JUSTICE SOTOMAYOR: Counsel, what is
18 there -- what is there about compelled speech?
19 I mean, our line has drawn a big difference
20 between compelled speech and compelled subsidy.

21 MR. FRANKLIN: I agree with that,
22 Justice Sotomayor. I mean, if you look at the
23 cases --

24 JUSTICE SOTOMAYOR: And -- and we've
25 compelled people to pay bar associations, so

1 long as you're not compelled or stopped from
2 speaking when you disagree. We've said that's
3 a compelled subsidy.

4 MR. FRANKLIN: And all --

5 JUSTICE SOTOMAYOR: Bar members can
6 come out any day they want and say they don't
7 take the same position on a policy question as
8 the bar association. Any union member is free
9 to get up publicly in any setting he or she
10 wants to say they don't agree with the position
11 the union is taking, correct?

12 MR. FRANKLIN: Correct. And all of
13 those cases, Keller, Southworth, Glickman, were
14 outside of the workplace context, where the
15 state has always been recognized to have
16 paramount interests in ensuring that its
17 managerial prerogatives can be carried out.

18 You know, the state's interest here,
19 if I can spend just a few moments talking about
20 that, is, first, we have an interest in dealing
21 with a single spokesman for the -- for the
22 employees. Second, we have an interest in
23 imposing on that spokesman a legal duty to
24 represent everyone.

25 But as regards agency fees, they are

1 complementary to those first two interests.
2 They serve our managerial interests in two
3 ways. First, they allow us to avoid a
4 situation where some employees bear the cost of
5 representing others who contribute nothing.
6 That kind of two-tiered workplace would be
7 corrosive to our ability to cultivate
8 collaboration, cohesion, good working
9 relationships among our personnel.

10 Second, independent of that, we have
11 an interest at the end of the day in being able
12 to work with a stable, responsible, independent
13 counterparty that's well-resourced enough that
14 it can be a partner with us in the process of
15 not only contract negotiation --

16 JUSTICE KENNEDY: It can be a partner
17 with you in advocating for a greater size
18 workforce, against privatization, against merit
19 promotion, against -- for teacher tenure, for
20 higher wages, for massive government, for
21 increasing bonded indebtedness, for increasing
22 taxes? That's -- that's the interest the state
23 has?

24 MR. FRANKLIN: No. The -- the state
25 has no interest or no overriding interest --

1 JUSTICE KENNEDY: Doesn't it --
2 doesn't it -- doesn't it blink reality to deny
3 that that is what's happening here?

4 MR. FRANKLIN: We -- with all due
5 respect, Justice Kennedy, we've never denied
6 that many of the topics that come up at the
7 bargaining table with public employee unions
8 have serious fiscal and public policy
9 implications. We've never denied that.

10 JUSTICE BREYER: All right. So what
11 about the compromise?

12 MR. FRANKLIN: The -- the line that
13 Justice Scalia drew in his Lehnert separate
14 opinion was, in our view, superior to the one
15 that was drawn by the plurality.

16 We've offered a test for where to draw
17 the line between chargeable and non-chargeable
18 expenses that, in practice, would overlap with,
19 would coincide with, Justice Scalia's line in
20 most cases, but the reason that we think that
21 it's superior to the plurality's line is that
22 the germaneness test does have a vagueness
23 problem and in -- in some instances, it allows
24 what it shouldn't allow, which is, for
25 chargeability, for speech to the government as

1 a sovereign. And we think a very firm line can
2 be drawn there.

3 JUSTICE KAGAN: Mr. -- Mr. Franklin,
4 Mr. Messenger has suggested, and -- and -- and
5 General Francisco, that if we overruled Abood,
6 things would in a few years get back to normal.
7 The state would pass a new statute, and these
8 municipal contracts would all be renegotiated
9 and it wouldn't be any real issue.

10 So could you -- what do you think
11 about that? What would the difficulties be, if
12 any, if the state -- if -- if the Court were to
13 overrule Abood?

14 MR. FRANKLIN: I'm happy to speak to
15 that, Justice Kagan. Here's what we know, and,
16 obviously, we're on a motion to dismiss, but
17 more broadly, what we know is that tangibly,
18 when these kinds of obligations of financial
19 support become voluntary, union membership goes
20 down, union density rates go down, union
21 resources go down. We've seen it again and
22 again. Mancur Olson spoke about it in the
23 foundational text of behavioral economics.

24 We also know that, intangibly, there
25 are plenty of studies that show that when

1 unions are deprived of agency fees, they tend
2 to become more militant, more confrontational,
3 they go out in search of short-term gains that
4 they can bring back to their members and say
5 stick with us.

6 CHIEF JUSTICE ROBERTS: Well, the
7 argument on the other side, of course, is that
8 the need to attract voluntary payments will
9 make the unions more efficient, more effective,
10 more attractive to a broader group of their
11 employees. What's wrong with that?

12 MR. FRANKLIN: Well, two things that
13 -- that I would say about that. First, the
14 studies that I've read indicate that, yes,
15 there can be an initial first flush of
16 mobilization and organizing when something like
17 this gets taken away, but that over the long
18 term, human nature and basic economics dictate
19 that the free-rider problem will become endemic
20 and, not only that, but contagious, because if
21 I'm an employee and I stick with a union and
22 others over time decide not to, my fees and my
23 dues are going to go up and up and up and the
24 pressure on me to make the same choice will
25 increase as well.

1 But the other point I'd make would be
2 a legal point. You know, this Court has said,
3 for example, in the Connick case that there
4 ought to be judicial deference to the
5 predictive judgments about workplace harm and
6 that in particular -- this is a quote from
7 Connick -- "we do not see the necessity for an
8 employer to allow events to unfold to the
9 extent that the destruction of working
10 relationships has to be manifest before the
11 state can take prophylactic action to stop it."

12 This is an area, Your Honor, where not
13 only has this Court -- we're, of course, aware
14 this Court has addressed this topic three times
15 in the past, what, four years, but also the
16 people around the country are addressing this
17 issue in a very visible and sustained way.

18 JUSTICE KAGAN: Mr. -- Mr. Franklin, I
19 mean, you just addressed what you considered to
20 be the harmful effects of a different rule, but
21 I was trying to get at a slightly different
22 question. I was asking you, even beyond that,
23 what are the effects on -- given that this rule
24 has been in place for so long?

25 MR. FRANKLIN: Mr. Chief Justice --

1 CHIEF JUSTICE ROBERTS: Please.

2 MR. FRANKLIN: -- may I respond?

3 We do think the reliance interests are
4 serious here. Under state law, because of the
5 severability clause, there would be state law
6 contract issues. There might even be a duty to
7 bargain that kicks in under state law where we
8 would have to renegotiate not only this
9 provision but surrounding provisions. That's a
10 serious reliance interest in our view.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Frederick.

15 ORAL ARGUMENT OF DAVID C. FREDERICK
16 ON BEHALF OF RESPONDENT AFSCME COUNCIL 31

17 MR. FREDERICK: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 I would note at the beginning that all
20 of these arguments were before the Court 40
21 years ago in Abood. And when the Court
22 unanimously upheld the idea of agency fees, it
23 considered whether or not these issues would
24 constrain the constitutional prerogatives of
25 government to act under democratic impulses to

1 come up with a system that would fit the local
2 culture, history, private sector background of
3 what state governments were having to do to
4 recruit and attract the most willing and able
5 people to discharge the public services that
6 public employees are required to perform.

7 So, when this Court addressed in
8 Lehnert the question of how do you draw the
9 line between those fees that are deemed to be
10 ideological and those that are deemed to be
11 part of a statutorily mandated process, the
12 Court cleaved, and the question of whether or
13 not the statute mandated, as it does here,
14 exclusive representation and the union is
15 required to represent the minority members,
16 what Justice Scalia said was it is fair to
17 assign a fee for the services that the union by
18 statute is required to provide.

19 JUSTICE ALITO: And what if the
20 statute -- what if the state statute says that
21 lobbying is a man -- is a mandatory subject of
22 bargaining?

23 MR. FREDERICK: Well, I -- I think
24 that the question -- I guess, what do you mean
25 by lobbying, Justice Alito? I'm not sure

1 exactly what you mean.

2 JUSTICE ALITO: Well, there's no -- is
3 there any limit on what states can make a
4 mandatory subject of collective bargaining? So
5 if the test is whether it's -- whether the --
6 it's mandated by the -- by the state, the state
7 can make anything it wants a mandatory subject
8 of bargaining.

9 MR. FREDERICK: Justice Alito, I would
10 say that that hypothetical is so far outside of
11 what this case is really all about that if you
12 think that there's a problem, that if any state
13 ever in the union would come up with some
14 requirement like that as part of collective
15 bargaining, you have the opportunity to review
16 it at this time.

17 But what we're talking about here is a
18 system that is well settled within the states
19 to allow for this kind of dynamic interchange
20 for the benefit of management.

21 JUSTICE KENNEDY: Well, do you think
22 that this case affects the political influence
23 of the unions?

24 MR. FREDERICK: No. The reason --

25 JUSTICE KENNEDY: So you've -- I can

1 try to find a union newsletter which says don't
2 worry about the Supreme Court, our political
3 influence will be exactly the same as it was
4 before, if this case comes out against us?

5 MR. FREDERICK: That's not a
6 chargeable expense, Justice Kennedy. We're
7 talking about --

8 JUSTICE KENNEDY: I'm asking --

9 MR. FREDERICK: Chargeable --

10 JUSTICE KENNEDY: I'm asking you
11 whether or not in your view, if you do not
12 prevail in this case, the unions will have less
13 political influence; yes or no?

14 MR. FREDERICK: Yes, they will have
15 less political influence.

16 JUSTICE KENNEDY: Isn't that the end
17 of this case?

18 MR. FREDERICK: It is not the end of
19 the case, Your Honor, because that is not the
20 question. The question is: Do states, as part
21 of our sovereign system, have the authority and
22 the prerogative to set up a collective
23 bargaining system in which they mandate that
24 the union is going to represent minority
25 interests on pain of being subject to any fair

1 labor practice.

2 JUSTICE KENNEDY: And in which they
3 mandate people that object to certain union
4 policies to pay for the implementation of those
5 policies against their First Amendment
6 interests?

7 MR. FREDERICK: Justice Kennedy, I
8 would ask you to read Justice Harlan's opinion
9 in Lathrop where he addressed every single one
10 of those considerations.

11 JUSTICE KENNEDY: I -- I read it, I
12 think, last night between 7:00 and 8:30.

13 (Laughter.)

14 MR. FREDERICK: It's a wonderful --
15 it's a wonderful opinion, because what he says
16 is that the -- what he says is that the
17 subsidization goes to the purpose of the
18 organization, here that is state-mandated
19 collective bargaining, and in which the person
20 who doesn't agree with the positions basically
21 gets two cracks.

22 One is to try to persuade the group
23 that he's right and, if that doesn't fail, he
24 still has his conscience and his speech to
25 speak outside as a citizen to explain why that

1 position is wrong.

2 JUSTICE BREYER: Is -- is it possible
3 to --

4 JUSTICE ALITO: Mr. Frederick, when I
5 -- when I read your brief I saw something I
6 thought I would never see in a brief filed by a
7 public employee union, and that is the argument
8 that the original meaning of the Constitution
9 is that public employees have no free speech
10 rights.

11 Where do you want us to go with that?

12 MR. FREDERICK: Well --

13 JUSTICE ALITO: Should -- should we
14 adopt that rule?

15 MR. FREDERICK: What I would say is
16 that what this Court, Justice White's opinion
17 in Connick, explains that if you look at this
18 from a question of what are the three choices
19 before you, at the origins, there were no
20 rights.

21 What they are asking for is basically
22 unfettered First Amendment for public servants
23 and what Justice White explained was that, as
24 the First Amendment evolved, there were
25 limitations on what the government could do

1 with respect to certain expression, but the
2 core principle, from the founding to today, is
3 that government has a free rein in regulating
4 expressive rights in its workplace.

5 That principle from the founding to
6 today is at stake here because what they are
7 saying is that every grievance, every
8 employment issue, becomes a constitutional
9 issue. And Justice White's opinion in Connick
10 says, of course you can't run government if
11 that becomes the principle --

12 JUSTICE ALITO: Do you think that's a
13 fair characterization of their argument?

14 MR. FREDERICK: I do think that it's a
15 fair characterization insofar as what they say
16 is the collective bargaining issues that are in
17 the contract are all raising matters of public
18 concern.

19 You could look at them. They are
20 talking about who gets assignments on holidays?
21 What are leave policies all about? Things that
22 do not affect the public fisc at all but go to
23 who can manage the workplace in an appropriate
24 way where there is buy-in by the employee --

25 JUSTICE KAGAN: If I understood --

1 JUSTICE BREYER: Can you do that? Can
2 you limit it to wages, hours, working
3 conditions, where mandated as subjects of
4 compulsory bargaining by the state, those three
5 terms have a hundred years of history written
6 around them. It shouldn't be hard to
7 administer and should keep the things like
8 lobbying and so forth out of it.

9 MR. FREDERICK: That's correct. And
10 even in this statute --

11 JUSTICE BREYER: Is that correct? Is
12 that what you favor?

13 MR. FREDERICK: Yes. It is.

14 JUSTICE BREYER: And can we get that
15 from the Connick -- from the Connick -- from
16 the Lehnert Kennedy, Scalia compromise there?

17 MR. FREDERICK: Yes, you can, Justice
18 Breyer. And I would point out that the state
19 here has carved out the questions about
20 managerial discretion. Managerial policy
21 cannot be bargained for.

22 The state's budget, that can't be
23 bargained for. So what we're talking about is
24 --

25 CHIEF JUSTICE ROBERTS: Well how does

1 --

2 MR. FREDERICK: -- how you manage the
3 workplace.

4 CHIEF JUSTICE ROBERTS: How do
5 negotiation over wages not affect the state
6 budget?

7 MR. FREDERICK: Your Honor, what
8 essentially happens as I understand it is that
9 either the budget is set and the negotiation
10 occurs within that parameter or the Governor
11 takes the collective bargaining agreement to
12 the state and the legislature decides to either
13 ratify it or not.

14 CHIEF JUSTICE ROBERTS: So the public
15 unions do not engage in advocacy with respect
16 to the state budget to the extent that impacts
17 the available wages?

18 MR. FREDERICK: I think -- I wouldn't
19 put it quite that way. What I would say is
20 that of course most public servants are
21 underpaid, and I will stipulate to that before
22 this body.

23 (Laughter.)

24 MR. FREDERICK: And the question is --
25 the question is how do you come to the

1 appropriate compromises in order to achieve a
2 system that attracts the best workers?

3 JUSTICE KENNEDY: I just want to make
4 sure that if I want to write something down to
5 get -- the amount of wages paid to government
6 employees, the size of the work force, the
7 amount of overtime, and the existence of tenure
8 do not affect the amount of the state budget?
9 That's what I have got down.

10 MR. FREDERICK: No. What I'm saying,
11 Your Honor --

12 JUSTICE KENNEDY: Isn't that what you
13 just said?

14 MR. FREDERICK: What I said is that in
15 different states the system works differently.
16 Sometimes the budget is set first and then the
17 bargaining happens and sometimes the bargaining
18 happens and, if the legislature doesn't think
19 it fits within the budget, they say we're not
20 going to ratify this or we're going to ratify
21 the budget, you go back and renegotiate this to
22 make it fit.

23 JUSTICE KAGAN: Mr. Frederick, if I
24 understood General Francisco's argument, it is
25 that speech as to matters of pay and benefits

1 and employment conditions and so forth are
2 matters of public concern when they are
3 addressed in a collective bargaining framework,
4 but are not matters of public concern when they
5 are addressed outside of a collective
6 bargaining framework by individual employees.

7 Tell -- tell me about that. What do
8 you think of that?

9 MR. FREDERICK: I don't know any case
10 of this Court that hinges the First Amendment
11 prerogatives of the government on the scope or
12 manner of the speech with respect to that.

13 And in fact, as my colleague said,
14 when this Court upheld the Hatch Act, that
15 applied to all workers. And the -- and the
16 Court applied Pickering balancing to say that
17 the government interest was sufficient to
18 outweigh the restrictions on the employee's
19 speech.

20 And the Court also did the same thing.
21 It applied the same Pickering balance when it
22 decided that it was constitutional to have
23 exclusive representation. That quelled the
24 speech of the minority to the exclusion of the
25 majority.

1 So these are all broad-sweep,
2 broad-scope principles where this Court has
3 applied Pickering.

4 JUSTICE ALITO: Well, if one employee
5 says I deserve a 5 percent raise, is that a
6 matter of public concern or private concern?

7 MR. FREDERICK: Well, it depends on
8 whether it affects the morale of the workplace,
9 as Justice White's opinion in Connick said.
10 There may be a circumstance, you look at the
11 balancing, and you look at the content and the
12 context in which that speech arises.

13 So that, for instance, in Connick,
14 what the Court said, the only thing that was a
15 matter of public concern there was whether it
16 affected the morale of the workplace. And the
17 Court said on the basis of that, it could be a
18 matter of public concern, but an individual
19 worker's agitation ordinarily for pay would not
20 raise a matter of public concern. That would
21 be classic government workplace speech.

22 JUSTICE ALITO: All right. So if
23 that's a matter of private concern, if the
24 union demands a 5 percent wage increase for all
25 of the employees it represents, can that be a

1 matter of public concern?

2 MR. FREDERICK: I don't think so
3 because --

4 JUSTICE ALITO: It can't? No?

5 MR. FREDERICK: No, because what the
6 -- what is happening in a negotiation, of
7 course this is a closed universe, your
8 hypothetical posits the opening bid by the
9 union.

10 And -- and it's important to keep in
11 mind the content and context of that speech.
12 All negotiations between workers and management
13 do not take place in a public forum.

14 JUSTICE ALITO: So what -- what if the
15 effect of the 5 percent wage increase across
16 the board would push a city to the brink and
17 perhaps over the brink into bankruptcy. Would
18 it then become a matter of public concern?

19 MR. FREDERICK: Well, I think that you
20 would look at that in terms of the context of
21 the particular scenario. I would say -- and
22 there are briefs on our side that make this
23 very clear -- that that particular
24 hypothetical, in fact, is an unfair smearing of
25 the -- of the collective bargaining process.

1 But what I would also point out is
2 that if management says we cannot pay for this,
3 and, therefore, there is no agreement, there
4 are state-mandated procedures to determine
5 whether one side is bargaining in good faith or
6 not.

7 And if the union is taking a position
8 that is not a good-faith position, it can be
9 subject to a state penalty.

10 JUSTICE BREYER: So I don't see how
11 you can say, if one person asks for more money,
12 that affects the budget. If one person in the
13 railroads asks for more money, that affects the
14 rates that a public body, the Interstate
15 Commerce Commission, used to have to set.

16 If one person in a public utility, an
17 electricity company, asks for money, that
18 affects the electricity rate.

19 So the line can't be, I would think,
20 whether or not you are asking for higher wages,
21 whether collectively or individually, because
22 they all affect the budget.

23 So then what is the line? I had
24 thought the line was wages, hours, working
25 conditions is okay, and if it is not okay, then

1 that goes way beyond just public employees,
2 doesn't it?

3 MR. FREDERICK: Yes. And I would note
4 that Justice Powell even had no problem in
5 Abood with the wages/hours formulation and he
6 was the one who disagreed with the basic
7 formulation.

8 CHIEF JUSTICE ROBERTS: Well,
9 hypotheticals are asked to address a principle
10 that can then be expanded. If one employee
11 doesn't affect wages, do -- does 20 percent of
12 the work force affect wages -- I mean,
13 negotiate or demands with respect to wages
14 affect the public policy concerns that go into
15 how much of a budget, as to which there are
16 many competing demands, is allocated to
17 employees?

18 MR. FREDERICK: Your Honor, the
19 question -- I'll -- I'll concede you that there
20 are certain matters in collective bargaining
21 that might raise matters of public concern.
22 But what the Court's cases say is that, even if
23 there is a matter of public concern, the
24 government has the adequate power to restrict
25 that speech if it can show there's

1 justification.

2 And Justice Scalia's opinion in
3 Lehnert provides the compelling interest by
4 saying that the state is mandated that the
5 union be the exclusive representative and must
6 conduct itself through a duty of fair
7 representation.

8 And that's where you get the
9 compelling interest in agency fees.

10 JUSTICE ALITO: Well, the germaneness
11 rule came out of Abood itself and it was
12 fleshed out in Lehnert. So do you -- are you
13 asking -- you're suggesting we should overrule
14 Abood in part?

15 MR. FREDERICK: No. What I'm
16 suggesting is that if you were to go to this
17 line, you should consider revisiting Lehnert.
18 That's not a question of Abood's basic
19 correctness.

20 Abood has been foundational precedent
21 --

22 JUSTICE ALITO: And didn't Abood talk
23 --

24 MR. FREDERICK: -- in a lot of
25 different areas.

1 JUSTICE ALITO: Didn't Abood draw --
2 talk about germaneness?

3 MR. FREDERICK: I think Abood used the
4 word germaneness. But what Lehnert did was to
5 give content to that because what Abood simply
6 said was it is constitutional for this to
7 happen.

8 Now, I'd like to turn to the reliance
9 interest because, if the other side succeeds in
10 persuading a majority of you to overrule Abood,
11 it will affect thousands of contracts and, more
12 importantly, it is going to affect the work of
13 state legislatures, city councils, school
14 districts, who are going to have to go back to
15 the drawing board in deciding what are the
16 rules for negotiating and how that works.

17 And what that means is that the key
18 thing that has been bargained for in this
19 contract for agency fees is a -- a limitation
20 on striking. And that is true in many
21 collective bargaining agreements.

22 The fees are the tradeoff. Union
23 security is the tradeoff for no strikes. And
24 so if you were to overrule Abood, you can raise
25 an untold specter of labor unrest throughout

1 the country.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Two minutes remaining, Mr. Messenger.

6 REBUTTAL ORAL ARGUMENT OF WILLIAM L. MESSENGER
7 ON BEHALF OF THE PETITIONERS

8 MR. MESSENGER: Mr. Chief Justice:
9 Just to pick up on the last point made, the
10 proposition that agency fees are the costs
11 employees have to pay to prevent unions from
12 striking, I submit is not only extremely
13 attenuated but also would make agency fees
14 effectively a form of protection money, the
15 idea that the government needs to force its
16 employees to subsidize unions or otherwise the
17 unions will disrupt the government, and I
18 submit that's not an interest that this Court
19 can accept as a compelling one for infringing
20 on individuals' First Amendment rights.

21 I would also like to make a brief
22 point about the grievance process. And we've
23 talked a lot about collective bargaining today.
24 But grievance processing is equally an
25 expressive activity, and in the aggregate can't

1 have an effect upon the public fisc.

2 Now, in terms of expressive activity,
3 a grievance is, by definition, the union is
4 trying to influence what the government is --
5 wants to do and, if it's a grievance, it is
6 something the government is resistant to
7 actually doing.

8 And advocacy to enforce a policy is
9 tied into advocacy to adopt that process.

10 JUSTICE SOTOMAYOR: You're basically
11 arguing do away with unions, because you are
12 really taking, in essence, and saying every
13 single employee decision is really a public
14 policy decision.

15 I have an individual person I want to
16 fire or discipline. You just said it's a
17 public policy question.

18 MR. MESSENGER: No, where I was going
19 with that, Your Honor, is that grievance as a
20 whole is a public -- a matter of public
21 concern.

22 JUSTICE SOTOMAYOR: But grievances
23 don't deal with one issue. Every grievance has
24 a different issue. Some people are disciplined
25 for being late. Some people are disciplined

1 for a workplace disruption. Some for --

2 MR. MESSENGER: Yes, Your Honor, but
3 non-members --

4 JUSTICE SOTOMAYOR: -- violating a
5 dozen other workplace rules.

6 MR. MESSENGER: But under the statute
7 non-members are charged for contract
8 administration an a whole. They're charged for
9 an entire year's worth of AFSCME grievance
10 processing, some of which are very significant,
11 like the grievance AFSCME recently filed to
12 compel the state to expend 75 million dollars
13 to pay for a 2 percent wage increase. That
14 went to the Illinois Supreme Court. Maybe some
15 other grievances are more minor matters, as you
16 mentioned, but as a whole, in the aggregate,
17 they affect matters of public concern.

18 JUSTICE SOTOMAYOR: As Justice --

19 MR. MESSENGER: That is what --

20 JUSTICE SOTOMAYOR: -- Breyer said,
21 every single decision affects the public fisc.
22 Every time you lose something, you -- the
23 public fisc is affected.

24 You are talking --

25 CHIEF JUSTICE ROBERTS: Care to

1 comment?

2 MR. MESSENGER: Again, to go back, I
3 think it's the scale that makes the
4 distinction, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:08 a.m., the case
8 was submitted.)

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Official - Subject to Final Review

<p>1</p> <p>10 [2] 19:2 31:20 10:06 [2] 1:16 4:2 11:08 [1] 71:7 16-1466 [1] 4:4 184 [1] 20:23 1945 [1] 28:7 1970 [1] 28:8</p>	<p>action [4] 5:23 6:1 27:23 50:11 actions [2] 34:23 35:5 activities [4] 5:1 7:1 37:7,25 activity [5] 8:13 15:18,24 68:25 69:2 actual [1] 23:19 actually [3] 29:9 44:13 69:7 add [1] 10:8 address [2] 14:7 65:9 addressed [6] 50:14,19 52:7 55:9 61:3,5 addressing [1] 50:16 adequate [1] 65:24 administer [1] 58:7 administration [1] 70:8 administrations [1] 34:8 adopt [2] 56:14 69:9 advising [1] 38:11 advocacy [9] 7:7 9:9 10:23 15:1,1 35:8 59:15 69:8,9 advocating [1] 46:17 affect [12] 17:2,3 57:22 59:5 60:8 64:22 65:11,12,14 67:11,12 70:17 affected [4] 19:7,18 62:16 70:23 affects [7] 33:21 53:22 62:8 64:12,13,18 70:21 affiliation [1] 42:7 affirmatively [1] 43:6 AFSCME [6] 2:16 3:16 17:1 51:16 70:9,11 agency [22] 4:24 5:5 8:1,24 22:23 23:2,8 24:15 27:4 29:5,6,18 33:19 37:1 43:20 45:25 49:1 51:22 66:9 67:19 68:10,13 aggregate [2] 68:25 70:16 agitation [1] 62:19 ago [2] 28:3 51:21 agree [6] 27:2 30:15 39:10 44:21 45:10 55:20 agreement [2] 59:11 64:3 agreements [5] 24:13 26:17 27:24 31:13 67:21 agrees [1] 31:6 AL [1] 1:8 ALITO [33] 11:12,22 12:4 27:18 38:21 39:8,17,21,25 40:3,13,14 41:10,18 42:10,16 43:22,25 44:6 52:19,25 53:2,9 56:4,13 57:12 62:4,22 63:4,14 66:10,22 67:1 allegations [1] 23:23 allocated [1] 65:16 allow [5] 15:16 46:3 47:24 50:8 53:19 allowed [1] 33:10 allows [3] 15:8,12 47:23 almost [2] 26:3,18 already [4] 10:9 33:20 34:7 35:21 alternative [1] 8:17 alternatives [1] 8:16 although [2] 10:18 30:15 amazing [1] 32:19 Amendment [22] 4:13 10:24 11:9 14:14 15:2,14,24 16:4,10,19 17:13 19:17 20:3,6 29:10 41:23 43:17 55:5 56:22,24 61:10 68:20</p>	<p>AMERICAN [2] 1:6 4:5 amicus [4] 2:8 3:8 22:17 28:2 among [2] 15:15 46:9 amount [4] 26:21 60:5,7,8 analyzed [1] 41:6 anecdotal [1] 20:21 Another [2] 5:2 8:11 answer [8] 21:4,6 27:7 34:17,19 41:3,4 42:17 anybody [1] 41:2 anyways [1] 22:8 appear [1] 40:24 APPEARANCES [1] 2:1 applicable [1] 36:9 applied [8] 6:1 13:4 14:13 42:2 61:15,16,21 62:3 applies [1] 36:13 apply [7] 4:13 6:2,21 12:19,24 28:16 35:3 applying [2] 14:19,20 appropriate [3] 26:12 57:23 60:1 approved [1] 6:12 arbitration [1] 28:8 Archie [1] 28:5 area [1] 50:12 areas [1] 66:25 arguably [1] 17:16 argue [2] 35:25 39:13 argued [1] 28:2 arguing [4] 34:1 36:24 39:11 69:11 argument [18] 1:15 3:2,5,10,13,17 4:4,8 22:16 29:23 35:12 37:21 49:7 51:15 56:7 57:13 60:24 68:6 arguments [1] 51:20 arises [1] 62:12 Arizona [1] 20:1 around [3] 36:13 50:16 58:6 articulated [1] 18:3 aside [1] 39:25 asks [4] 17:7 64:11,13,17 aspects [1] 28:22 assess [1] 41:9 assign [1] 52:17 assignments [1] 57:20 assistant [4] 40:16,17,24 42:17 association [7] 4:18 5:2,9,10,16 7:11 45:8 associations [3] 5:13 8:15 44:25 assumes [1] 10:6 assuming [1] 10:7 assumption [1] 22:4 assumptions [2] 23:17 38:16 attempt [1] 4:19 attention [1] 13:23 attenuated [1] 68:13 attorney [5] 40:16,17,23,24 42:18 attract [2] 49:8 52:4 attractive [1] 49:10 attracts [1] 60:2 auditorium [3] 17:9,18,22 authority [4] 10:8 35:22 38:25 54:21</p>	<p>available [3] 11:4 38:3 59:17 avoid [1] 46:3 aware [1] 50:13 away [2] 49:17 69:11 awful [1] 23:17</p> <p>B</p> <p>back [8] 12:24 23:18 26:14 48:6 49:4 60:21 67:14 71:2 backed [1] 42:3 background [1] 52:2 balance [2] 44:7 61:21 balancing [2] 61:16 62:11 bandied [1] 23:18 bankruptcy [1] 63:17 bar [8] 5:2,9,13 7:11 8:15 44:25 45:5,8 bargain [2] 15:10 51:7 bargained [3] 58:21,23 67:18 bargained-for [3] 21:12,18 22:6 bargaining [44] 9:8,18,24 10:4 15:8,17,17 17:1 22:2 23:4 24:8,13 26:17 27:24 29:7,12,20 30:2,3,12 31:13,22 32:6 37:4 38:14 47:7 52:22 53:4,8,15 54:23 55:19 57:16 58:4 59:11 60:17,17 61:3,6 63:25 64:5 65:20 67:21 68:23 bargains [1] 31:18 basic [4] 22:21 49:18 65:6 66:18 basically [5] 12:18 35:3 55:20 56:21 69:10 basis [3] 23:6 38:16 62:17 bear [1] 46:4 Beck [2] 28:2 37:18 become [5] 18:1 48:19 49:2,19 63:18 becomes [2] 57:8,11 beg [1] 23:15 begin [1] 12:25 beginning [1] 51:19 behalf [14] 2:4,8,12,15 3:4,7,12,15,19 4:9 22:17 35:14 51:16 68:7 behavioral [1] 48:23 behind [1] 39:16 belief [1] 10:25 believe [3] 25:3 27:21 34:10 benefit [2] 9:5 53:20 benefits [3] 23:11 30:1 60:25 best [2] 41:1 60:2 better [1] 32:13 between [10] 32:3,6 38:22 42:11,20 44:20 47:17 52:9 55:12 63:12 beyond [3] 10:9 50:22 65:1 bid [1] 63:8 big [1] 44:19 blink [1] 47:2 board [4] 17:3 20:4 63:16 67:15 body [3] 16:20 59:22 64:14 bona [1] 42:3 bonded [1] 46:21 boss [1] 39:15 both [3] 18:9,13 23:18 Brandeis [1] 12:22 break [3] 38:4,18 41:23</p>
---	---	--	---

Official - Subject to Final Review

breaks ^[1] 38:17 BREYER ^[19] 12:15 14:8 20:24 21:4 27:25 28:4,11,18,25 34:16 37:4 47:10 56:2 58:1,11,14,18 64:10 70:20 brief ^[7] 13:24 20:25 28:3 29:5 56:5,6 68:21 briefs ^[1] 63:22 bring ^[1] 49:4 brink ^[2] 63:16,17 broad ^[1] 35:22 broad-scope ^[1] 62:2 broad-sweep ^[1] 62:1 broader ^[2] 40:8 49:10 broadly ^[1] 48:17 brought ^[1] 28:23 budget ^[11] 58:22 59:6,9,16 60:8,16,19,21 64:12,22 65:15 Bureau ^[2] 24:11,24 business ^[1] 17:10 buy-in ^[1] 57:24 <hr/> C <hr/> California ^[4] 20:24,25 21:8,25 called ^[1] 13:23 came ^[7] 1:14 14:10,11,18 17:9 26:11 66:11 cannot ^[3] 15:19 58:21 64:2 Care ^[1] 70:25 carried ^[1] 45:17 Carriers ^[1] 36:10 cars ^[1] 20:2 carved ^[1] 58:19 Case ^[30] 4:4 5:4,23 6:2 13:10 18:18 26:11 27:10 29:11,14 36:11,23,23,24,25 37:18,18 38:15 40:4,22 50:3 53:11,22 54:4,12,17,19 61:9 71:6,7 cases ^[18] 5:10,22 12:9,20,23,25 13:3,12 14:10,11 34:15 35:17 38:7 42:7 44:23 45:13 47:20 65:22 categories ^[1] 38:4 CBA ^[1] 38:8 Ceballos ^[1] 44:11 certain ^[4] 44:8 55:3 57:1 65:20 cetera ^[1] 38:12 chain ^[1] 33:17 challenged ^[1] 5:24 chance ^[1] 10:17 change ^[3] 17:7 37:15 44:16 changes ^[1] 22:9 changing ^[1] 28:12 characterization ^[2] 57:13,15 chargeability ^[1] 47:25 chargeable ^[6] 15:13 38:5,13 47:17 54:6,9 charged ^[2] 70:7,8 charges ^[1] 38:8 charging ^[2] 15:8,16 Chicago ^[1] 2:12 CHIEF ^[20] 4:3,10 22:11,13,19 35:9,15 49:6 50:25 51:1,12,17 58:25 59:4,14 65:8 68:3,8 70:25 71:5 choice ^[1] 49:24	choices ^[1] 56:18 chosen ^[2] 8:18 32:12 Circuit ^[2] 27:19,20 circulating ^[1] 40:18 circumstance ^[1] 62:10 circumstances ^[1] 43:13 citizen ^[2] 40:9 55:25 citizens ^[1] 35:20 city ^[2] 63:16 67:13 classic ^[1] 62:21 clause ^[2] 21:10 51:5 clauses ^[2] 20:17,21 clear ^[2] 19:22 63:23 cleaved ^[1] 52:12 clients ^[1] 13:14 closed ^[1] 63:7 cohesion ^[1] 46:8 coin ^[1] 42:15 coincide ^[1] 47:19 collaboration ^[1] 46:8 colleague ^[1] 61:13 collective ^[31] 6:18 15:8,16,17,21 16:20 24:13 26:16 27:24 29:7,12,20 30:2,3 31:13,21 32:5 37:3 38:14 53:4,14 54:22 55:19 57:16 59:11 61:3,5 63:25 65:20 67:21 68:23 collectively ^[2] 31:18 64:21 Columbia ^[1] 18:23 come ^[10] 16:13,13 17:8 35:21 44:8 45:6 47:6 52:1 53:13 59:25 comes ^[4] 27:23 31:13 35:6 54:4 coming ^[2] 16:20 39:12 command ^[1] 33:18 comment ^[1] 71:1 Commerce ^[1] 64:15 Commission ^[1] 64:15 committed ^[1] 12:12 company ^[1] 64:17 comparable ^[1] 6:19 compel ^[5] 9:7 29:20 39:1 43:8 70:12 compelled ^[13] 5:5 15:19 36:17,17 42:21 43:14,15 44:18,20,20,25 45:1,3 compelling ^[15] 5:14,18 6:5,14,19,22 7:17,21 8:1 23:3 35:7 44:2 66:3,9 68:19 competing ^[1] 65:16 complementary ^[1] 46:1 compromise ^[4] 13:21 14:6 47:11 58:16 compromises ^[1] 60:1 compulsion ^[2] 42:11,14 compulsory ^[6] 4:14 19:14 20:9,13 21:23 58:4 concede ^[1] 65:19 concern ^[25] 17:17 30:5,10 31:19,23 32:23 41:12,16,18,19 57:18 61:2,4 62:6,6,15,18,20,23 63:1,18 65:21,23 69:21 70:17 concerns ^[2] 29:10 65:14 concluding ^[1] 23:6 concrete ^[1] 40:15	condition ^[2] 37:1 42:2 conditions ^[6] 29:24 32:16 35:22 58:3 61:1 64:25 conduct ^[1] 66:6 confer ^[1] 10:10 confidence ^[1] 40:19 confrontational ^[1] 49:2 Connick ^[9] 40:16 50:3,7 56:17 57:9 58:15,15 62:9,13 conscience ^[2] 43:10 55:24 consider ^[1] 66:17 consideration ^[1] 19:23 considerations ^[1] 55:10 considered ^[2] 50:19 51:23 constantly ^[1] 36:20 Constitution ^[2] 11:13 56:8 constitutional ^[6] 11:15 19:25 51:24 57:8 61:22 67:6 constitutionally ^[2] 12:5 15:13 constrain ^[1] 51:24 contagious ^[1] 49:20 content ^[3] 62:11 63:11 67:5 context ^[6] 30:12 32:6 45:14 62:12 63:11,20 continued ^[1] 26:22 contract ^[15] 10:1,3 19:4 21:9,13,17 22:4,6 27:13 37:7 46:15 51:6 57:17 67:19 70:7 contracts ^[11] 19:1,1 20:11,12,16,20,23 22:7 26:18 48:8 67:11 contrary ^[2] 33:17 42:8 contribute ^[1] 46:5 controlled ^[1] 25:21 controlling ^[2] 34:22 35:4 core ^[4] 15:18 29:4 33:10 57:2 corporate ^[1] 25:8 correct ^[6] 16:4,15 45:11,12 58:9,11 correctness ^[1] 66:19 corresponding ^[1] 35:6 corrosive ^[1] 46:7 corruption ^[1] 33:18 cost ^[7] 29:6,12 30:6,8,13 31:15 46:4 costs ^[3] 9:24 10:8 68:10 couldn't ^[2] 20:18 39:13 COUNCIL ^[4] 1:8 2:16 3:16 51:16 councils ^[1] 67:13 counsel ^[5] 22:14 44:17 51:13 68:4 71:6 counterparty ^[1] 46:13 country ^[3] 36:14 50:16 68:1 COUNTY ^[2] 1:7 4:6 course ^[11] 7:5 14:25 15:15 21:2,11 26:13 49:7 50:13 57:10 59:20 63:7 COURT ^[39] 1:1,15 4:11 7:24 8:6 11:20 14:23 16:24 20:3 22:20 27:1,14 28:20 35:16 36:6 40:17 41:10 42:1,12 48:12 50:2,13,14 51:18,20,21 52:7,12 54:2 56:16 61:10,14,16,20 62:2,14,17 68:18 70:14 Court's ^[4] 28:15 35:17 41:23 65:	22 courts ^[1] 5:16 cover ^[1] 19:2 Cox ^[2] 28:5 37:5 cracks ^[1] 55:21 cultivate ^[1] 46:7 culture ^[1] 52:2 curiae ^[3] 2:8 3:8 22:17 cut ^[2] 6:23 28:20 <hr/> D <hr/> D.C. ^[4] 1:11 2:7,15 27:20 data ^[2] 24:11,24 DAVID ^[6] 2:11,15 3:11,14 35:12 51:15 day ^[4] 38:10,10 45:6 46:11 day-to-day ^[1] 37:5 deal ^[1] 69:23 dealing ^[2] 14:25 45:20 debatable ^[1] 28:22 decide ^[3] 15:13 38:15 49:22 decided ^[3] 6:17 15:9 61:22 decides ^[1] 59:12 deciding ^[1] 67:15 decision ^[4] 4:21 69:13,14 70:21 decisions ^[2] 6:7 27:1 decisis ^[6] 4:22 14:3 19:20,21 22:24 26:15 declared ^[2] 18:24 21:15 deemed ^[2] 52:9,10 deference ^[2] 35:25 50:4 deferential ^[1] 36:8 definition ^[1] 69:3 degree ^[1] 11:7 delivery ^[2] 18:14 30:14 demand ^[4] 9:18 11:13 17:12,14 demands ^[3] 62:24 65:13,16 democratic ^[1] 51:25 denied ^[2] 47:5,9 density ^[1] 48:20 deny ^[1] 47:2 Department ^[1] 2:7 departure ^[1] 14:15 depends ^[2] 36:1 62:7 deprive ^[2] 6:9,10 deprived ^[1] 49:1 deserve ^[1] 62:5 destruction ^[1] 50:9 determine ^[1] 64:4 dictate ^[1] 49:18 Diego ^[1] 36:12 difference ^[1] 44:19 differences ^[1] 38:22 different ^[13] 5:1,12 7:9 21:14 23:15 31:16 40:11 42:23 50:20,21 60:15 66:25 69:24 differently ^[2] 44:8 60:15 difficulties ^[1] 48:11 dignity ^[1] 43:9 diminished ^[3] 9:16 11:5,8 disagree ^[3] 31:8 33:24 45:2 disagreed ^[1] 65:6 discharge ^[1] 52:5 discipline ^[1] 69:16
---	--	--	---

Official - Subject to Final Review

<p>disciplined [4] 16:8 44:14 69:24, 25 discretion [2] 10:4 58:20 discussed [1] 12:9 dismiss [5] 26:10,12,14 38:2 48:16 disparage [1] 43:16 disposition [1] 44:12 disputes [2] 30:24 31:11 disrupt [1] 68:17 disruption [2] 27:3 70:1 dissent [2] 14:12 15:6 distinction [3] 13:16 42:10 71:4 distinguish [1] 14:4 distinguishable [1] 5:11 District [6] 18:22 40:16,17,23,24 42:18 districts [1] 67:14 doctrine [4] 14:20 19:20,21 27:12 doing [6] 8:11 12:18 19:10 34:24 38:10 69:7 dollars [2] 17:2 70:12 done [1] 19:8 down [8] 38:17,18 41:6 48:20,20, 21 60:4,9 dozen [1] 70:5 drains [1] 9:10 dramatic [1] 6:15 draw [4] 42:11 47:16 52:8 67:1 drawing [1] 67:15 drawn [4] 42:20 44:19 47:15 48:2 drew [2] 43:5 47:13 due [2] 20:14 47:4 dues [3] 10:20 37:12 49:23 duties [7] 15:12 36:23,25 39:6,9, 20 40:1 duty [8] 9:23 10:5 11:20 12:2 15:10 45:23 51:6 66:6 dynamic [1] 53:19</p>	<p>25 65:1,17 68:11,16 employees [1] 35:23 employer [11] 6:5,14 9:19 32:1,4 35:19 36:5 37:9 40:9 42:5 50:8 employer's [1] 36:1 employers [2] 21:14 35:4 employment [12] 6:6 16:14 17:25 29:24 32:16 37:2,6,9 40:6 42:3 57:8 61:1 employment-related [2] 16:3,9 end [3] 46:11 54:16,18 endemic [1] 49:19 enforce [2] 27:14 69:8 engage [1] 59:15 enormous [1] 26:21 enough [1] 46:13 ensuring [2] 8:22 45:16 entire [1] 70:9 entirely [1] 18:6 entitled [2] 16:3,10 entitlement [1] 16:18 equal [2] 9:11,19 equally [1] 68:24 especially [1] 38:7 ESQ [2] 2:3,15 essence [1] 69:12 essential [1] 21:8 essentially [2] 30:22 59:8 established [1] 31:9 ET [2] 1:8 38:12 even [14] 14:3,12,21 21:11 22:2,5 24:14 26:23 33:9 50:22 51:6 58:10 65:4,22 events [1] 50:8 everybody [2] 8:23 40:25 everyone [1] 45:24 evidentiary [1] 38:16 evolved [1] 56:24 exact [2] 33:3,4 exacting [1] 14:13 exactly [5] 25:15 44:2,4 53:1 54:3 example [8] 6:25 11:15,25 20:1 21:25 23:7 42:22 50:3 except [2] 20:13 21:17 excision [2] 20:13 21:10 exclusion [1] 61:24 exclusive [7] 8:25 9:4 10:7 23:4 52:14 61:23 66:5 exercising [1] 11:8 existence [1] 60:7 expanded [1] 65:10 expend [1] 70:12 expense [1] 54:6 expenses [4] 38:5,13,18 47:18 expensive [1] 10:2 expire [1] 22:7 explain [1] 55:25 explained [3] 8:6 14:23 56:23 explains [1] 56:17 exploits [1] 40:6 expresses [1] 36:19 expression [1] 57:1 expressive [3] 57:4 68:25 69:2 expressly [1] 12:2</p>	<p>extent [3] 22:5 50:9 59:16 extraordinary [1] 9:6 extremely [1] 68:12</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faces [1] 9:19 fact [6] 6:22 20:3 24:10 42:1 61:13 63:24 factored [1] 27:1 facts [1] 17:21 factual [1] 23:23 fail [1] 55:23 failed [1] 4:13 failure [1] 4:16 fair [8] 6:10 12:2 34:16 52:16 54:25 57:13,15 66:6 faith [1] 64:5 far [2] 34:15 53:10 favor [1] 58:12 February [1] 1:12 federal [9] 7:21 11:20 23:7,20 24:6,15,19 25:1,4 FEDERATION [2] 1:6 4:5 fee [7] 4:14 6:10 8:24 27:4 29:6 43:14 52:17 fees [29] 4:25 5:1,5,9,10,17,24 7:10 8:1,11 10:17 22:23 23:2,8 24:15 29:18 37:1,11 43:20 45:25 49:1,22 51:22 52:9 66:9 67:19,22 68:10,13 few [5] 18:21 28:3,3 45:19 48:6 fide [1] 42:4 field [1] 38:9 filed [2] 56:6 70:11 financial [1] 48:18 financing [2] 28:12,21 find [4] 20:18 24:12 38:6 54:1 fire [2] 6:8 69:16 fired [2] 33:21 40:18 firing [1] 6:15 firm [1] 48:1 first [35] 4:4,13 5:8 9:22 10:23 11:9 14:9,14 15:2,14,24 16:4,10,18 17:13 19:13,16 22:22 24:4 29:10 31:2 37:23 41:23 43:17 45:20 46:1,3 49:13,15 55:5 56:22,24 60:16 61:10 68:20 fisc [6] 18:13 33:22 57:22 69:1 70:21,23 fiscal [1] 47:8 fit [2] 52:1 60:22 fits [1] 60:19 fleshed [1] 66:12 flip [1] 19:20 flipped [1] 34:7 flush [1] 49:15 focus [2] 22:21 29:12 follow-up [1] 27:9 force [3] 60:6 65:12 68:15 forcing [3] 7:6,9,12 Foremost [1] 21:23 form [1] 68:14 formal [1] 31:21 formulation [2] 65:5,7</p>	<p>forth [4] 13:21 23:18 58:8 61:1 forum [3] 5:19 7:11 63:13 found [1] 4:20 foundational [2] 48:23 66:20 founding [2] 57:2,5 four [1] 50:15 four-year [1] 26:18 Fourth [2] 20:3,6 framework [7] 12:19,23 31:9,10 36:7 61:3,6 frameworks [2] 12:25 13:4 FRANCISCO [40] 2:6 3:6 22:15,16, 19 23:12,25 24:3,23 25:3,10,12,19, 22 26:1,4,9 27:6,15 28:1,10,17,24 29:3,17 30:11,25 31:3,7,24 32:14, 20 33:5,14,23 34:3,9,13,19 48:5 Francisco's [1] 60:24 FRANKLIN [33] 2:11 3:11 35:11, 12,15 36:21 37:16,23 39:4,15,19, 23 40:2,4 41:3,13,20 43:12,24 44:4,7,21 45:4,12 46:24 47:4,12 48:3, 14 49:12 50:18,25 51:2 frankly [1] 38:19 FREDERICK [38] 2:15 3:14 51:14, 15,17 52:23 53:9,24 54:5,9,14,18 55:7,14 56:4,12,15 57:14 58:9,13, 17 59:2,7,18,24 60:10,14,23 61:9 62:7 63:2,5,19 65:3,18 66:15,24 67:3 free [4] 9:2 45:8 56:9 57:3 free-rider [1] 49:19 Freed [1] 13:24 freer [2] 35:18,21 friend [1] 42:11 friends [1] 35:24 full [1] 24:5 function [2] 39:5,9 fundamentally [1] 35:1 further [2] 23:3 29:14</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gains [1] 49:3 Gant [1] 20:1 Garcetti [6] 36:12,15,23 39:7 40:4 44:10 GEN [2] 2:6 3:6 General [51] 2:6,11 20:12,20,22 22:15,16,19 23:12,16,25 24:3,23 25:3,8,10,12,19,22 26:1,4,9 27:6, 15 28:1,10,17,24 29:3,17,22 30:11, 25 31:3,7,24 32:14,20 33:5,14,23 34:3,6,9,13,19 35:10,13 37:5 48:5 60:24 generally [8] 6:12 16:6,16 23:9 24:16 25:4 26:17 36:9 germaneness [4] 47:22 66:10 67:2,4 gets [4] 17:23 49:17 55:21 57:20 GINSBURG [6] 4:23 9:10 10:11, 14 11:1 27:6 give [3] 40:15 42:22 67:5 given [4] 8:21 23:11 42:23 50:23 Glickman [1] 45:13 good-faith [1] 64:8</p>
---	---	---	---

Official - Subject to Final Review

<p>got ^[5] 17:11 38:19 40:10 41:14 60:9</p> <p>government ^[5] 5:14 6:5,8,13 7:3,13,14,21 8:3,22 9:7 10:24 14:25 15:9,12 18:12 23:7,8 24:7,15,19 25:2,4 29:1 30:14,20,22 31:5,16 32:8,9,21 33:9,19 36:4,16 46:20 47:25 51:25 56:25 57:3,10 60:5 61:11,17 62:21 65:24 68:15,17 69:4,6</p> <p>government's ^[10] 5:17 6:11,20,24 8:7 13:13 22:22 23:21 30:8 34:22</p> <p>governmental ^[1] 4:15</p> <p>governments ^[1] 52:3</p> <p>Governor ^[1] 59:10</p> <p>grant ^[1] 44:9</p> <p>greater ^[2] 16:14 46:17</p> <p>greatest ^[1] 28:6</p> <p>grievance ^[15] 28:8 29:8,9 37:6,14 38:11 57:7 68:22,24 69:3,5,19,23 70:9,11</p> <p>grievances ^[5] 11:17 37:15,25 69:22 70:15</p> <p>group ^[5] 7:7 17:23 36:6 49:10 55:22</p> <p>groups ^[1] 9:9</p> <p>guess ^[1] 52:24</p>	<p>31:8,25 33:24 34:9,13 37:17 39:20 43:12 44:5 50:12 54:19 59:7 60:11 65:18 69:19 70:2 71:4</p> <p>hour ^[1] 37:14</p> <p>hours ^[2] 58:2 64:24</p> <p>However ^[1] 37:1</p> <p>Hudson ^[1] 38:4</p> <p>huge ^[1] 33:22</p> <p>human ^[1] 49:18</p> <p>hundred ^[1] 58:5</p> <p>hundreds ^[1] 17:2</p> <p>hypothetical ^[4] 17:16 53:10 63:8,24</p> <p>hypotheticals ^[1] 65:9</p>	<p>inquiry ^[1] 34:21</p> <p>insist ^[1] 43:3</p> <p>insofar ^[1] 57:15</p> <p>instance ^[2] 20:8 62:13</p> <p>instances ^[3] 5:8 44:9 47:23</p> <p>instrument ^[1] 28:6</p> <p>insurance ^[1] 18:11</p> <p>intangibly ^[1] 48:24</p> <p>interchange ^[1] 53:19</p> <p>interest ^[33] 5:15,18 6:6,14,16,19,24 7:17,22 8:3,5,7 22:22 23:3 31:12 34:22 35:2,6 40:9 42:4 45:18,20,22 46:11,22,25,25 51:10 61:17 66:3,9 67:9 68:18</p> <p>interested ^[1] 30:7</p> <p>interests ^[18] 5:12 6:21 7:5,13 8:1,22 18:17,19 22:10 26:16 30:21 43:17 45:16 46:1,2 51:3 54:25 55:6</p> <p>interferes ^[1] 33:11</p> <p>Interstate ^[1] 64:14</p> <p>invalidate ^[1] 27:4</p> <p>invalidated ^[1] 19:1</p> <p>investigate ^[1] 9:17</p> <p>involve ^[1] 37:7</p> <p>involved ^[6] 13:14,14 20:2 33:4 36:15 42:24</p> <p>irrespective ^[1] 7:18</p> <p>irresponsible ^[1] 38:19</p> <p>isn't ^[8] 6:18 7:15 8:25 14:16 18:6 19:14 54:16 60:12</p> <p>issue ^[16] 16:9,15 17:25 22:6 23:1 26:10 27:20 29:4 33:7 43:17 48:9 50:17 57:8,9 69:23,24</p> <p>issues ^[7] 6:17 16:3 17:1 22:22 51:6,23 57:16</p> <p>itself ^[5] 9:5 29:6 34:21 66:6,11</p>	<p>justification ^[4] 19:9 29:18 36:17 66:1</p> <p>justified ^[3] 5:12,14,17</p> <p>justify ^[2] 4:19 7:6</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[19] 18:16 19:12,19 20:15 21:11 29:16,22 30:18 31:1,4,17 32:10,15,21 48:3,15 50:18 57:25 60:23</p> <p>Kagan's ^[1] 34:18</p> <p>keep ^[3] 9:15 58:7 63:10</p> <p>Keller ^[2] 37:18 45:13</p> <p>KENNEDY ^[23] 10:13 12:8 13:22 26:7 36:15,22 37:10,20 46:16 47:1,5 53:21,25 54:6,8,10,16 55:2,7,11 58:16 60:3,12</p> <p>key ^[1] 67:17</p> <p>kicks ^[1] 51:7</p> <p>kind ^[2] 46:6 53:19</p> <p>kinds ^[3] 8:16 13:3 48:18</p> <p>known ^[1] 21:15</p> <p>Knox ^[2] 4:17 26:20</p> <p>Kraemer ^[1] 27:13</p>
<hr/> <p style="text-align: center;">H</p> <hr/> <p>hand ^[3] 32:25 35:18,21</p> <p>handle ^[1] 11:16</p> <p>happen ^[3] 27:17 38:6 67:7</p> <p>happened ^[1] 44:13</p> <p>happening ^[2] 47:3 63:6</p> <p>happens ^[5] 27:11 30:5 59:8 60:17,18</p> <p>happy ^[3] 36:21 42:6 48:14</p> <p>hard ^[1] 58:6</p> <p>harder ^[1] 24:8</p> <p>Harlan's ^[1] 55:8</p> <p>harm ^[1] 50:5</p> <p>harmful ^[1] 50:20</p> <p>Harris ^[6] 4:16 5:11 14:23 16:25 26:13,20</p> <p>Hatch ^[3] 6:25 36:11 61:14</p> <p>head ^[1] 26:5</p> <p>health ^[1] 18:11</p> <p>hear ^[1] 4:3</p> <p>heard ^[1] 28:5</p> <p>heart ^[1] 30:3</p> <p>heightened ^[4] 4:13 15:2 35:1,3</p> <p>held ^[2] 27:22 40:17</p> <p>higher ^[5] 17:11,24 32:24 46:20 64:20</p> <p>highly ^[1] 37:12</p> <p>hinge ^[1] 5:22</p> <p>hinges ^[1] 61:10</p> <p>history ^[4] 12:11 42:19 52:2 58:5</p> <p>holidays ^[1] 57:20</p> <p>Holmes ^[1] 12:22</p> <p>Honor ^[36] 5:7 7:23 9:4,21 10:22 11:19 12:7,14 16:1,5 20:19 21:3,7 23:13 24:4 26:6 27:16 29:3 30:11</p>	<hr/> <p style="text-align: center;">I</p> <hr/> <p>idea ^[5] 12:12 29:18,23 51:22 68:15</p> <p>ideological ^[1] 10:19</p> <p>identical ^[2] 13:11,11</p> <p>identified ^[2] 27:19,20</p> <p>ideological ^[1] 52:10</p> <p>illegal ^[2] 19:25 27:13</p> <p>Illinois ^[8] 2:11,12 11:25 12:1 35:13 38:25 39:13 70:14</p> <p>immaterial ^[1] 10:22</p> <p>impacts ^[1] 59:16</p> <p>implementation ^[1] 55:4</p> <p>implicate ^[1] 30:16</p> <p>implications ^[1] 47:9</p> <p>implicit ^[1] 42:9</p> <p>implied ^[1] 11:20</p> <p>important ^[5] 18:12 19:22 29:22 43:19 63:10</p> <p>importantly ^[2] 33:7 67:12</p> <p>imposed ^[1] 11:18</p> <p>imposing ^[1] 45:23</p> <p>impulses ^[1] 51:25</p> <p>includes ^[1] 35:22</p> <p>including ^[1] 24:16</p> <p>income ^[1] 6:10</p> <p>incompatible ^[1] 35:2</p> <p>inconsistent ^[3] 14:9,11,16</p> <p>increase ^[4] 49:25 62:24 63:15 70:13</p> <p>increasing ^[2] 46:21,21</p> <p>incredibly ^[1] 10:5</p> <p>indebtedness ^[1] 46:21</p> <p>independent ^[2] 46:10,12</p> <p>indicate ^[1] 49:14</p> <p>individual ^[7] 10:22 27:4 31:11,25 61:6 62:18 69:15</p> <p>individually ^[1] 64:21</p> <p>individuals ^[4] 7:6 11:8 15:19 19:6</p> <p>individuals' ^[3] 10:25 20:6 68:20</p> <p>industries ^[2] 14:5 25:18</p> <p>industry ^[3] 25:17,17 28:14</p> <p>inequitable ^[1] 21:19</p> <p>influence ^[6] 4:15 53:22 54:3,13,15 69:4</p> <p>infringe ^[1] 43:9</p> <p>infringing ^[1] 68:19</p> <p>initial ^[1] 49:15</p>	<hr/> <p style="text-align: center;">J</p> <hr/> <p>JANUS ^[3] 1:3 4:5 6:2</p> <p>job ^[1] 33:12</p> <p>jobs ^[2] 23:22 34:24</p> <p>judgments ^[1] 50:5</p> <p>judicial ^[1] 50:4</p> <p>Justice ^[17] 2:7 4:3,10,23 6:3 7:8,20 8:10 9:1,10 10:11,13,14 11:1,12,22 12:4,8,15 13:9 14:8,13 15:20 16:2,7,12,17 17:6,20 18:7,15,16 19:12,19 20:15,24 21:4,11 22:11,13,19 23:10,14 24:1,21,25 25:7,11,16,20,24 26:2,7 27:6,18,25 28:4,11,18,25 29:16,22 30:18 31:1,4,17 32:10,15,21 33:13,15,25 34:5,11,16,18 35:9,16 36:15,22 37:4,10,20 38:21 39:8,17,21,25 40:3,12,14 41:10,18 42:10,16 43:22,25 44:6,17,22,24 45:5 46:16 47:1,5,10,13,19 48:3,15 49:6 50:18,25 51:1,12,18 52:16,19,25 53:2,9,21,25 54:6,8,10,16 55:2,7,8,11 56:2,4,13,16,23 57:9,12,25 58:1,11,14,17,25 59:4,14 60:3,12,23 62:4,9,22 63:4,14 64:10 65:4,8 66:2,10,22 67:1 68:3,8 69:10,22 70:4,18,18,20,25 71:5</p> <p>Justices ^[1] 13:22</p>	<hr/> <p style="text-align: center;">L</p> <hr/> <p>labor ^[16] 7:14,15,25 8:3,5 12:1 13:12,12 14:22 24:11,24 28:4,7,23 55:1 67:25</p> <p>lack ^[1] 40:19</p> <p>largely ^[1] 27:18</p> <p>last ^[2] 55:12 68:9</p> <p>late ^[1] 69:25</p> <p>Lathrop ^[1] 55:9</p> <p>Laughter ^[3] 39:18 55:13 59:23</p> <p>law ^[14] 5:5,15 11:18,20,23,24,25 12:20 14:20 36:3 41:24 51:4,5,7</p> <p>lawyers ^[3] 13:2,20 28:19</p> <p>lay ^[1] 41:5</p> <p>least ^[4] 8:2 20:20 28:20,21</p> <p>leave ^[2] 21:17 57:21</p> <p>legal ^[3] 21:22 45:23 50:2</p> <p>legislature ^[2] 59:12 60:18</p> <p>legislatures ^[1] 67:13</p> <p>legs ^[1] 28:20</p> <p>Lehnert ^[8] 23:1 47:13 52:8 58:16 66:3,12,17 67:4</p> <p>Leonard ^[1] 15:7</p> <p>Lerner ^[1] 13:23</p> <p>less ^[3] 25:14 54:12,15</p> <p>Letter ^[1] 36:10</p> <p>level ^[1] 31:12</p> <p>leverages ^[1] 40:7</p> <p>life ^[1] 43:5</p> <p>limit ^[2] 53:3 58:2</p> <p>limitation ^[2] 40:21 67:19</p> <p>limitations ^[4] 38:24 39:3 40:1 56:25</p> <p>limited ^[2] 12:16 24:8</p> <p>limiting ^[2] 13:5,6</p> <p>line ^[15] 38:14,14 42:20 43:5 44:19 47:12,17,19,21 48:1 52:9 64:19,23,24 66:17</p> <p>listen ^[3] 8:8 9:7,8</p>

Official - Subject to Final Review

<p>listening [2] 8:4,7 litigate [1] 30:23 litigation [1] 12:10 livelihoods [1] 19:6 lobbying [3] 52:21,25 58:8 local [1] 52:1 logic [1] 44:15 long [3] 45:1 49:17 50:24 long-term [1] 30:21 look [9] 24:18 27:25 38:3 44:22 56:17 57:19 62:10,11 63:20 looking [1] 30:20 lose [1] 70:22 lot [5] 23:17,22 25:18 66:24 68:23 lots [1] 13:1 love [1] 41:1</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>machine [1] 7:4 made [1] 68:9 Madison [1] 13:1 majority [2] 61:25 67:10 malfeasance [1] 16:9 Man [4] 43:2,20,23 52:21 manage [2] 57:23 59:2 management [3] 53:20 63:12 64:2 managerial [4] 45:17 46:2 58:20,20 manages [1] 35:19 Mancur [1] 48:22 mandate [2] 54:23 55:3 mandated [6] 21:24 52:11,13 53:6 58:3 66:4 mandatory [4] 5:2 52:21 53:4,7 manifest [1] 50:10 manner [1] 61:12 many [13] 12:23 18:11 19:5 20:4,5,16 34:6,12 38:7 42:19 47:6 65:16 67:20 Marbury [1] 13:1 MARK [1] 1:3 marker [1] 41:6 marketing [1] 9:12 marketplace [1] 40:8 massive [1] 46:20 matter [20] 1:14 13:7 17:16 18:5 21:23 30:10 31:19,23 32:17,23 41:11 62:6,15,18,20,23 63:1,18 65:23 69:20 matters [14] 16:23 30:4 32:22 33:6 37:12 41:16 57:17 60:25 61:2,4 65:20,21 70:15,17 mean [11] 13:9 18:10 20:25 25:24 32:17 44:19,22 50:19 52:24 53:1 65:12 Meaning [2] 26:2 56:8 means [4] 8:2 26:18 30:22 67:17 mechanical [1] 25:16 meeting [1] 40:25 member [1] 45:8 members [6] 10:3 24:9,14 45:5 49:4 52:15 membership [1] 48:19</p>	<p>memo [1] 44:12 mentioned [1] 70:16 merely [1] 16:19 merit [1] 46:18 messages [2] 6:12,12 MESENTER [46] 2:3 3:3,18 4:7,8,10,24 5:7 6:20 7:18,23 8:24 9:3,20 10:21 11:6,19,24 12:7,14 14:7 16:1,5,11,16,24 17:15 18:4,9,16 19:11,24 20:18 21:2,6,21 27:8 48:4 68:5,6,8 69:18 70:2,6,19 71:2 Messenger's [1] 29:23 method [1] 28:12 might [2] 51:6 65:21 militant [1] 49:2 million [2] 19:3 70:12 millions [4] 17:2 19:2,6 36:13 mind [1] 63:11 minor [1] 70:15 minority [3] 52:15 54:24 61:24 minutes [1] 68:5 mobilization [1] 49:16 modern [4] 12:19,23,25 13:4 moments [1] 45:19 Monday [1] 1:12 money [8] 6:9 9:15 30:6,8 64:11,13,17 68:14 Moore [1] 43:3 morale [2] 62:8,16 morning [2] 4:4 35:25 most [5] 13:25 20:20 47:20 52:4 59:20 motion [5] 26:10,12,13 38:2 48:16 move [1] 18:5 movie [1] 43:2 much [11] 24:21,25 25:7 27:3 31:8,24 33:23 35:18 37:22 38:13 65:15 multiple [1] 8:8 MUNICIPAL [3] 1:7 4:6 48:8 municipalities [1] 18:25 must [1] 66:5</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrowly [1] 8:19 nature [8] 15:21 16:22 31:10 33:8 34:20 37:13 42:23 49:18 near [1] 13:11 necessarily [5] 10:8 14:19 15:3 21:22 29:13 necessary [2] 8:25 23:3 necessity [2] 22:23 50:7 need [6] 7:24 8:19 22:8 26:11 29:19 49:8 needs [1] 68:15 negative [1] 25:25 negotiate [2] 15:23 65:13 negotiated [1] 26:19 negotiating [5] 10:1,2 26:25 32:1 67:16 negotiation [6] 24:6 32:2 46:15 59:5,9 63:6 negotiations [2] 37:14 63:12 neutrality [1] 12:13 never [6] 36:3 42:1,5 47:5,9 56:6</p>	<p>new [4] 14:19 26:25 34:2 48:7 newsletter [1] 54:1 next [2] 22:7 26:25 night [1] 55:12 NOEL [3] 2:6 3:6 22:16 non-chargeable [1] 47:17 non-members [6] 9:23 10:6 11:14,17 70:3,7 normal [1] 48:6 north [1] 24:19 note [2] 51:19 65:3 nothing [2] 44:15 46:5 notices [1] 38:4 nowhere [1] 4:20 number [4] 20:19 24:17 25:23 26:5 numerous [1] 38:22</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O'Connor [1] 13:22 object [1] 55:3 obligations [1] 48:18 obviously [1] 48:16 occurring [1] 20:4 occurs [1] 59:10 odds [1] 4:16 offered [1] 47:16 office [2] 40:20,25 official [6] 36:23,24 39:6,9,20 40:1 oftentimes [3] 6:23 16:11,12 Okay [6] 12:21 23:20 40:20 41:7 64:25,25 old [1] 12:25 older [2] 12:19 13:3 Olson [1] 48:22 once [6] 16:21 18:24 19:7 22:1 28:4 42:5 One [28] 4:25 8:4,7,18 13:5,17 17:10,23 21:18 22:7 23:15 28:20 33:6 38:24 43:15 44:14 47:14 55:9,22 62:4 64:5,11,12,16 65:6,10 68:19 69:23 only [11] 5:23 8:7 9:13 14:9 42:22 46:15 49:20 50:13 51:8 62:14 68:12 opening [1] 63:8 operates [1] 18:12 operation [1] 18:13 opinion [10] 27:19,21 28:15 47:14 55:8,15 56:16 57:9 62:9 66:2 opportunity [1] 53:15 oppose [1] 10:15 opposed [2] 9:13 44:13 opposite [2] 6:23 20:25 oral [10] 1:14 3:2,5,10,13 4:8 22:16 35:12 51:15 68:6 order [5] 14:8 25:13 32:8 34:23 60:1 ordinarily [1] 62:19 organization [2] 32:7 55:18 organized [1] 7:4 organizing [1] 49:16 original [1] 56:8 origins [1] 56:19</p>	<p>Orwellian [1] 41:14 other [19] 4:17 9:8 12:9 14:4 15:11,16 21:25 23:5,22 26:8,9 32:25 35:24 36:8 49:7 50:1 67:9 70:5,15 others [4] 6:19 30:17 46:5 49:22 otherwise [1] 68:16 ought [1] 50:4 out [17] 10:17 24:18 28:20 37:4 38:4,10 44:8 45:6,17 49:3 54:4 58:8,18,19 64:1 66:11,12 out-years [1] 38:7 outcome [1] 44:16 outside [5] 6:11 45:14 53:10 55:25 61:5 outweigh [1] 61:18 over [11] 10:7 15:10 17:1 19:2 32:1,15 41:22 49:17,22 59:5 63:17 overall [2] 31:14 32:8 overlap [1] 47:18 overriding [1] 46:25 overrule [4] 48:13 66:13 67:10,24 overruled [3] 4:12 18:18 48:5 overtime [1] 60:7 own [1] 9:15</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE [1] 3:2 paid [2] 43:5 60:5 pain [1] 54:25 parameter [1] 59:10 paramount [1] 45:16 part [7] 27:21 29:23 34:2 52:11 53:14 54:20 66:14 participate [2] 8:12,14 participation [1] 7:10 particular [5] 21:18 32:2 50:6 63:21,23 particularly [2] 14:4 26:16 partner [3] 9:11 46:14,16 party [2] 36:18,19 pass [2] 10:19 48:7 past [1] 50:15 patronage [1] 14:14 pay [11] 8:12 10:20 29:25 37:2 44:25 55:4 60:25 62:19 64:2 68:11 70:13 paying [1] 10:17 payment [1] 43:14 payments [2] 5:3 49:8 peace [8] 6:16 7:15,25 8:3,5 28:4,7,23 penalty [1] 64:9 people [13] 6:9 9:13 10:15,16 28:23 38:10 42:19 44:25 50:16 52:5 55:3 69:24,25 percent [10] 24:12,17,20 37:11,13 62:5,24 63:15 65:11 70:13 percentage [1] 37:24 perfectly [1] 11:10 perform [1] 52:6 perhaps [1] 63:17 permission [1] 17:22 permit [3] 6:8,13 33:20 permitted [1] 8:14</p>
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Official - Subject to Final Review

<p>person [6] 43:11 55:19 64:11,12, 16 69:15 person's [1] 43:9 personnel [2] 35:19 46:9 persuade [1] 55:22 persuading [1] 67:10 Petitioner [9] 1:4 2:4,9 3:4,9,19 4: 9 22:18 41:22 PETITIONERS [1] 68:7 pick [1] 68:9 Pickering [18] 31:2,9,16 33:8,9,16 34:21,21,25 36:7 38:22 40:12 41: 7,8 44:7 61:16,21 62:3 place [4] 32:3,6 50:24 63:13 places [2] 4:16 20:4 play [1] 43:2 please [6] 4:11 22:20 29:16 35:16 51:1,18 plenty [1] 48:25 plurality [1] 47:15 plurality's [1] 47:21 pocket [1] 9:15 point [13] 12:10,11 14:9 15:6 26: 10,15 44:1 50:1,2 58:18 64:1 68:9, 22 pointed [1] 37:4 points [2] 26:8 41:23 policies [5] 4:15 36:9 55:4,5 57:21 policy [12] 6:12 16:23 18:1,6 30:17 45:7 47:8 58:20 65:14 69:8,14,17 political [14] 7:1,4 15:1,1,18 17:4 33:10 36:19 37:13 42:7 53:22 54: 2,13,15 politicalization [1] 7:2 position [12] 11:3 28:5 30:9,19 34: 2,14 39:11 45:7,10 56:1 64:7,8 positions [2] 34:7 55:20 posits [1] 63:8 possible [2] 41:13 56:2 possibly [1] 41:2 Post [1] 13:25 Postal [7] 23:12,13,21 24:4,10,16, 18 Powell [2] 14:13 65:4 power [2] 32:13 65:24 powers [1] 9:6 practice [4] 5:15 20:1 47:18 55:1 precedent [2] 14:16 66:20 precedents [3] 4:18 14:17,18 predicated [1] 29:19 predictive [1] 50:5 preface [1] 41:4 prerogative [1] 54:22 prerogatives [4] 36:1 45:17 51:24 61:11 pressure [1] 49:24 presumably [1] 21:12 pretextual [1] 40:10 prevail [2] 27:10 54:12 prevalence [2] 19:13 20:9 prevent [1] 68:11 preventing [2] 7:2,3 price [1] 8:13 principle [6] 13:6,7 57:2,5,11 65:9</p>	<p>principles [1] 62:2 printing [1] 25:17 prior [4] 14:16,21 22:4 34:7 private [21] 5:4,6,21,25 7:13 14:24 15:4 25:11,15 27:11,17,22 32:7 36:18,18 41:12,18,19 52:2 62:6, 23 privatization [1] 46:18 probably [3] 19:2 27:2 39:10 probing [1] 10:24 problem [6] 13:25 15:7 47:23 49: 19 53:12 65:4 procedures [1] 64:4 process [9] 29:7,9,10,21 46:14 52: 11 63:25 68:22 69:9 processing [2] 68:24 70:10 Professor [2] 13:24,24 prohibit [2] 33:10 35:4 prohibits [1] 10:24 promotion [1] 46:19 property [1] 19:4 prophylactic [1] 50:11 proposition [1] 68:10 prosperity [1] 28:7 protected [1] 17:12 protection [5] 15:3 16:4,10,19 68: 14 provide [3] 7:10 11:14 52:18 provides [3] 9:6 12:2 66:3 provision [6] 12:1 21:9,18 22:1 29: 6 51:9 provisions [5] 19:14 20:14 21:13 27:5 51:9 public [63] 5:3,23 7:10 16:23 17: 17,18 18:1,5,13 20:19 28:13 30:5, 5,10,12,14,16 31:12,19,23 32:5,22 33:22 36:8,13 37:2 41:16,24 42:3 47:7,8 52:5,6 56:7,9,22 57:17,22 59:14,20 61:2,4 62:6,15,18,20 63: 1,13,18 64:14,16 65:1,14,21,23 69: 1,13,17,20,20 70:17,21,23 publicly [2] 38:3 45:9 Puerto [1] 18:23 purpose [4] 7:13,14 29:19 55:17 purposes [1] 29:11 pursuant [1] 39:20 push [1] 63:16 put [5] 13:21 17:21 18:21 35:22 59: 19</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quarter [2] 25:5,5 quelled [1] 61:23 question [27] 5:22,25 8:17 9:21,22 22:24 23:16 27:7 34:18,20 36:2 41:4 42:10,17 45:7 50:22 52:8,12, 24 54:20,20 56:18 59:24,25 65:19 66:18 69:17 questions [4] 12:17 14:8 16:23 58: 19 quick [1] 12:17 quite [5] 19:21 31:4 32:19 42:23 59:19 quote [1] 50:6</p>	<p style="text-align: center;">R</p> <hr/> <p>radical [1] 34:2 railroad [1] 13:13 railroads [1] 64:13 Railway [3] 13:11,12 14:22 raise [5] 9:23 62:5,20 65:21 67:24 raises [1] 29:10 raising [1] 57:17 rampant [1] 33:18 range [2] 24:5,8 rate [2] 25:15 64:18 rates [2] 48:20 64:14 rather [2] 9:15 31:2 ratify [3] 59:13 60:20,20 rationales [1] 4:20 reach [1] 7:24 read [6] 21:1 28:15 49:14 55:8,11 56:5 reading [1] 29:5 real [1] 48:9 reality [3] 23:23,24 47:2 really [9] 13:18 22:9 23:6 30:3 31: 14 40:10 53:11 69:12,13 reason [9] 9:3,25 19:15,15 20:5,10 31:11 47:20 53:24 reasons [4] 5:11 10:19 27:18 33:6 REBUTTAL [2] 3:17 68:6 recent [1] 22:6 recently [1] 70:11 recognize [3] 11:2 35:17 43:19 recognized [4] 6:4 16:25 43:18 45:15 record [4] 23:17 26:11 38:1,6 recruit [2] 24:9 52:4 reference [1] 12:8 referencing [1] 37:5 reflects [2] 34:21,25 Regardless [1] 34:17 regards [1] 45:25 regulated [4] 7:11 13:13 14:5 28: 14 regulates [1] 35:20 regulating [3] 5:15 6:6 57:3 rein [1] 57:3 relations [2] 7:15 12:1 relationship [2] 40:6,7 relationships [2] 46:9 50:10 reliance [12] 18:17,19 19:22,24,25 22:9 26:16,21,23 51:3,10 67:8 remainder [1] 22:12 remaining [1] 68:5 remember [1] 43:1 remotely [1] 18:19 removed [1] 43:15 renegotiate [2] 51:8 60:21 renegotiated [3] 22:8 38:8 48:8 repeatedly [1] 36:7 represent [6] 8:23 9:23 32:12 45: 24 52:15 54:24 representation [6] 8:25 9:4 12:3 52:14 61:23 66:7 representative [5] 10:7 23:4 32: 11 37:8 66:5</p>	<p>representatives [1] 38:9 representing [2] 39:12 46:5 represents [1] 62:25 require [2] 11:13 21:9 required [8] 12:6 40:23 41:15 42: 18 44:11 52:6,15,18 requirement [2] 11:16 53:14 reserve [1] 22:11 resistant [1] 69:6 resolution [1] 37:6 resolve [1] 29:14 resources [5] 9:11,17 11:4,7 48: 21 respect [9] 5:8,21 15:5 41:24 47:5 57:1 59:15 61:12 65:13 Respectfully [1] 27:16 respond [1] 51:2 Respondent [3] 2:16 3:15 51:16 Respondents [5] 1:9 2:13 3:12 4: 19 35:14 responses [1] 24:4 responsible [1] 46:12 rest [1] 24:6 Restatement [1] 20:22 restrict [2] 43:11 65:24 restricting [3] 6:21,25 7:1 restriction [3] 42:12,14,20 restrictions [1] 61:18 restrictive [1] 8:2 result [1] 11:11 results [1] 4:20 retaining [2] 4:22 19:15 reverse [1] 26:13 reversing [3] 19:16 20:5,10 review [1] 53:15 revised [1] 34:14 revisiting [1] 66:17 Rico [1] 18:23 riding [1] 9:2 rights [6] 19:4 20:6 56:10,20 57:4 68:20 Riley [1] 42:13 rises [1] 31:12 ROBERTS [13] 4:3 22:13 35:9 49: 6 51:1,12 58:25 59:4,14 65:8 68:3 70:25 71:5 Roe [1] 36:12 room [1] 13:2 routine [1] 6:17 rule [7] 6:2 20:22 36:12 50:20,23 56:14 66:11 rules [2] 67:16 70:5 run [1] 57:10 runs [1] 8:15</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same [13] 7:5 23:21 33:3,4 40:23 42:15 44:3,5 45:7 49:24 54:3 61: 20,21 San [1] 36:12 satisfy [1] 8:2 saw [1] 56:5 saying [12] 11:1 17:8 23:20 31:5, 17 32:22 43:3 44:3 57:7 60:10 66:</p>
--	--	--	---

Official - Subject to Final Review

<p>4 69:12 says ^[11] 17:24 20:24 27:13 43:11 52:20 54:1 55:15,16 57:10 62:5 64:2 scale ^[8] 16:25 17:4,12 18:7,9,15 36:2 71:3 scales ^[1] 19:23 Scalia ^[4] 13:22 47:13 52:16 58:16 Scalia's ^[2] 47:19 66:2 scenario ^[4] 41:14 43:21,23 63:21 school ^[1] 67:13 scope ^[6] 32:9 33:6,16,21 36:2 61:11 scrutiny ^[7] 4:14 14:14 35:1,3 41:21,25 42:2 search ^[1] 49:3 searches ^[1] 20:2 Seasons ^[3] 43:2,20,23 second ^[4] 22:24 31:1 45:22 46:10 sector ^[17] 5:4,4,6,22,23,25 14:24 15:4 20:19 25:9,11,15 27:11,17, 22 32:5 52:2 security ^[1] 67:23 see ^[7] 8:21 14:2 36:10,11 50:7 56:6 64:10 seems ^[2] 37:21,21 seen ^[3] 20:21 28:19 48:21 send ^[1] 26:14 sense ^[1] 25:25 separate ^[2] 29:8 47:13 serious ^[4] 29:10 47:8 51:4,10 seriously ^[1] 43:19 servants ^[2] 56:22 59:20 serve ^[1] 46:2 Service ^[7] 23:13,13,21 24:5,10,16, 18 services ^[6] 11:14 18:14 30:15 37:3 52:5,17 session ^[1] 26:25 set ^[5] 32:8 54:22 59:9 60:16 64:15 setting ^[3] 5:19 9:12 45:9 settled ^[1] 53:18 seven ^[1] 38:13 severability ^[4] 20:14,16,21 51:5 severable ^[1] 21:7 shadow ^[1] 26:19 share ^[1] 6:10 Shelley ^[1] 27:12 short-lived ^[1] 26:24 short-term ^[1] 49:3 shouldn't ^[3] 7:20 47:24 58:6 show ^[2] 48:25 65:25 side ^[7] 14:1 23:5 35:24 49:7 63:22 64:5 67:9 sides ^[2] 23:19 42:15 siding ^[1] 28:15 significant ^[1] 70:10 simply ^[3] 27:4,23 67:5 since ^[5] 12:15 27:3 29:15,17 35:2 single ^[4] 45:21 55:9 69:13 70:21 site ^[1] 17:10 situation ^[4] 38:23 39:22 40:15 46:4 six ^[1] 38:12</p>	<p>size ^[5] 30:13 31:15 32:9 46:17 60:6 slew ^[1] 4:17 slightly ^[1] 50:21 smearing ^[1] 63:24 solely ^[1] 14:19 Solicitor ^[3] 2:6,11 35:13 solve ^[1] 13:25 somebody ^[2] 43:8 44:2 somehow ^[1] 36:1 someone ^[1] 6:15 Sometimes ^[2] 60:16,17 sorry ^[3] 6:3 14:17 33:13 SOTOMAYOR ^[39] 6:3 7:8,20 8:10 9:1 15:20 16:2,7,12,17 17:6,20 18:7,15 23:10,14 24:1,21,25 25:7, 11,16,20,24 26:2 33:13,15,25 34:5, 11 44:17,22,24 45:5 69:10,22 70:4, 18,20 Souter ^[1] 13:22 Southworth ^[1] 45:13 sovereign ^[3] 35:20 48:1 54:21 speaking ^[2] 16:6 45:2 specifically ^[1] 13:23 specter ^[1] 67:25 speech ^[35] 4:14,17 5:20 6:21,22, 25 7:7 29:24 30:4,9 33:4,10 35:23 36:2,16 37:8 38:17 40:9 42:14,21, 21 43:15 44:18,20 47:25 55:24 56:9 60:25 61:12,19,24 62:12,21 63:11 65:25 spend ^[1] 45:19 spoke ^[1] 48:22 spokesman ^[2] 45:21,23 Springfield ^[1] 2:3 stable ^[1] 46:12 stage-in ^[1] 17:17 stake ^[1] 57:6 stare ^[6] 4:21 14:2 19:20,21 22:24 26:15 starts ^[1] 18:5 STATE ^[53] 1:6 2:12 3:12 4:5 5:5, 13,22 6:1 7:17,21 8:15,17 11:18, 23,24,25 15:23 16:8,14 17:10 27:23 35:14,18 38:25 39:1,5,12 40:5 42:4 45:15 46:22,24 48:7,12 50:11 51:4,5,7 52:3,20 53:6,6,12 58:4, 18 59:5,12,16 60:8 64:9 66:4 67:13 70:12 state's ^[4] 5:14 41:9 45:18 58:22 state-mandated ^[2] 55:18 64:4 stated ^[1] 5:11 STATES ^[19] 1:1,15 2:8 3:7 11:13 18:22 19:5,17 20:9 21:23,25 22:17 28:2 29:1 30:21 53:3,18 54:20 60:15 Statistics ^[2] 24:11,24 statute ^[8] 21:24 48:7 52:13,18,20, 20 58:10 70:6 statutes ^[2] 18:24 19:5 statutorily ^[1] 52:11 statutory ^[1] 15:12 stays ^[1] 22:1 step ^[5] 31:1 41:7,8,17 43:15</p>	<p>Stewart ^[2] 13:9,9 stick ^[2] 49:5,21 still ^[6] 7:16 17:13 24:19 36:4 41:6 55:24 stipulate ^[1] 59:21 stood ^[1] 17:19 stop ^[1] 50:11 stopped ^[1] 45:1 story ^[1] 40:11 straight ^[1] 41:25 strength ^[1] 41:9 stretch ^[1] 43:21 strict ^[3] 41:21,25 42:2 strikes ^[2] 30:19 67:23 striking ^[3] 31:5 67:20 68:12 strong ^[1] 18:19 struck ^[1] 32:18 structure ^[3] 30:13 31:15 32:9 student ^[8] 4:25 5:8,9,16 7:9,9 8:11, 13 students ^[1] 8:12 studies ^[2] 48:25 49:14 subject ^[13] 15:2 18:8,10,10 22:2 24:13 41:12 42:24 52:21 53:4,7 54:25 64:9 subjective ^[1] 10:25 subjects ^[3] 30:2 33:3 58:3 submit ^[10] 9:24 10:21 11:10 15:18 18:4 20:12 21:7 24:7 68:12,18 submitted ^[2] 71:6,8 subsequent ^[1] 14:17 subsidization ^[3] 7:12 36:18 55:17 subsidize ^[3] 11:9 35:7 68:16 subsidy ^[2] 44:20 45:3 substantially ^[1] 11:5 substantive ^[1] 16:22 succeeds ^[1] 67:9 suddenly ^[2] 28:11,20 sufficient ^[1] 61:17 suggested ^[4] 10:14 15:6 40:19 48:4 suggesting ^[3] 15:22 66:13,16 superior ^[2] 47:14,21 supervisors ^[3] 40:20 41:1,2 support ^[10] 2:9 3:8 6:22 7:6 10:16, 23 15:19 22:18 29:20 48:19 supporters ^[1] 9:14 Suppose ^[2] 37:10,11 supremacy ^[1] 43:4 SUPREME ^[4] 1:1,15 54:2 70:14 surrounding ^[1] 51:9 survive ^[1] 20:12 sustained ^[1] 50:17 system ^[7] 28:21 52:1 53:18 54:21, 23 60:2,15</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[6] 9:8,18 16:21 18:22 23:5 47:7 tailored ^[1] 8:20 talked ^[1] 68:23 talks ^[1] 33:18 tangibly ^[1] 48:17</p>	<p>taxes ^[1] 46:22 taxpayers ^[1] 30:7 teacher ^[1] 46:19 teaching ^[1] 34:25 tend ^[1] 49:1 tenure ^[2] 46:19 60:7 term ^[2] 34:6 49:18 terms ^[6] 20:11 23:2 32:15 58:5 63:20 69:2 test ^[8] 15:6,11,12,15 33:16 47:16, 22 53:5 tested ^[1] 24:2 tests ^[1] 36:8 text ^[1] 48:23 there's ^[8] 8:10 9:20,25 23:6 35:5 53:2,12 65:25 therefore ^[2] 6:1 64:3 they've ^[3] 12:9 18:2 28:19 third ^[5] 5:3 15:5 22:25 25:5 27:19 third-party ^[2] 32:7 35:7 Thomas ^[1] 43:3 though ^[3] 24:14 28:22 41:5 thousands ^[3] 17:3 18:25 67:11 three ^[13] 4:25 12:16,16 13:19 14:2,5 22:7,21 34:15 38:12 50:14 56:18 58:4 Throughout ^[2] 42:19 67:25 tied ^[1] 69:9 today ^[4] 35:21 57:2,6 68:23 together ^[3] 31:21 32:24 33:1 top ^[1] 26:5 topic ^[1] 50:14 topics ^[1] 47:6 towards ^[1] 18:5 tradeoff ^[2] 67:22,23 training ^[1] 16:14 transform ^[1] 16:18 transformative ^[1] 16:21 treats ^[1] 36:5 tried ^[1] 42:11 tries ^[1] 15:23 true ^[3] 21:12,22 67:20 try ^[3] 13:17 54:1 55:22 trying ^[5] 12:18 26:8 32:17 50:21 69:4 turn ^[1] 67:8 Turning ^[1] 26:15 Twenty-three ^[1] 18:22 two ^[15] 5:8 9:21 13:6 19:11 24:3 26:8,17 33:6,7 42:15 46:1,2 49:12 55:21 68:5 two-tiered ^[1] 46:6</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unanimously ^[1] 51:22 unconstitutional ^[2] 18:24 21:16 under ^[15] 15:14 20:2,22 23:9 26:19 30:24 31:2 33:16 37:6 41:6,8 51:4,7,25 70:6 undercuts ^[1] 4:21 underlines ^[1] 40:5 underpaid ^[1] 59:21 understand ^[7] 12:4 32:18 34:1 39:10,21,24 59:8</p>
--	---	---	--

Official - Subject to Final Review

<p>understood ^[2] 57:25 60:24 unfair ^[1] 63:24 unfettered ^[1] 56:22 unfold ^[1] 50:8 uniformly ^[1] 35:17 union ^[54] 5:24 8:4,8 9:5,14,14,16,23,25 10:3,6,9,16,16,18,23 11:7,10,16 14:24 15:10,21 16:13 17:7 21:20 24:9,14 25:21 31:18,22 32:7,10 33:2,2 37:12 45:8,11 48:19,20,20 49:21 52:14,17 53:13 54:1,24 55:3 56:7 62:24 63:9 64:7 66:5 67:22 69:3 union's ^[2] 10:4 37:24 unionism ^[4] 19:14 20:9,14 21:24 unionization ^[1] 25:8 unionized ^[2] 25:1,6 unions ^[23] 8:9,23 9:6 10:13 11:2,14 12:10 13:15 14:4 21:14 23:11 28:9,13 47:7 49:1,9 53:23 54:12 59:15 68:11,16,17 69:11 unit ^[1] 10:2 UNITED ^[8] 1:1,15 2:8 3:7 22:17 28:2 29:1 30:21 universe ^[1] 63:7 university's ^[1] 5:18 unrest ^[1] 67:25 until ^[1] 26:24 untold ^[1] 67:25 unusual ^[1] 30:19 up ^[17] 5:19 17:11,19,23 19:2 26:11 35:21 37:25 45:9 47:6 49:23,23,23 52:1 53:13 54:22 68:9 upheld ^[2] 51:22 61:14 uphold ^[1] 36:9 upholding ^[1] 36:11 usual ^[2] 19:20,21 utility ^[1] 64:16</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacation ^[1] 29:25 vacuum ^[1] 38:16 vagueness ^[1] 47:22 valuable ^[1] 9:5 value ^[1] 4:22 varies ^[1] 11:19 various ^[1] 30:1 vault ^[1] 41:22 versus ^[3] 4:5 13:1 36:12 view ^[5] 37:15 38:18 47:14 51:10 54:11 viewpoint ^[1] 12:13 viewpoint-neutral ^[1] 5:19 views ^[1] 36:19 violated ^[1] 20:7 violating ^[1] 70:4 violations ^[1] 19:17 Virginia ^[1] 2:3 visible ^[1] 50:17 vitality ^[1] 26:22 vividly ^[1] 30:16 voluntary ^[2] 48:19 49:8</p> <hr/> <p style="text-align: center;">W</p> <hr/>	<p>wage ^[8] 31:11 32:2 37:13,14,14 62:24 63:15 70:13 wages ^[15] 15:23 17:11,24 18:11 32:24 46:20 58:2 59:5,17 60:5 64:20,24 65:11,12,13 wages/hours ^[1] 65:5 walk ^[1] 17:22 wants ^[7] 18:2 39:2,5 41:22 45:10 53:7 69:5 Washington ^[3] 1:11 2:7,15 way ^[12] 6:18,23 8:11 33:22 34:6 38:5 40:7 43:10 50:17 57:24 59:19 65:1 ways ^[2] 18:11 46:3 weight ^[1] 37:22 well-fitted ^[1] 8:18 well-resourced ^[1] 46:13 well-tailored ^[1] 8:19 Whereupon ^[1] 71:7 whether ^[16] 6:1 7:19,25 17:7 23:2 44:1 51:23 52:12 53:5,5 54:11 62:8,15 64:5,20,21 White ^[1] 56:23 White's ^[3] 56:16 57:9 62:9 whole ^[8] 20:25 23:22 29:15,17 36:6 69:20 70:8,16 wide ^[1] 10:5 wide-scale ^[1] 19:16 wield ^[1] 32:13 will ^[14] 11:3 13:2 20:12 22:7 30:23 49:8,19,24 54:3,12,14 59:21 67:11 68:17 WILLIAM ^[5] 2:3 3:3,18 4:8 68:6 willing ^[1] 52:4 wish ^[1] 10:23 within ^[3] 53:18 59:10 60:19 without ^[2] 23:11 31:21 wonder ^[2] 12:15 28:16 wonderful ^[2] 55:14,15 Wooley ^[1] 42:13 word ^[1] 67:4 words ^[3] 15:11 34:23 35:5 work ^[6] 26:3 38:11 46:12 60:6 65:12 67:12 work-related ^[1] 17:13 worker's ^[1] 62:19 workers ^[5] 19:3 28:18 60:2 61:15 63:12 workforce ^[2] 7:3 46:18 working ^[4] 46:8 50:9 58:2 64:24 workplace ^[25] 6:16,17 24:22 25:1,5,6 30:6 31:20 36:9 37:3,5 38:11 39:6 41:15 45:14 46:6 50:5 57:4,23 59:3 62:8,16,21 70:1,5 works ^[3] 31:10 60:15 67:16 worry ^[1] 54:2 worth ^[1] 70:9 wrapped ^[1] 37:25 write ^[2] 44:11 60:4 writing ^[1] 40:18 written ^[1] 58:5 wrote ^[2] 13:10 44:14</p> <hr/> <p style="text-align: center;">Y</p> <hr/>	<p>year's ^[1] 70:9 years ^[8] 12:20 22:8 28:3,7 48:6 50:15 51:21 58:5</p>
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No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
JURISDICTION	1
ARGUMENT	2
I. The Court Should Overrule <i>Abood</i>	2
A. <i>Abood</i> Was Wrongly Decided Because There Is No Distinction Between Bargain- ing with the Government and Lobbying the Government	2
B. <i>Abood</i> Conflicts with <i>Harris</i> , <i>Knox</i> , and Other Precedents Subjecting Compelled Association and Speech to Heightened Scrutiny	7
C. <i>Abood</i> Is Unworkable	14
D. Reliance Interests Do Not Justify Retain- ing <i>Abood</i>	15
E. <i>Abood</i> Should Be Overruled	16
II. Agency Fee Requirements Fail Heightened Constitutional Scrutiny	18
III. The Court Should Hold It Unconstitutional to Seize Agency Fees from Nonmembers	22
CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977).....	<i>passim</i>
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009).....	15
<i>Bd. of Regents v. Southworth</i> , 529 U.S. 217 (2000).....	16
<i>Borough of Duryea v. Guarnieri</i> , 564 U.S. 379 (2011).....	7, 15
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000).....	5, 12
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980).....	7
<i>Cal. Motor Transp. v. Trucking Unlimited</i> , 404 U.S. 508 (1972).....	4
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	17
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	11
<i>Davenport v. Wash. Educ. Ass’n</i> , 551 U.S. 177 (2007).....	24, 25
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	7, 8

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	2, 15
<i>Givhan v. W. Line Sch. Dist.</i> , 439 U.S. 410 (1979).....	4
<i>Glickman v. Wileman Bros. & Elliott, Inc.</i> , 521 U.S. 457 (1997).....	12, 16
<i>Harris v. Quinn</i> , ___ U.S. ___, 134 S. Ct. 2618 (2014)	<i>passim</i>
<i>Johanns v. Livestock Mktg. Ass’n</i> , 544 U.S. 550 (2005).....	16
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990).....	16
<i>Knox v. SEIU, Local 1000</i> , 567 U.S. 298 (2012).....	<i>passim</i>
<i>Lane v. Franks</i> , 134 S. Ct. 2369 (2014).....	10, 12
<i>Lehnert v. Ferris Faculty Ass’n</i> , 500 U.S. 507 (1991).....	14
<i>Locke v. Karass</i> , 555 U.S. 207 (2009).....	14
<i>Machinists v. Street</i> , 367 U.S. 740 (1961).....	10, 11
<i>Miami Herald Publ’g Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	6

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Minn. State Bd. v. Knight</i> , 465 U.S. 271 (1984).....	13, 14
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968).....	10, 11, 17
<i>Rutan v. Republican Party</i> , 497 U.S. 62 (1990).....	7
<i>State v. AFSCME Council 31</i> , 51 N.E.3d 738 (Ill. 2016)	6
<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	23
<i>United States v. Williams</i> , 504 U.S. 36 (1992).....	2
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001).....	5, 6, 13, 22
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	5
CONSTITUTION & STATUTES	
U.S. Const. amend. I	<i>passim</i>
Federal Statutes	
28 U.S.C. § 1331	1
28 U.S.C. § 1343(a)(3)	1
29 U.S.C. § 158(a)(2)	3
42 U.S.C. § 1983	2

TABLE OF AUTHORITIES—Continued

Page(s)

Illinois Public Employee Labor Relations Act

5 Ill. Comp. Stat. 315/6(e).....6, 18, 24

5 Ill. Comp. Stat. 315/10(a)(1)3

OTHER AUTHORITIES

Edwin Vieira, “*To break and control the violence of faction,*” *The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Lib. Cong. No. 80-65161, 1980)..... 11

The Federalist No. 10 (J. Madison).....11

INTRODUCTION

The Court has twice held agency fee provisions are subject to at least “exacting First Amendment scrutiny.” *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012). Respondents, however, hardly argue that agency fees satisfy that scrutiny. They do not attempt to prove that the fees are a least restrictive means for collective bargaining, even though *Harris* held Illinois’ enforcement of its agency fee statute against personal assistants unconstitutional because Illinois failed to make that showing. 134 S. Ct. at 2639-41.

Respondents, instead, stake their case on the proposition that agency fees are subject to a lesser form of scrutiny because the fees embody employee “official duties” speech and are required by the government in its capacity as an employer. This is a new justification for *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which undermines any *stare decisis* value in adhering to that decision. If the Court rejects it, Respondents’ defense of *Abood* collapses.

The Court should reject the justification. A union’s bargaining against the government is not government speech expressed through employees; it is advocacy by an independent interest group. And when the government forces its employees to subsidize that advocacy, that is not a mere managerial action, but an act that infringes on employees’ First Amendment rights, as citizens, to choose which political speech is worthy of their support. That infringement warrants strict or exacting scrutiny, which agency fees fail.

JURISDICTION

There is no jurisdictional question in this case because 28 U.S.C. §§ 1331 and 1343(a)(3) provide for

jurisdiction over Janus’ First Amendment and 42 U.S.C. § 1983 claim. AFSCME earlier agreed that “the district court had federal question jurisdiction,” Resp. C.A. Br. 3, and could “therefore grant the employees leave to file their complaint in intervention as the operative pleading.” Union Defs.’ Reply 12, Dist. Ct. ECF No. 115. AFSCME’s newfound objection mischaracterizes the district court’s action, does not implicate subject matter jurisdiction, and is meritless for reasons stated in Petitioner’s Certiorari Reply Brief 1-6. “In granting certiorari, [the Court] necessarily considered and rejected that contention as a basis for denying review.” *United States v. Williams*, 504 U.S. 36, 40 (1992).

ARGUMENT

I. The Court Should Overrule *Abood*.

A. *Abood* Was Wrongly Decided Because There Is No Distinction Between Bargaining With the Government and Lobbying the Government.

1. Lobbying and collective bargaining are both advocacy directed at the government to influence policies that may have political and fiscal significance. Pet.Br. 10-14. Thus, contrary to *Abood*, compelling employees to subsidize either form of advocacy infringes equally on their First Amendment rights. *Id.*

a. AFSCME argues that “agency fees embody speech engaged in as part of the employee’s ‘official duties.’” Br. 22 (quoting *Garcetti v. Ceballos*, 547

U.S. 410, 421 (2006)). Such speech “owes its existence to a public employee’s professional responsibilities,” and “reflects the exercise of employer control over what the employer itself has commissioned or created.” *Garcetti*, 547 U.S. at 421-22. It is government speech expressed through employees.

The State does not speak through AFSCME. The union is not a state employee, contractor, or agent. It is an independent advocacy group whose speech the State does not control as an employer or otherwise. The IPLRA, like other labor laws, makes it unlawful for the State “to dominate or interfere with the formation, existence, or administration of any labor organization or contribute financial or other support to it.” 5 Ill. Comp. Stat. 315/10(a)(1); *see, e.g.*, 29 U.S.C. § 158(a)(2).

Not only does AFSCME not speak *for* the State, it speaks *against* the State in collective bargaining. This is an adversarial process, as AFSCME’s bargaining with Illinois illustrates. Pet.Br. 6-7. It is not the government speaking to itself through a union. The union advocacy nonmembers are forced to subsidize is thus nothing like speech employees engage in on behalf of their government employer.

b. The fact that union bargaining usually occurs in nonpublic forums and under regulated procedures does not change its political nature. AFSCME Br. 41-45; State Br. 23-24; 46-48. The same can be said of lobbying. It often takes place behind closed doors or under regulated procedures, such as those provided

for in administrative procedures acts. And government officials can and do choose the lobbyists to whom they will listen and on what topics. Yet, First Amendment protections nonetheless apply to lobbying administrative agencies. *See Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

The reason is that speech is not stripped of its expressive content by the government choosing to listen and respond to that speech in nonpublic forums. *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979). In *Harris*, Illinois’ decision to subject a lobbying activity—meeting and speaking with state officials to advocate for changes to a Medicaid program—to the IPLRA’s collective bargaining process did not transform that petitioning into an internal, non-expressive activity. 134 S. Ct. at 2625-26. To the contrary, this Court held that bargaining involves “a matter of great public concern,” and “cannot be equated with the sort of speech that our cases have treated as concerning matters of only private concern.” *Id.* at 2643.

c. AFSCME asserts (at 41) that the government can sometimes restrict employee speech in its workplaces that it could not restrict in public forums. But that is due not to any diminution of the speech’s expressive value, but to the government’s countervailing interests. And those interests do not justify forcing unwilling employees to subsidize union advocacy. *See* Pet.Br. 23-25. For example, that Illinois can prohibit union agents from “solicit[ing] funds for a political candidate or political party” in the workplace, J.A.

142, does not make that activity non-expressive. It remains political speech. Consequently, Illinois could not constitutionally force employees to subsidize such political solicitations.

This illustrates the greater point that a state's ability to restrict one party's speech has little bearing on the constitutionality of forcing another party to pay for that speech. The First Amendment injury inflicted on individuals forced to support advocacy is not mitigated by regulation of that advocacy. Respondents' arguments that the government can sometimes restrict employee or union speech are therefore beside the point. *See* Cal. Educators' Amicus Br. 13-14.

d. Equally beside the point are arguments that the IPLRA does not restrict nonmembers from speaking in public forums. That does not reduce, much less excuse, the First Amendment injury nonmembers suffer when forced to subsidize union speech.

In compelled association and speech cases in which the Court found constitutional violations, the victims almost always were otherwise free to speak. In *Wooley v. Maynard*, motorists were free to express messages different from the motto inscribed on the license plates they were required to display. 430 U.S. 705 (1977). In *Boy Scouts of America v. Dale*, the Boy Scouts spoke against the positions of the activists with whom they were compelled to associate. 530 U.S. 640, 651-52 (2000). In *United States v. United Foods*, mushroom producers were free to express messages different from the advertising they were

compelled to subsidize. 533 U.S. 405, 411 (2001). And, in *Miami Herald Publishing Co. v. Tornillo*, “the statute in question . . . [did] not prevent[] the Miami Herald from saying anything it wished,” in addition to the articles it was compelled to publish. 418 U.S. 241, 256 (1974). Yet, the Court held each instance of compelled association or speech unconstitutional.

2. Turning to contract administration, Respondents falsely accuse Janus of arguing that every union grievance has political importance, and retort that many do not. State Br. 48-49; AFSCME Br. 45. That is not responsive to Janus’ actual position (at 14-15) that union advocacy to adopt policies and union advocacy to enforce those policies are “complementary aspects of the same expressive conduct.”

Even if uncoupled, AFSCME admits (at 44) that “[a]lmost every personnel issue may affect the public fisc, particularly *when aggregated* across many public employees” (emphasis added). The Court views union activities in the aggregate. *See Harris*, 134 S. Ct. at 2642-43 & n.28. It must, as nonmembers are forced to pay for union “contract administration” activities as a whole. 5 Ill. Comp. Stat. 315/6(e). This includes both inconsequential and consequential grievances, such as AFSCME’s grievance seeking to compel Illinois to appropriate \$75 million to fund a 2% wage increase. *State v. AFSCME Council 31*, 51 N.E.3d 738, 740 & 742 n.4 (Ill. 2016). As a whole, union contract enforcement activities have political and fiscal significance.

That conclusion is consistent with this Court’s treatment of employee grievances in *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), and refutes the notion that Janus’ position will “constitutionalize every workplace grievance.” State Br. 13. Whether a grievance rises to a matter of public concern depends on that particular grievance. *Guarnieri*, 564 U.S. at 398. Some may not, such as “[t]he \$338 payment at issue in *Guarnieri* [that] had a negligible impact on public coffers.” *Harris*, 134 S. Ct. at 2642 n.28. But union contract enforcement activities as a whole affect matters of public concern.

B. *Abod* Conflicts with *Harris*, *Knox*, and Other Precedents Subjecting Compelled Association and Speech to Heightened Scrutiny.

1. a. The Court has held that “[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to believe and associate, or to not believe and not associate.” *Rutan v. Republican Party*, 497 U.S. 62, 76 (1990). Respondents nevertheless argue that strict and exacting scrutiny precedents do not apply when government acts as an employer. The problem with this argument is that the Court has held such scrutiny does apply when the government forces its employees to subsidize political parties or unions. See *Knox*, 567 U.S. at 310; *Rutan*, 497 U.S. at 74; *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980); *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion). Even

Abood applied heightened scrutiny to union fees for political activities. 431 U.S. at 233-35.

Respondents retort that, in those instances, the government did not act pursuant to employer-related interests. State Br. 32; AFSCME Br. 25. But the government's proffered interest does not dictate the level of scrutiny. The First Amendment *injury* does. The government's interest affects whether that scrutiny is satisfied.

Elrod is instructive. The plurality opinion explained that the "inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice," 427 U.S. at 355, and found compelled political association to infringe on employee First Amendment rights. *Id.* at 360-62. The plurality next stated that "[b]efore examining [petitioners'] justifications, . . . it is necessary to have in mind the standards according to which their sufficiency is to be measured," and held that "a significant impairment of First Amendment rights must survive exacting scrutiny." *Id.* at 362. Only then were the government's alleged interests as an employer examined. *Id.* at 364. Those interests were held inadequate because "less drastic means for insuring government effectiveness and employee efficiency are available to the State." *Id.* at 336.

The same analysis and result applies here. Because "an agency-fee provision imposes a significant impingement on First Amendment rights, . . . [it] cannot be tolerated unless it passes exacting First

Amendment scrutiny.” *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310-11) (internal punctuation omitted). The provision fails that scrutiny because less restrictive means are available. *See* Pet.Br. 36-52.

b. Similar reasoning applies to the State’s claim (at 36) that agency fees are “authorized by the State in its capacity as an employer.” Even if accurate, at most that could affect the strength of the State’s interest. But it would not change the requisite level of First Amendment scrutiny.

The State’s claim is inaccurate because the government does not act solely as an employer when it compels employees to subsidize union advocacy. That advocacy can have significant effects on government policies and budgets, and thus on the public at large. *See Harris*, 134 S. Ct. at 2632. There are millions of tax dollars at stake in AFSCME’s bargaining with Illinois alone. Pet.Br. 6-7. Respondents’ own amici claim union bargaining has had a substantial impact on governmental policies that concern education (Am. Fed. of Teachers Amicus Br. 15-27), child welfare (Child Protective Service Workers Amicus Br. 5-13), and minority rights (e.g., Human Rights Campaign et al. Amicus Br. 10-17). Given that union bargaining affects the government not just as an employer, but also as sovereign, it follows that forcing employees to subsidize that advocacy infringes on their rights not just as employees, but as citizens.

c. The *Pickering* test is not the proper method to evaluate this infringement for reasons previously stated. See Pet.Br. 22-24; U.S. Br. 23-26. *Pickering v. Board of Education*, 391 U.S. 563 (1968) “provides the framework for analyzing whether the employee’s interest or the government’s interest should prevail in cases where the government seeks to curtail the speech of its employees.” *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014). The balancing test is predicated on this Court’s finding that, depending on the speech at issue and other factors, the “government’s countervailing interest in controlling the operation of its workplaces” can justify speech restrictions. *Id.*

To apply the *Pickering* test here, the Court would have to assume that the government has overriding interests in forcing employees to pay for union advocacy. But that assumption is the dispositive question. And that assumption is unwarranted because the government’s interest as an employer is in protecting workplace operations *from* employee expressive activities and politicization, not in forcing employees to support expressive political activities to keep their jobs. Pet.Br. 24.

2. AFSCME asserts (at 17-20) that originalism supports deferential review of agency fees. That is audacious given that compulsory unionism did not take root in the public sector until the 1960’s. Pet.Br. 54. It is also audacious given that the Framers had a dim view of government-compelled belief. See *Macchinists v. Street*, 367 U.S. 740, 790 (1961) (Black J., dissenting); Center for Const. Juris. Amicus Br. 12-

15; Cal. Educators Amicus Br. 16-18. The “views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment,” which “leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money . . . to urge ideologies and causes he believes would be hurtful to the country.” *Street*, 367 U.S. at 790 (Black J., dissenting)

Madison also was concerned about factions, by which he meant “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *The Federalist No. 10* (J. Madison). Madison and other Framers likely would have been aghast at governments regimenting their workforces into involuntary, artificially-powerful factions for petitioning the government for a greater share of scarce public resources. See Edwin Vieira, “*To break and control the violence of faction*,” *The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* 17-23 (Lib. Cong. No. 80-65161, 1980).

The pre-1950’s “dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment,” *Connick v. Myers*, 461 U.S. 138, 143 (1983), does not support applying *Pickering* to this case. Returning to that dogma would require overruling *Pickering* and over sixty years of other unconstitutional-condition precedents. See *id.* at 144-45 (discussing cases). Given that AFSCME does not

argue for that drastic result, its discussion of the right-privilege distinction (at 2-4, 17-19) is pointless. As long as this Court continues to maintain, as it has “time and again[,] that public employers may not condition employment on the relinquishment of constitutional rights,” *Lane*, 134 S. Ct. at 2377, it follows that public employment cannot be conditioned on citizens relinquishing their First Amendment right not to support factions whose agendas they may oppose.

3. Illinois argues (at 28) that “agency fees support the activities of a mandatory association,” and that “the governing standard for mandatory associations . . . asks whether the challenged fee supports activities that further the non-speech related interests justifying the association.” The State is right that an exclusive representative is a mandatory association. Pet.Br. 48-50. The State may be right on its second point with respect to *non*-expressive associations that do not trigger First Amendment scrutiny, such as the agricultural marketing cooperative upheld on rational-basis review in *Glickman v. Wileman Brothers & Elliott*, 521 U.S. 457, 460-62, 477 (1997).

But the State is wrong in thinking that this standard applies to compelled *expressive* association. That triggers exacting scrutiny. *See Dale*, 530 U.S. at 658-59; Pet.Br. 19-20. An exclusive representative epitomizes an expressive association, as its principal function is to speak with the government. This Court has never “upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.” *United Foods*, 533 U.S. at 415.

The State, after acknowledging that an exclusive representative is a mandatory association (at 28), later inconsistently argues (at 41) that employees are not associated with their representative or its speech. *See also* AFSCME Br. 39-40.¹ That makes as much sense as saying that principals are not associated with their agents. Unions cannot speak and contract for employees, and yet employees not be associated with their proxy’s speech and contracting. *See* Pet.Br. 48-50.

Minnesota State Board v. Knight, 465 U.S. 271 (1984) is not to the contrary. *Knight* concerned only the constitutionality of *excluding* employees from union meetings with the government. The sole “question presented” was whether that “restriction on [employee] participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees.” *Id.* at 273.² Reasoning that “[t]he Constitution does not grant to members of the public generally a right to be heard

¹ AFSCME is correct that this case does not present the question “whether the First Amendment permits exclusive representation” (at 39). The contours of this expressive association are, however, relevant to whether employees can be forced to subsidize it. *See* Pet.Br. 37-52.

² The associational argument *Knight* addressed likewise only concerned whether “Minnesota’s restriction of participation in ‘meet and confer’ sessions to the faculty’s exclusive representative” infringed on associational rights by indirectly pressuring them to join the union. *Id.* at 288.

by public bodies making decisions of policy,” *id.* at 283, the Court concluded that the employees were not “unconstitutionally denied an opportunity to participate in their public employer’s making of policy,” *id.* at 292. *Knight*’s holding that the government can choose to whom it *listens* says nothing about the government’s ability to dictate who *speaks* for individuals vis-à-vis the government.

Overall, there is no reason for the Court to abandon its holdings in *Harris*, 134 S. Ct. at 2639, and *Knox*, 567 U.S. at 310, that compelled subsidies for union speech are subject to heightened scrutiny. This, in turn, means the Court should abandon *Abood*, whose failure to apply that scrutiny conflicts with *Harris*, *Knox*, and four lines of precedent. Pet.Br. 18-26.

C. *Abood* Is Unworkable.

The State argues (at 54) that *Abood* has proven workable because “the Court has addressed the line between chargeable and nonchargeable expenses in the public sector twice, in [*Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 522 (1991)] and *Locke v. Karass*, 555 U.S. 207 (2009).” But the Court fractured on that question in *Lehnert*, and left critical issues unresolved in *Locke*, *see* 555 U.S. at 221 (Alito, J., concurring). The State forgets that the line is so blurred that *Knox* had to reverse a lower court decision holding it constitutional to force employees to pay for union ballot initiative campaigns. 567 U.S. at 320-21.

The State’s argument is not responsive to the most important way in which *Abood*’s framework is un-

workable: it does not adequately protect employees' First Amendment rights because it depends on unions to determine, under vague and subjective criteria, what fees they can constitutionally seize from nonmembers. Pet.Br. 27-32. Respondents propose no alternative way to fix *Abood*'s practical flaw.

D. Reliance Interests Do Not Justify Retaining *Abood*.

The existence of compulsory fee requirements in twenty-two states is not, contrary to Respondents' positions, reason for retaining *Abood*. It is reason for overruling *Abood*, as it demonstrates the scale of the First Amendment violations that decision is inflicting. Because of *Abood*, an estimated five million public employees are being denied their basic right to choose whether to support political advocacy. Pet.Br. 1. "If it is clear that a practice is unlawful," as it is here, "individuals' interest in its discontinuance clearly outweighs any . . . entitlement to its persistence." *Ariz. v. Gant*, 556 U.S. 332, 349 (2009).

Overruling *Abood* will not undermine *Guarnieri*, *Garcetti*, and related cases that permit legitimate restrictions on employee speech and grievances. To again hold that "the core union speech involuntarily subsidized by dissenting public-sector employees . . . [concerns] issues such as wages, pensions, and benefits [that] are important political issues," *Harris*, 134 S. Ct. at 2632, will not mean every individual employee utterance or grievance also is political speech. *See supra* 4-5. And to hold that the government lacks

an overriding interest in forcing employees to pay for union advocacy will not mean that government employers lack overriding interests in restricting some employee speech. *Id.* at 6-7.

Nor will overruling *Abood* undermine other lines of precedent. The Court recognized that *Keller v. State Bar*, 496 U.S. 1 (1990), can stand on its own two feet in *Harris*, 134 S. Ct. at 2643-44. The Court expressly decided *not* to apply *Abood* to mandatory fees in *Johanns v. Livestock Marketing Ass’n* because the fees funded government speech, 544 U.S. 550, 559-62 (2005); in *Glickman* because the fees funded a non-expressive economic association, 521 U.S. at 469-70 & n.14; and in *Board of Regents v. Southworth* because of *Abood*’s workability problems, among other reasons, 529 U.S. 217, 230 (2000). *Abood* is “an anomaly,” *Knox*, 567 U.S. at 311, which can safely be excised from this Court’s jurisprudence.

E. *Abood* Should Be Overruled.

1. Respondents have failed to rebut the four reasons *stare decisis* does not justify retaining *Abood*. Pet.Br. 34-35; see Cato Amicus Br. 4-11. In fact, they have strengthened the case against *stare decisis* by offering new justifications for *Abood*.

Unlike Respondents, *Abood* did not deem collective bargaining to be internal employee speech, but found that it “may be properly termed political.” 431 U.S. at 231. *Abood* did not opine on the government’s special interests as an employer, and mentioned *Pickering* only in a footnote that addressed “exceptions not

pertinent here.” *Id.* at 230.³ *Abood* did not apply the Court’s mandatory association precedents to agency fees for bargaining purposes, but only to compulsory fees for political and ideological activities, *id.* at 233-35. Respondents’ primary arguments are not those upon which the *Abood* Court relied.

Abood was, instead, predicated on the proposition that two private sector cases had “all but decided the constitutionality of compulsory payments to a public-sector union.” *Harris*, 134 S. Ct. at 2632. Respondents barely defend that reasoning, likely because the Court subsequently recognized that *Abood* “seriously erred” in relying on it. *Id.*

When, as here, “neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.” *Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010). *Stare decisis* does not require retaining *Abood* notwithstanding its infirmities.

2. AFSCME, after having moved the district court to decide the case on the pleadings, now protests (at 53-55) that a record greater than the pleadings is needed to decide the case. Not so. *Abood* was decided on the pleadings. 431 U.S. at 213 n.4. It can be overruled on the same basis, as its flaws are legal in nature. No unknown facts can save *Abood*.

³ That the briefing in *Abood* discussed *Pickering* and similar cases, see State Br. 25, but the opinion barely did so, only further proves that *Abood* did not rely on those cases.

Allowing AFSCME to “interrogate Janus’ claim” about “the specific areas on which Janus disagrees with the position AFSCME takes” (at 55) would reveal no information material to *Abood*’s propriety. It makes no difference why Janus and others do not want to support AFSCME’s advocacy. *See* Pet.Br. 52, 62. It is enough under the First Amendment that Janus and other nonmembers subject to Illinois’ agency fee statute did not consent to pay for that speech. *Id.* That is established by the statute’s terms. 5 Ill. Comp. Stat. 315/6(e).

II. Agency Fee Requirements Fail Heightened Constitutional Scrutiny.

1. Respondents do not argue that agency fee requirements survive strict or exacting scrutiny, except in a conclusory footnote. AFSCME Br. 30 n.9. In response to Janus’ argument that agency fees are not necessary for exclusive representation, Illinois claims that “misses the point” (at 44), and AFSCME says that “necessity is not the standard” (at 38). But, narrow tailoring and least-restrictive-means *are* the standard under strict and exacting scrutiny, respectively. Pet.Br. 18-21.

The latter is also the standard *Harris* used. *Harris* recognized that “a critical pillar of the *Abood* Court’s analysis rests on [the] unsupported empirical assumption . . . that the principle of exclusive representation in the public sector is dependent on a union or agency shop,” and held Illinois’ agency fee unconstitutional as applied to personal assistants because

“this assumption is unwarranted.” 134 S. Ct. at 2634; *see id.* at 2639-41. Respondents do not defend that assumption here.

Illinois claims Janus’ positions “that exclusive representation confers benefits on unions, Pet.Br. 37-43, and that the costs of fair representation are overstated, Pet.Br. 45-47 . . . are similarly beside the point.” State Br. 45.⁴ To the contrary, they are the reasons why agency fees are unnecessary for exclusive representation—for a union, its benefits are great and its unwanted costs are low. Exclusive representative authority is not a burden imposed on unions, but rather is an extraordinarily valuable power that unions covet and voluntarily assume.

Respondents argue agency fees “fairly distribute the costs of exclusive representation,” State Br. 42, and “prevent[] unfair free-riding by non-members,” AFSCME Br. 34. But fairness is not a government interest. “Fair” is an adjective. And it is an adjective unfitting for agency fees. There is nothing legally “fair” about violating someone’s First Amendment rights. Nor is there anything equitably “fair” about forcing individuals to pay for union representation they may not want and that may harm their rights and interests. Pet.Br. 48-53.

⁴ The State’s comment that these positions are also not supported by the record is belied by the fact that they are legal in nature. They are also asserted in the complaint. Pet.App. 12a.

The State’s rejoinder (at 42-43) is that some employees who believe they benefit from union advocacy may also not want to pay for it. The same can be said of most interest group advocacy, and that alone does not justify compelling support for it. *See Harris*, 134 S. Ct. at 2638; *Knox*, 567 U.S. at 311. If anything, the membership recruitment advantages that come with exclusive representation make so-called “free-riding” *less likely* than in other contexts. Pet.Br. 40-43.

Respondents’ amici’s agency fee justifications are even less credible. Several claim forced fees are needed so that union members do not resent non-members. E.g., Mayor Garcetti *et al.* Amicus Br. 9-10. But the government cannot force one person to support speech in violation of his or her First Amendment rights just to please someone else. Several governmental amici claim agency fees make unions less responsive to their members, and thus more amenable to cooperating with the government. *See id.*; Gov. Wolf *et al.* Amicus Br. 22-24; L.A. County’s Dep’t of Health Services *et al.* Amicus Br. 24-27. Even if agency fees had a tranquilizing effect on union officials, which is doubtful, the government cannot force unconsenting individuals to subsidize an advocacy group just to placate it.

Respondents have not come close to meeting their burden of proving that agency fees are a narrowly tailored or least restrictive means for collective bargaining. In fact, their argument would not satisfy even a balancing test or lesser form of First Amendment scrutiny. Pet.Br. 25 n.11; U.S. Br. 26-29.

2. The Court, therefore, need not reach whether “labor peace” is a compelling enough interest to justify an agency fee. If the Court reaches this issue, it is not. *See* Pet.Br. 56-59; Cato Amicus Br. 11-18; Center for Const. Juris. Amicus Br. 15-18. In fact, Respondents hardly defend *Abood*’s conception of the labor peace interest, which was avoiding “conflicting demands from different unions.” 431 U.S. at 221. Respondents’ inability to defend *Abood* on its terms is yet another strike against *stare decisis*.

Illinois’ asserted interest in dealing with an exclusive representative is the same attenuated interest the Court rejected in *Harris*, 134 S. Ct. at 2640-41: that it enables Illinois to obtain “feedback” from represented individuals, which in turn leads to better policies and enhanced productivity. State Br. 38, 40;⁵ *see* AFSCME Br. 40-41. In *Harris*, the Court rhetorically inquired, “[w]hy are [voluntary] dues insufficient to enable the union to provide ‘feedback’ to a State that is highly receptive to suggestions for increased wages and other improvements?” 134 S. Ct. at 2641. Recognizing that many “groups are quite

⁵ Illinois also tersely claims (at 39) that exclusive representation is “effective in avoiding strikes.” The notion that unionizing employees reduces union strikes is counter-intuitive, to say the least. It is also wrong. *See* Freedom Foundation Amicus Br. 8-16. Even if the claim were factually plausible, the government cannot force employees to subsidize unions, in violation of their First Amendment rights, just to appease belligerent unions. That would make agency fees a form of protection money.

successful even though they are dependent on voluntary contributions,” the Court held this “feedback” rationale “falls far short of what the First Amendment demands.” *Id.* It should do so again.

The feedback rationale fails for other reasons, too. *First*, subsidies for speech cannot be justified by an interest in generating speech itself. *United Foods*, 533 U.S. at 415-16. *Second*, states do not have a “compelling” need for union policymaking advice. *Third*, there exist means to obtain employee feedback, such as meetings and surveys, far less onerous than forcing employees to subsidize a mandatory advocate. *Finally*, states can change their employment policies without unions demanding that they do so. Pet.Br. 59-60. The State’s feedback justification is not a compelling interest that justifies the First Amendment injury agency fee requirements inflict on employees.

III. The Court Should Hold It Unconstitutional to Seize Agency Fees from Nonmembers.

1. AFSCME’s last-ditch defense is that the Court should not hold Illinois’ agency fee statute facially invalid, but should remand the case for determination of which specific union activities are constitutionally chargeable (at 46-47, 53-54). This is unnecessary for three reasons.

First, the IPLRA authorizes the deduction of a fee for “the costs of [1] the collective bargaining process, [2] contract administration and [3] pursuing matters affecting wages, hours and conditions of employ-

ment.” 5 Ill. Comp. Stat. 315/6(e). If the Court holds it unconstitutional to require employees to pay for these *categories* of expressive activities, as it should, the statute is facially unconstitutional. In fact, it would be enough if most of these activities are constitutionally nonchargeable, for “[i]n the First Amendment context . . . a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted).

Second, a public sector union’s activities are inter-related: bargaining with government to adopt certain policies; contractual actions to enforce those policies; legislative lobbying to fund those policies or facilitate their adoption; electoral activities to elect government officials who support those policies; and administrative activities to provide the organizational backbone for the foregoing. All are parts of the same political machine. Or, as AFSCME’s constitution puts it, “[f]or unions, the work place and the polling place are inseparable . . .”⁶ It violates the First Amendment to force nonmembers to subsidize these advocacy groups in any respect.⁷

⁶ <https://www.afscme.org/news/publications/afscme-governance/afscme-constitution/preamble> (last visited Jan. 30, 2018).

⁷ To the extent a public sector union engages in activities completely unrelated to influencing or dealing with the government, there is no justification to force public employees to subsidize those activities.

Third, even if it were theoretically possible to separate an advocacy group such as AFSCME into expressive and non-expressive components—which it is not—there is no workable way to do it. Tellingly, Respondents suggest no alternative test to unravel this Gordian Knot. The only solution is to cut it by holding all public-sector agency fees unconstitutional.

2. This Court’s holding should provide that unions “may not exact any funds from nonmembers without their affirmative consent.” *Knox*, 567 U.S. at 322; *see* Cal. Educators Amicus Br. 27-34; Rebecca Friedrichs Amicus Br. 30-32. That holding would be within the question presented for the same reason it was within the second question presented in *Knox*, 567 U.S. at 322 n.9. If the Court overrules *Abood*, it needs to delineate a constitutional rule that identifies from whom unions cannot seize compulsory fees.

The Court also must speak to this issue to resolve the facial challenge. The IPLRA authorizes the seizure of agency fees from nonmembers. 5 Ill. Comp. Stat. 315/6(e). The Court must decide whether that authorization is invalid on its face, or only invalid as applied to objecting nonmembers.

The statute is facially invalid because it violates the First Amendment to compel individuals to pay for speech even if they do not object to its content. It is enough that they did not choose to subsidize that speech. *See* Pet.Br. 52-53.

AFSCME quotes (at 58) this Court’s observation in *Davenport v. Washington Education Ass’n*, 551 U.S.

177, 181 (2007), that prior cases did not mandate affirmative consent. The Court, however, subsequently explained in *Knox* that “acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.” 567 U.S. at 312. The Court’s prior cases did not “explore the extent of First Amendment protection for employees who might not qualify as active ‘dissenters’ but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union.” *Id.* at 313.

AFSCME points out (at 58-59) that in judicial proceedings “individuals affirmatively must invoke their own constitutional rights.” But that is due to the adversarial structure of litigation. This case concerns a “union’s extraordinary *state* entitlement to acquire and spend *other people’s* money.” *Davenport*, 551 U.S. at 187. Almost no one appreciates an interest group taking his or her money without permission, no matter what the cause. And “[c]ourts ‘do not presume acquiescence in the loss of fundamental rights.’” *Knox*, 567 U.S. at 312 (citation omitted). The Court should recognize that, absent affirmative consent, it is unconstitutional for states and unions to take nonmembers’ money for union speech.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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February 12, 2018

In the Supreme Court of the United States

MARK JANUS,
PETITIONER,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
RESPONDENTS.

**On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit**

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QUESTION PRESENTED

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which holds that a State may permit a public-employee union to collect a fee from the employees it represents to pay a proportionate share of the costs of its representational activities—collective bargaining, contract administration, and grievance resolution—should be overruled.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
INTRODUCTION	1
STATEMENT	3
SUMMARY OF ARGUMENT	10
ARGUMENT	14
I. The use of agency fees to support a public-sector union’s representational activities is not subject to heightened First Amendment scrutiny.....	14
A. The Constitution permits States to place reasonable conditions on government employment.....	16
B. The government may require the payment of a fee to support the activities of a mandatory association.	21
C. Agency fees are conditions of public employment that support the costs of a mandatory association.	23
D. The use of agency fees to support lobbying and other speech directed to the government as a sovereign is not entitled to judicial deference.....	29
E. Petitioner’s arguments for subjecting all agency fees to heightened scrutiny are without merit.	32

II. Agency fees in support of a union's representational activities are a permissible condition of public employment.	36
A. Agency fee provisions are justified by the State's substantial interest in dealing with a fairly and adequately funded exclusive representative.	37
1. The State has a well-recognized interest as an employer in dealing with an exclusive representative.	37
2. The State has a substantial interest in ensuring that the representative is fairly and adequately funded.	41
B. Agency fees represent a limited impingement on employees' First Amendment interests.	46
III. There is no special justification for departing from <i>stare decisis</i>	51
A. Overruling <i>Abood</i> would undermine the reliance interests of States, public employers, employees, and unions.	52
B. <i>Abood</i> 's standard is workable.	54
C. Overruling <i>Abood</i> would cast several lines of First Amendment jurisprudence into doubt.	56
CONCLUSION	58

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Aboud v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977).....	<i>passim</i>
<i>Board of Cnty. Comm’rs v. Umbehr</i> , 518 U.S. 668 (1996).....	19, 20, 25
<i>Board of Ed. v. Compton</i> , 526 N.E.2d 149 (Ill. 1988)	53
<i>Board of Ed. v. Mergens</i> , 496 U.S. 226 (1990).....	50
<i>Board of Regents v. Southworth</i> , 529 U.S. 217 (2000).....	22, 23, 56
<i>Borough of Duryea v. Guarnieri</i> , 564 U.S. 379 (2011).....	<i>passim</i>
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000).....	32
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980).....	33
<i>Chicago Teachers Union Local No. 1 v. Hudson</i> , 475 U.S. 292 (1986).....	<i>passim</i>
<i>City of Madison School Dist. v. Wisconsin Empl. Relations Comm’n</i> , 429 U.S. 167 (1976).....	25, 49
<i>City of Ontario v. Quon</i> , 560 U.S. 746 (2010).....	18
<i>City of San Diego v. Roe</i> , 543 U.S. 77 (2004).....	26

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Communications Workers of Am. v. Beck</i> , 487 U.S. 735 (1988).....	37, 42
<i>Communications Workers v. Ector Cty. Hosp. Dist.</i> , 467 F.3d 427 (5th Cir. 2006)	26
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	<i>passim</i>
<i>D’Agostino v. Baker</i> , 812 F.3d 240 (1st Cir. 2016), <i>cert. denied</i> , 136 S. Ct. 2473 (2016)	41
<i>Dickerson v. United States</i> , 530 U.S. 428 (2000).....	51
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984).....	44
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	33
<i>Engquist v. Or. Dep’t of Agric.</i> , 553 U.S. 591 (2008).....	16, 19, 45
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	<i>passim</i>
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985).....	55
<i>Gilpin v. AFSCME</i> , 875 F.2d 1310 (7th Cir. 1989)	42
<i>Glickman v. Wileman Bros. & Elliott, Inc.</i> , 521 U.S. 457 (1997).....	22, 28–29, 56

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Harris v. Quinn</i> , 134 S. Ct. 2618 (2014).....	<i>passim</i>
<i>Hill v. Service Emps. Int’l Union</i> , 850 F.3d 861 (7th Cir. 2017), <i>cert. denied</i> , 138 S. Ct. 446 (2017).....	41
<i>Hilton v. S.C. Pub. Railways Comm’n</i> , 502 U.S. 197 (1991).....	52
<i>Hohn v. United States</i> , 524 U.S. 236 (1998).....	53
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.</i> , 515 U.S. 557 (1995).....	32
<i>International Ass’n of Machinists v. Street</i> , 367 U.S. 740 (1961).....	3
<i>Johanns v. Livestock Mktg. Ass’n</i> , 544 U.S. 550 (2005).....	21, 56
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	50
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	55
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990).....	<i>passim</i>
<i>Kelley v. Johnson</i> , 425 U.S. 238 (1976).....	19
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967).....	25

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Kimble v. Marvel Entm’t, LLC</i> , 135 S. Ct. 2401 (2015).....	51, 54, 56
<i>Knight v. Connecticut Dep’t of Pub. Health</i> , 275 F.3d 156 (2d Cir. 2001).....	26–37
<i>Knox v. SEIU, Local 1000</i> , 567 U.S. 298 (2012).....	<i>passim</i>
<i>Lane v. Franks</i> , 134 S. Ct. 2369 (2014).....	17
<i>Lehnert v. Ferris Faculty Ass’n</i> , 500 U.S. 507 (1991).....	<i>passim</i>
<i>Lehnert v. Ferris Faculty Ass’n</i> , 881 F.2d 1388 (6th Cir. 1989)	30
<i>Locke v. Karass</i> , 555 U.S. 207 (2009).....	54, 55
<i>Melanie Thompson</i> , 34 PERI ¶ 29, 2017 WL 3634394 (IELRB 2017)	48
<i>Minn. State Bd. for Cmty. Colls. v. Knight</i> , 465 U.S. 271 (1984).....	<i>passim</i>
<i>NASA v. Nelson</i> , 562 U.S. 134 (2011).....	16, 19, 29, 57
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963).....	37, 42
<i>O’Connor v. Ortega</i> , 480 U.S. 709 (1987).....	18

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>O’Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996).....	33
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	54
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009).....	54
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	25
<i>Pickering v. Board of Ed.</i> , 391 U.S. 563 (1968).....	<i>passim</i>
<i>Railway Employees’ Department v. Hanson</i> , 351 U.S. 225 (1956).....	3
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006).....	51
<i>Raymond Gora</i> , 30 PERI ¶ 91, 2013 WL 5973879 (IELRB 2013)	48
<i>Riley v. National Federation of the Blind</i> , 487 U.S. 781 (1988).....	26
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	32, 35–36
<i>Rumsfeld v. FAIR</i> , 547 U.S. 47 (2006).....	50
<i>Rutan v. Republican Party</i> , 497 U.S. 62 (1990).....	32, 33
<i>SEIU, Local 73</i> , 31 PERI ¶ 7, 2014 WL 3108228 (ILRB 2014).....	48

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	50
<i>U.S. Civil Serv. Comm’n v. Letter Carriers</i> , 413 U.S. 548 (1973).....	20
<i>United Public Workers of America v. Mitchell</i> , 330 U.S. 75 (1947).....	20
<i>United States ex rel. Texas Portland Cement Co.</i> <i>v. McCord</i> , 233 U.S. 157 (1914)	14
<i>United States v. Donnelly’s Estate</i> , 397 U.S. 286 (1970).....	52
<i>United States v. IBM Corp.</i> , 517 U.S. 843 (1996).....	51
<i>United States v. National Treasury Emps. Union</i> , 513 U.S. 454 (1995).....	27
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001).....	<i>passim</i>
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	39, 41–42, 45
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000).....	19
<i>W. Va. State Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943).....	49
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994).....	16, 20
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	49–50

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Regulations:

Federal Statutes:

29 U.S.C. § 152(2)	37
29 U.S.C. § 158(a)(3)	37
29 U.S.C. § 159(a)	37

Alaska Stat. § 23.40.110(b)	52
-----------------------------------	----

Cal. Gov't Code § 3502.5	52
--------------------------------	----

Cal. Gov't Code § 3513(k)	52
---------------------------------	----

Cal. Gov't Code § 3515	52
------------------------------	----

Cal. Gov't Code § 3515.7	52
--------------------------------	----

Cal. Gov't Code § 3546	52
------------------------------	----

Cal. Gov't Code § 3583.5	52
--------------------------------	----

Conn. Gen. Stat. Ann. § 5-280	52
-------------------------------------	----

Del. Code Ann. tit. 19, § 1319	52
--------------------------------------	----

D.C. Code § 1-617.07	52
----------------------------	----

Haw. Rev. Stat. § 89-4	52
------------------------------	----

Illinois Public Labor Relations Act (IPLRA):

5 ILCS 315/1 <i>et seq.</i>	5
5 ILCS 315/2	5
5 ILCS 315/3(g)	7
5 ILCS 315/3(s)(1)	28
5 ILCS 315/4	6, 46
5 ILCS 315/6(a)	5
5 ILCS 315/6(b)	6

TABLE OF AUTHORITIES—Continued

	Page(s)
5 ILCS 315/6(c).....	6
5 ILCS 315/6(d)	6
5 ILCS 315/6(e).....	6, 7
5 ILCS 315/6(g)	7
5 ILCS 315/7	6
5 ILCS 315/8.....	7
5 ILCS 315/9(b)	28
5 ILCS 315/10(b)	6
5 ILCS 315/10(b)(1).....	7
5 ILCS 315/24	6, 46
 Other Illinois Statutes:	
5 ILCS 120/2(c)(2)	6, 46
40 ILCS 5/14-108.....	6
40 ILCS 5/14-110.....	6
 Me. Rev. Stat. Ann. tit. 26, § 629	
Md. Code Ann., State Pers. & Pens. § 3-502	52
Mass. Gen. Laws Ann. ch. 150E, § 2	52
Mich. Comp. Laws § 423.210(4)(a)(i)	53
Minn. Stat. Ann. § 179A.06	52
Mo. Ann. Stat. § 105.520.....	52
Mont. Code Ann. § 39-31-204	52
N.H. Rev. Stat. Ann. § 273-A:1.....	52
N.H. Rev. Stat. Ann. § 273-A:3.....	52
N.J. Stat. Ann. § 34:13A-5.5	52
N.M. Stat. Ann. § 10-7E-4.....	52

TABLE OF AUTHORITIES—Continued

	Page(s)
N.Y. Civ. Serv. Law § 208(3).....	52
Ohio Rev. Code Ann. § 4117.09(C)	52
Or. Rev. Stat. § 243.672(c)	52
43 Pa. Stat. & Cons. Stat. Ann. § 1102.3	52
P.R. Laws Ann. tit. 3, § 1451f.....	52
6A R.I. Gen. Laws § 36-11-2	52
Vt. Stat. Ann. tit. 3, § 962	52
Vt. Stat. Ann. tit. 16, § 1982	52
Wash. Rev. Code Ann. § 41.59.100	52
Wash. Rev. Code Ann. § 41.80.100	52
Wash. Rev. Code Ann. § 47.64.160	52
Wis. Stat. § 111.70(2)	53
Illinois Regulations	
80 Ill. Admin. Code § 1125.10–1125.100	53
80 Ill. Admin. Code § 1220.100	31, 53
Other Authorities:	
93 Cong. Rec. 4887 (1947).....	37
83d Ill. Gen. Assem., Senate Proceedings, June 27, 1983	52
83d Ill. Gen. Assem., Senate Proceedings, June 30, 1983	53

TABLE OF AUTHORITIES—Continued

	Page(s)
Am. Arbitration Ass’n, Rules for Impartial Determination of Union Fees (1988)	54
Janet Currie & Sheena McConnell, <i>The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation</i> , 37 J.L. & Econ. 519 (1994)	39
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TABLE OF AUTHORITIES—Continued

	Page(s)
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Joseph E. Slater, <i>Public Workers: Government Employee Unions, the Law, and the State, 1900-1962</i> (2004).....	38
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INTRODUCTION

Illinois, like every other State, is not only a sovereign but also an employer. As an employer, Illinois must attract and retain qualified employees; set salaries, benefits, and workplace rules; and impose day-to-day discipline for workplace infractions. Like more than 20 other States, Illinois has decided to allow employees who form a bargaining unit to designate an exclusive representative to negotiate with their public employers over these terms and conditions of employment and to help administer the collective bargaining agreement during the life of the contract. Under this system, the exclusive representative has a duty to fairly represent all of the employees in the bargaining unit, whether or not they are union members.

States have adopted this system because it brings them important benefits as employers. But the process of collective bargaining and contract administration carries a price tag. For example, the representative must pay staff who identify employee priorities and concerns, negotiators who translate those interests into concrete positions at the bargaining table, and field representatives who counsel employees when workplace disputes arise. Historically, many of these costs have been defrayed through union dues, but such dues may also be used by the union to pay for core political and ideological speech such as campaign advertisements with which non-member employees may strongly disagree.

So, for more than 40 years, this Court has struck a balance: public employees may opt out of paying union dues, but can be required to pay an agency fee,

or “fair-share fee,” so long as the proceeds are used to support “collective bargaining, contract administration, and grievance adjustment,” not political or ideological causes. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225–26 (1977).

Petitioner invites the Court to overrule *Abood* and declare *all* mandatory public-sector agency fees unconstitutional, regardless of the activities they support. The Court should decline that invitation. The core activities funded by agency fees—negotiating employment contracts and resolving workplace grievances—involve speech by an employee representative to an employer in an employment-related forum for employment-related purposes. Accordingly, such fees fall within the wide zone of discretion States enjoy when acting as employers to manage their workforces.

By contrast, agency fees that fund union speech that is directed to the government as a sovereign or to the public in a public forum are not entitled to judicial deference. Such speech—including lobbying and public information campaigns—is citizen speech, not employee speech, even if its message may be broadly related to the welfare of employees. To the extent the plurality opinion in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991), treats such activities as “chargeable,” that conclusion should be revisited in an appropriate case.

This, however, is not that case. Petitioner’s radically overbroad constitutional claim seeks to invalidate *all* public-sector agency fees on the theory that *everything* a public employee union does—right down to the most picayune workplace grievance—is political speech in a public forum. That is not an accurate

view of the world. It would be especially imprudent for the Court to adopt such a view, which rests on mistaken factual assumptions, in a case with no factual record. This Court should not sweep aside a precedent that has helped shape countless employment contracts for four decades. Doing so would unsettle several areas of First Amendment law and would undermine the States' well-established authority as employers to manage their workplaces. *Abood* should be reaffirmed.

STATEMENT

1. In *Abood*, this Court upheld the power of a State to authorize an exclusive representative to collect a mandatory fee from the public employees it is charged with representing. Specifically, the Court drew a line between a union's representational activities—collective bargaining, contract administration, and grievance resolution—and its political or ideological speech unrelated to those activities, holding that the First Amendment permits fees to be used to support the former but not the latter. 431 U.S. at 223–37.

Abood drew upon earlier decisions upholding private-sector agency fee provisions under the Railway Labor Act, *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). See *Abood*, 431 U.S. at 218–19, 226. The Court's primary reason for citing *Hanson* and *Street* was to emphasize its consistent view that any impingement on First Amendment interests effected by agency fees is "constitutionally justified by the legislative assessment of the important contribution of the union shop

to the system of labor relations established by Congress.” *Abood*, 431 U.S. at 222.

The Court left the task of refining the boundary between “chargeable” and “non-chargeable” expenses to later cases. *Id.* at 236–37. In *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1991), the Court established a three-part test under which a chargeable expense must “(1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” And in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 302–10 (1986), the Court specified a procedure by which public-sector unions must notify employees of the activities on which fees are being spent so that employees have a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker.

2. Illinois, like many other States, has chosen to manage labor relations between public employers and employees through a comprehensive system of exclusive representation and collective bargaining. Under that system, a bargaining unit of employees has the option to select a union to act as its exclusive representative in bargaining with the employer, processing grievances, and otherwise administering the collective bargaining contract that governs the employment relationship. No public employee is required to join a union. An exclusive bargaining representative takes on the state-law duty to fairly represent the interests of all employees in the unit, including those who choose not to join the union, and may (but is not

required to) collect an agency fee from non-union employees to pay their proportionate share of the costs of bargaining, contract administration, and related activities.

In enacting the Illinois Public Labor Relations Act (IPLRA), 5 ILCS 315/1 *et seq.*, the legislature declared that “[i]t is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours, and other conditions of employment or other mutual aid or protection.” 5 ILCS 315/2. The purpose of the IPLRA is “to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements.” *Ibid.*

Public employees are not required to form bargaining units or select representatives. The IPLRA provides that public employees “have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment . . . , and to engage in other concerted activities . . . free from interference, restraint or coercion.” 5 ILCS 315/6(a). The Act also provides that public employees “have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities.” *Ibid.* To that end, the Act guarantees public employees the right to “present[] a grievance to the employer and hav[e] the grievance heard and settled without the

intervention of an employee organization.” 5 ILCS 315/6(b). The Act also makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of rights guaranteed by the Act or to discriminate against an employee because he or she did not join the union or petitioned to have the union decertified. 5 ILCS 315/10(b).

The organization chosen by a majority of the public employees in an appropriate unit is designated as the unit’s exclusive representative for purposes of collective bargaining. 5 ILCS 315/6(c). The representative must fairly represent the interests of all employees in the unit, including those who are not dues-paying members of the organization. 5 ILCS 315/6(d). The IPLRA imposes a duty on the employer and the exclusive representative to “meet at reasonable times” and to “negotiate in good faith with respect to wages, hours, and other conditions of employment.” 5 ILCS 315/7. Those collective bargaining sessions are exempt from Illinois’s Open Meetings Act, as are grievance proceedings. 5 ILCS 120/2(c)(2); 5 ILCS 315/24. The statute excludes from the scope of bargaining “matters of inherent managerial policy,” including “the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees.” 5 ILCS 315/4. Pension rates are set by the State’s Pension Code. *See* 40 ILCS 5/14-108, 5/14-110.

The IPLRA permits (but does not require) collective bargaining agreements to include a provision authorizing the union to collect a fee from employees who are not members of the union. 5 ILCS 315/6(e). That fee is limited to the non-members’ “proportion-

ate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment.” *Ibid.*; see 5 ILCS 315/3(g) (defining “fair share agreement”). The Act requires that “[a]greements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide” religious objections. 5 ILCS 315/6(g). An employee with a religious objection to paying the agency fee may instead donate the fee to a nonreligious charity. *Ibid.*

The IPLRA requires that a collective bargaining agreement contain a grievance resolution procedure, which “shall apply to all employees in the bargaining unit” and “shall provide for final and binding arbitration of disputes.” 5 ILCS 315/8. The union’s duty of fair representation requires it to treat union members and non-members the same for purposes of grievance adjustment. See 5 ILCS 315/10(b)(1). An agreement containing a grievance procedure must also contain a provision prohibiting strikes for the duration of the contract. 5 ILCS 315/8.

3. Petitioner Mark Janus is a state employee in a bargaining unit represented by respondent American Federation of State, County and Municipal Employees, Council 31 (“AFSCME”) who has chosen not to join the union. Pet. App. 10a. According to his complaint, petitioner “objects to many of the public policy positions that AFSCME advocates, including the positions that AFSCME advocates for in collective bargaining.” Pet. App. 18a ¶ 42. Petitioner “does not agree with what he views as the union’s one-sided politicking for only its point of view” and believes that the union’s bargaining conduct “does not appreciate

the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens.” *Id.* ¶ 43. Petitioner’s complaint does not identify any specific positions taken by AFSCME with which he disagrees or any expenditure to which he objects.

Many of the terms and conditions of petitioner’s employment are set out in a collective bargaining agreement entered into by AFSCME and the Illinois Department of Central Management Services. *Id.* at 10a–11a. In addition to setting wages and salaries (JA 320–28), the collective bargaining agreement (“CBA”) establishes terms and conditions on such issues as vacations (JA 152–59), holidays (JA 159–63), overtime (JA 163–94), health insurance (JA 194–95), indemnification (JA 198–99), temporary assignment (JA 200–04), promotions (JA 204–13), demotions (JA 213–15), records and forms (JA 215–16), seniority (JA 216–20), and vacancies (JA 220–51). The CBA incorporates by reference the pension rates set by operation of the State’s Pension Code. JA 195–97.

The CBA also provides procedures for resolving grievances (JA 124–38) and imposing discipline (JA 146–52), and sets a schedule of meetings between labor and management to discuss and solve problems of mutual concern (JA 143–45). In addition, the CBA sets up programs for training (JA 308–11) and workplace health and safety (JA 295–301). It also prohibits both strikes and lockouts. JA 328.

AFSCME sends an annual notice to petitioner and others in his bargaining unit who pay an agency fee, explaining how the fee was calculated and the procedure for challenging it. Pet. App. 28a–42a. In 2011, the fee was equivalent to 78.06% of union dues. *Id.* at

34a. The notice listed the expenses that were charged to all unit members and formed the basis for that calculation, which was audited by a certified public accountant, and included tables illustrating how the fee amount was determined. *Id.* at 34a–39a. The notice also informed employees that they could file a written challenge to the fee amount and that, if they did, the burden would shift to AFSCME to justify the fee to a neutral arbitrator. *Id.* at 40a–41a.

4. Illinois Governor Bruce Rauner initiated this case by filing suit against various Illinois public employee unions and asking for declarations that the agency fee provision in the IPLRA violated the First Amendment. He also sought a declaration authorizing his issuance of an executive order barring the collection of such fees. Dist. Ct. Doc. 1. The district court allowed Illinois Attorney General Lisa Madigan to intervene as a defendant on behalf of the People of the State of Illinois. Dist. Ct. Doc. 53.

Defendants filed a motion to dismiss (JA 20–59), and petitioner, along with two other state employees, then moved to intervene as plaintiffs (JA 60–62). The court dismissed Governor Rauner’s complaint, holding that it lacked subject matter jurisdiction over his claims and that he lacked Article III standing to challenge the constitutionality of the IPLRA. JA 104, 106–10, 113. As to intervention, the court recognized that it generally could not allow a party to intervene in an action over which it lacks jurisdiction, but went on to grant intervention here under what it viewed as an exception to that rule that applies when a court has an independent basis to exercise jurisdiction over a separate claim brought by an intervening party. JA 110–13.

Petitioner and one of the other intervenors later filed a second amended complaint against AFSCME, Attorney General Madigan, and Michael Hoffman, the Acting Director of the Illinois Department of Central Management Services, alleging that the parts of the IPLRA that allow for the collection of agency fees violate the First Amendment. Pet. App. 8a–27a. The district court dismissed, concluding that the case was controlled by *Abood*. Pet. App. 6a–7a. The Seventh Circuit affirmed the dismissal of petitioner’s claim under *Abood*, while also holding that the other intervenor’s claim was barred by claim preclusion. Pet. App. 1a–5a.

SUMMARY OF ARGUMENT

I. The government has broad discretion as an employer to determine how to manage its workforce. In particular, this Court has consistently held that state regulations of public-employee speech do not implicate the First Amendment if they affect only the speech of employees *qua* employees. Indeed, even when such regulations restrict employees’ ability to speak as citizens on matters of public concern, they are not subject to heightened scrutiny but are instead reviewed under a balancing test that gives great weight to the interests of the State as an employer. Similarly, this Court has repeatedly held that the government may require the payment of fees to support speech by a mandatory association, as long as (1) the funded activities further the regulatory interests that justify the association, and (2) those interests are independent from the association’s speech.

Agency fees that support the representational activities of a public employee union—contract negotia-

tion, contract administration, and grievance adjustment—are supported by these well-established principles. Such fees are assessed as a condition of employment and promote the government’s distinctive interests as an employer. *Abood*’s central holding—that mandatory fees may permissibly support a union’s employment-related activities but not its political or ideological speech—tracks precisely the fundamental distinction between government as employer and government as sovereign. In addition, the activities funded by agency fees serve the same workplace-management purposes that justify the State’s recognition of the underlying association among employees. Consequently, a State’s decision to allow a public employee representative to collect agency fees is entitled to the same broad deference that attaches to every other action taken by the State as an employer.

That deference should not be accorded, however, to agency fees that fund lobbying or other speech in a public forum that is not directed to the government as employer. To the extent that the plurality opinion in *Lehnert* suggested that such deference is appropriate, that conclusion should be revisited in an appropriate case. This is not such a case, though, because petitioner has chosen instead to argue that agency fee provisions are unconstitutional in all of their applications.

That sweeping argument is without merit. Petitioner overlooks the basic distinction between government as employer and government as regulator. Cases involving compelled expressive association, compelled speech, and campaign expenditures are inapposite here because in those cases the government acted as a sovereign to regulate the speech of

citizens. Likewise, cases invalidating patronage-based employment schemes are not controlling because agency fees do not coerce belief or require overt speech with which an employee disagrees. And neither *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), nor *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014), holds that agency fees are subject to heightened scrutiny when they apply to a traditional public workplace, as here.

II. Agency fees are justified by the State’s interest in dealing with a fairly and adequately funded exclusive representative. Both Congress and this Court have long recognized that exclusive representation contributes to stable and effective labor-management relations. The exclusive representative provides the government with a counterparty that can aggregate employee preferences, convey accurate information, and resolve workplace disputes.

The duty of fair representation, which requires the union to work on behalf of all employees, is a crucial corollary to exclusive representation. The State has a powerful interest in ensuring that the costs of carrying out that duty are borne equally by all represented employees. Without agency fees, many employees—supporters and opponents of the union alike—would have an incentive to opt out of paying for what the union is legally obligated to provide to them. The State is entitled to conclude that the resulting disparity and resentment would disrupt the workplace. The First Amendment should not be held to mandate that outcome.

Agency fees constitute only a limited impingement on dissenting employees’ First Amendment interests.

The activity funded by such fees occurs exclusively within the employment setting. Although unions do address some matters of public concern at the negotiating table, in that setting they are speaking to an employer on behalf of employees. In addition, much of the speech involved in collective bargaining—and most or all of the speech involved in grievance adjustment—does not involve matters of public concern. The across-the-board relief petitioner seeks would constitutionalize every workplace grievance, in direct violation of this Court’s repeated admonitions.

Agency fee requirements do not threaten the vitality of public debate. They do not restrict any expression, prescribe any orthodoxy, or convert employees into mouthpieces for any message. Nor do they create an expressive association between the union and dissenting employees. Rather, they play an important role in the system by which many States have chosen to manage their workforces.

III. Petitioner has not come close to establishing a special justification for departing from *stare decisis*. On the contrary, *Abood* has engendered an extraordinary degree of reliance on the part of States, government employers, employees, and unions. Ordinary line-drawing difficulties associated with the distinction between chargeable and non-chargeable expenses do not warrant obliterating that distinction altogether; at most, they counsel revisiting aspects of *Lehnert*’s holding in an appropriate case. Perhaps most worryingly, overruling *Abood* would undermine several areas of First Amendment law, including the

principle that the government enjoys wide discretion as an employer to structure its own workplace.¹

ARGUMENT

I. The use of agency fees to support a public-sector union’s representational activities is not subject to heightened First Amendment scrutiny.

More than 40 years ago, this Court drew a line in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), holding that a State may require government employees to pay a proportionate share of the costs associated with exclusive representation but may not require them to subsidize the representative’s political or ideological activities. That holding was consistent with the First Amendment at the time, and it remains so today.

Abood’s approval of limited agency fees fits comfortably with a long line of this Court’s precedents, both before and since, holding that conditions placed on government employment are permissible as long as they reasonably promote the government’s legitimate interests as an employer. At the same time, *Abood* correctly prohibited compelled support for political and ideological causes in light of the greater scrutiny that applies when the government reaches beyond the employment relationship and compels financial

¹ As respondent AFSCME has argued, AFSCME Br. Opp. 13–17, the district court’s decision to allow petitioner to intervene in a matter over which it lacked jurisdiction was inconsistent with this Court’s decision in *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914).

support for citizen speech on matters of public concern.

Petitioner goes astray at the outset by ignoring this fundamental distinction between government as employer and government as regulator. In his view, heightened scrutiny applies to all public-sector agency fees because *everything* funded by such fees—from negotiating holiday schedules to establishing employee training programs to resolving individual workplace grievances—counts as core citizen speech. That is simply wrong, both as a matter of fact and as a matter of law. The negotiating table, the government office, and the arbitrator’s conference room are not public forums for citizen speech, and in many cases what is said in those settings has no broader significance. When a State provides for shared funding of contract negotiation and administration, it is acting as an employer managing its employees, not as a sovereign regulating the speech of its citizens. Employees in the same bargaining unit are already associated with one another for purposes of the State’s management of its workforce, and it is well-established that the State may charge a fee to support activities in furtherance of the interests served by such an association.

A decision subjecting agency fees to heightened scrutiny would upend decades of First Amendment law ranging far beyond public-sector unions, and would imperil the long-recognized authority of States as employers to place reasonable conditions on public employment. It would also inappropriately displace the policy judgment of more than 20 state legislatures about how best to promote their interests in having an efficient and effective public workforce. The

Court should decline petitioner’s invitation to subject all agency fees to strict or exacting scrutiny.

A. The Constitution permits States to place reasonable conditions on government employment.

This Court has “long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation.” *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008) (internal quotations omitted; alteration in original). This difference “has been particularly clear in [the Court’s] review of state action in the context of public employment.” *Ibid.* Accordingly, “[t]ime and again [the Court has] recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large.” *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (internal quotation omitted); *see also Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion) (“The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”). In view of the government’s substantial interest in effectively and efficiently discharging its official duties, this Court has consistently accorded it wide discretion to manage its personnel and internal affairs. *Connick v. Myers*, 461 U.S. 138, 150–51 (1983); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011) (“government has a substantial

interest in ensuring that all of its operations are efficient and effective”).

In particular, this Court has consistently held that States have substantial latitude to adopt and enforce policies in their capacity as employers that restrict the speech of government employees. In a line of cases beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court has set forth a two-step framework for reviewing regulations of public-employee speech. At the first step, the court asks whether the employee spoke as a citizen on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). “If the answer is no, the employee has no First Amendment cause of action.” *Ibid.* In other words, when an employee speaks as an employee rather than as a citizen, that speech enjoys no First Amendment protection at all. *Id.* at 421; *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014); *Borough of Duryea*, 564 U.S. at 386.

But “[e]ven if an employee does speak as a citizen on a matter of public concern, the employee’s speech is not automatically privileged.” *Ibid.* Instead, the court proceeds to the second step of the *Pickering* analysis, asking “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” *Garcetti*, 547 U.S. at 418. The sufficiency of the State’s justification will vary depending on the nature of the employee’s speech, *Connick*, 461 U.S. at 150, but the background presumption is that a “citizen who accepts public employment ‘must accept certain limitations on his or her freedom,’” *Borough of Duryea*, 564 U.S. at 386 (quoting *Garcetti*, 547 U.S. at 418). Thus, even when

the employee speaks as a citizen, speech-restrictive policies are subject not to heightened scrutiny but to a test that turns on a “balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568.

The same pattern holds true for other constitutional rights: the Court has repeatedly applied a balancing or reasonableness test to uphold conditions of public employment that would be subject to heightened scrutiny had they been imposed generally by the State in its capacity as a regulator. Thus, for instance, the Court has allowed public employers to search workers’ employer-issued electronic devices without a warrant if the search is “motivated by a legitimate work-related purpose” and is “not excessively intrusive in light of that justification.” *City of Ontario v. Quon*, 560 U.S. 746, 764 (2010). Similarly, the Court upheld a public employer’s search of an employee’s desk without a warrant or probable cause after balancing “the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.” *O’Connor v. Ortega*, 480 U.S. 709, 719–20 (1987) (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment) (“government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment”).

For the same reason, the “class of one” theory of equal protection, which binds the government in its role as regulator, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000), does not bind public employers, in light of the “unique considerations applicable when the government acts as employer as opposed to sovereign,” *Engquist*, 553 U.S. at 598. And the right of informational privacy does not protect government workers against having to fill out an intrusive background-check questionnaire as a condition of employment. *Nelson*, 562 U.S. at 151 (upholding “reasonable, employment-related inquiries that further the Government’s interests in managing its internal operations.”); *see also Kelley v. Johnson*, 425 U.S. 238, 244–45 (1976) (assuming police officer’s claim of constitutional right not to cut his hair stated a liberty interest but rejecting claim because plaintiff was regulated “not as a member of the citizenry at large, but on the contrary as an employee of the police department”).

Moreover, this Court has made clear that the government need not show that the conditions it places on public employment are the least restrictive means of achieving its goals. *See Nelson*, 562 U.S. at 153–55 (rejecting least-restrictive-means test and noting that deferential “analysis applies with even greater force where the Government acts, not as a regulator, but as the manager of its internal affairs . . . within the wide latitude granted the Government in its dealings with employees”). Nor is the government forced to wait until the workplace is disrupted before it may take steps to prevent such disruption. *See Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 676 (1996) (Court has “consistently given greater deference to

government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large”) (quoting *Waters*, 511 U.S. at 673); *Connick*, 461 U.S. at 152 (“[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”).

In short, when the government acts as an employer, the restrictions it imposes on employee speech are not subject to First Amendment scrutiny. And as long as the State has an “adequate justification” grounded in its interests as an employer, *Garcetti*, 547 U.S. at 418, even restrictions on citizen speech are subject only to a balancing test, and are generally upheld. See *Umbehr*, 518 U.S. at 677 (describing *Pickering* as involving “a *deferential* weighing of the government’s *legitimate* interests”) (emphasis added); see also *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 99 (1947) (upholding Hatch Act’s restrictions on political activity by federal employees); *id.* at 102 (“The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power.”); *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 556 (1973) (“unhesitatingly reaffirm[ing]” *Mitchell*). It is only when the government reaches beyond its interests as an employer and tries to exploit the employment relationship “to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens,” that

heightened First Amendment scrutiny takes effect. *Garcetti*, 547 U.S. at 419.

B. The government may require the payment of a fee to support the activities of a mandatory association.

In a complementary line of cases decided since *Abood*, this Court has upheld the constitutionality of laws that recognize or establish a mandatory association and require the payment of fees to defray the costs of that association, even outside the employment context. In each of these cases, this Court has acknowledged the First Amendment interests of dissenters but concluded that the government's interest in the effective operation of the association justified the limited impingement on those interests. The rule that emerges from these cases is that the government may require the payment of fees to support such an association if (1) the funded activities are germane to the regulatory interests that justify the association, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557–59 (2005), and (2) those interests are “independent from the speech [of the association] itself,” *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001).

These precedents have recognized the government's interest in ensuring that those who benefit from an association share in its costs. For example, in *Keller v. State Bar of California*, 496 U.S. 1, 15–16 (1990), the Court unanimously upheld the use of compulsory member dues by an integrated bar to fund improvements in the quality of legal services and regulation of the profession, while making clear that such dues may not be used to finance political and

ideological speech unrelated to those purposes. Relying on the reasoning of *Abood*, *id.* at 9–10, the Court emphasized the need to “prevent free riders” and explained that “[i]t is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort,” *id.* at 12.

The Court later clarified that compulsory fees are permitted when they serve legitimate regulatory interests apart from the government’s desire to favor a particular message. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Court upheld an order by the Secretary of Agriculture requiring tree fruit producers to finance generic advertising. Relying on *Abood* and *Keller*, *id.* at 471–73, the Court emphasized that fees were assessed “as a part of a broader collective enterprise in which [producers’] freedom to act independently is already constrained by the regulatory scheme,” *id.* at 469. And in *United Foods*, 533 U.S. 405, the Court reaffirmed *Glickman*’s holding while invalidating mandatory assessments for mushroom advertising because, unlike the cooperative marketing program in *Glickman*, the advertising itself was the “principal object of the regulatory scheme,” *id.* at 412, and the assessments were not “ancillary to a more comprehensive program restricting marketing autonomy,” *id.* at 411.

Finally, in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court, again noting the central relevance of *Abood* and *Keller*, held that a public university may assess fees to support student activities on a viewpoint-neutral basis, even though it was

“all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable.” *Id.* at 231–33. The Court held that the First Amendment does not require the State to “allow each student to list those causes which he or she will or will not support,” because such an approach “could be so disruptive and expensive that the program to support extracurricular speech would be ineffective.” *Id.* at 232.

C. Agency fees are conditions of public employment that support the costs of a mandatory association.

Public-employee agency fees stand at the intersection of these two lines of cases and are supported by the holdings in both.

First, agency fees are paid by government employees “as a condition of employment.” *Abood*, 431 U.S. at 211. As *Abood* recognized, although such fees do give rise to an “impingement upon associational freedom,” *id.* at 225, that impingement is justified by the government’s distinctive interests as an employer in avoiding the workplace disruption that would arise if the costs of fairly representing all employees were not fairly distributed among those who are represented, *id.* at 222–32. *See infra* II.A.2. The conduct supported by agency fees—contract negotiation, contract administration, and grievance adjustment—is undeniably directed to the government in its capacity as employer, and is entirely employment-related in that it occurs within the employment relationship and has “some potential to affect the [government] entity’s operations.” *Garcetti*, 547 U.S. at 418. And obviously no one other than an employee or his or her

representative may bargain with the government over the terms and conditions of his or her employment, file a grievance with a public employer, or object to discipline imposed by that employer.

Petitioner protests that the Court has not viewed *Abood* through the lens of the employee-speech cases, Pet. Br. 22 (quoting *Harris*, 134 S. Ct. at 2641), but the Court’s analysis in *Abood* is firmly grounded in the animating principle of those cases. The holding of *Abood*—that agency fees may be used for “collective bargaining, contract administration, and grievance adjustment,” 431 U.S. at 225–26, but not for “political and ideological purposes unrelated to collective bargaining,” *id.* at 232—closely tracks *Pickering*’s distinction between government as employer and government as regulator. As long as agency fees are devoted to employment-related purposes, *Abood* held, they are justified by the government’s interest as an employer in dealing with a single representative and preventing free-riding. *Id.* at 220–32. But when the government reaches beyond its prerogatives as an employer and seeks to affect citizen speech on political and ideological subjects, judicial deference is diminished. *Id.* at 232–37. To put it in the terms used by one of *Pickering*’s successor cases, in disapproving fees for political or ideological speech *Abood* recognized that “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Garcetti*, 547 U.S. at 419.

Unsurprisingly, *Pickering* and other employee-speech cases figured prominently in the way *Abood* was litigated in this Court. The objecting employees

in *Abood*, like petitioner here, argued that their case was “governed by a long line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights.” 431 U.S. at 226. Their brief relied extensively on *Pickering* and other cases involving the expressive rights of public employees, such as *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). See Appellants Br. 27, 35, 38 (No. 75-1153). For its part, the appellee school board repeatedly cited *Pickering* in defense of agency fees. See Appellee Br. 16–17, 42, 43 (No. 75-1153). The *Abood* Court cited *Pickering*, 431 U.S. at 230 n.27; see also *id.* at 259 (Powell, J., concurring in the judgment), as well as *Sindermann* and *Keyishian*, *id.* at 233–34, and *City of Madison School Dist. v. Wisconsin Empl. Relations Comm’n*, 429 U.S. 167 (1976), another *Pickering* case, 431 U.S. at 230. And the Court has since grouped *Abood* together with *Sindermann*, *Keyishian*, and other employee-speech cases. See *Umbehr*, 518 U.S. at 674–75.

Petitioner tries to distinguish the *Pickering* line of cases by suggesting that *restricting* employee speech is an inherently reasonable managerial policy whereas *requiring* payment of a fee to support the activities of an exclusive representative is not. Pet. Br. 24; see also U.S. Br. 24. That argument makes no sense. A policy that requires employees to share the costs of fair representation is, if anything, less speech-restrictive and more closely tied to workforce management than one that penalizes employees for engaging in core political speech outside the workplace, such as writing a letter to a local newspaper, *Picker-*

ing, 391 U.S. at 566. If the latter is subject to a balancing test, *a fortiori* so is the former.

In fact, even if agency fee provisions were deemed to compel speech as opposed to merely requiring shared financial support for employment-related activities, petitioner’s argument would still amount to a distinction without a difference. As this Court has observed, while “[t]here is certainly some difference between compelled speech and compelled silence, . . . in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.” *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 796–97 (1988). And petitioner’s additional contention (Pet. Br. 23) that *Pickering* applies only when the government has a sufficient interest to overcome an employee’s speech interests is simply circular: that is the inquiry required by *Pickering*’s second step, not a threshold requirement for the *Pickering* test to apply.

Nor does it make any difference that agency fees support speech on behalf of an entire class of employees rather than taking effect on an *ad hoc* basis. First of all, it is unclear whether this distinction is even a meaningful one. Courts often rely on the *Pickering* test to uphold the enforcement of generally applicable workplace policies. See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 79, 84–85 (2004) (upholding application of police department policies to individual employee); *Comm’n Workers of Am. v. Ector Cty. Hosp. Dist.*, 467 F.3d 427, 441–42 (5th Cir. 2006) (upholding application of policy prohibiting hospital employee from wearing “Union Yes” pin at work); *Knight v.*

Connecticut Dep't of Pub. Health, 275 F.3d 156, 162, 164–65 (2d Cir. 2001) (upholding application of policy preventing interpreters from proselytizing on the job). Conversely, agency fees often fund union activities that relate to a single employee, such as grievance adjustment.

In any case, actions taken by the State in its capacity as employer do not lose that character by virtue of their broad applicability. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), in which the Court struck down a prohibition on federal employees receiving honoraria, proves the point. The United States cites *NTEU* in support of its argument that *Pickering* is inapplicable here because agency fees apply to a “broad category of expression by a massive number of potential speakers,” while the typical *Pickering* case involves “*post hoc* analysis of one employee’s speech.” U.S. Br. 24 (quoting *NTEU*, 513 U.S. at 466–67). But this argument fails at the outset because, contrary to the United States’ suggestion, *NTEU* applied a balancing test; the “wholesale” nature of the restriction did not trigger strict scrutiny. See 513 U.S. at 468–77. Rather, the Court held that the honoraria ban, which prohibited speech that had “nothing to do with [the employees’] jobs and [did] not even arguably have any adverse impact on the efficiency of the offices in which they work,” *id.* at 465, was not a “reasonable response” to concerns about operational efficiency, *id.* at 473, 476. Agency fees, by contrast, do not restrict any employee’s right to speak in any public forum on any subject and are justified by the State’s interest as an employer in effectively managing its workforce.

Second, agency fees support the activities of a mandatory association. Public employees in a single bargaining unit are already associated with one another for employment-related purposes because they work for the same employer and are represented by the same bargaining agent.² As discussed *infra* II.A.1, this Court has repeatedly recognized the government’s strong interest in certifying bargaining units for purposes of exclusive representation, including in the public sector. *See, e.g., Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984). Unlike the assessments invalidated in *United Foods*, which were unmoored from any larger regulatory purpose and which paid for speech the government favored, 533 U.S. at 411, 414, agency fees promote the government’s interest in managing its workforce and do not require individuals to subsidize any particular message.

Abood’s distinction between the chargeable expenses of contract negotiation and administration and the non-chargeable expenses of political or ideological speech is consistent with the governing standard for mandatory associations, which asks whether the challenged fee supports activities that further the non-speech-related interests justifying the association. It is no wonder, then, that the mandatory association cases rely heavily on *Abood*’s reasoning. *See, e.g., Keller*, 496 U.S. at 12–17; *Glickman*, 521

² Employees may form a bargaining unit only if their “collective interests may suitably be represented by a labor organization for collective bargaining.” 5 ILCS 315/3(s)(1); *see also* 5 ILCS 315/9(b) (listing factors guiding determination of appropriate bargaining unit).

U.S. at 471–73. For that reason, as discussed *infra* III.C, subjecting all agency fees to heightened scrutiny would create an irreconcilable conflict with the principles on which these decisions are grounded.

D. The use of agency fees to support lobbying and other speech directed to the government as a sovereign is not entitled to judicial deference.

As explained, agency fees that support a public sector union’s contract negotiation, contract administration, and grievance adjustment activities are justified by the government’s interest as an employer in managing its workforce. The speech that inheres in those activities is directed to the government as an employer, not as a sovereign, and the government accordingly has wide latitude to place reasonable conditions on it, including a shared funding requirement.

By contrast, when a union engages in lobbying or other speech that occurs in a public forum or is directed to the government as a sovereign, the constitutional analysis shifts considerably. State laws that place restrictions on, or mandate private support for, such speech are no longer insulated by the State’s “much freer hand in dealing with citizen employees than it [has] when it brings its sovereign power to bear on citizens at large.” *Nelson*, 562 U.S. at 148 (internal quotation omitted). Instead, such laws present the risk that the State has acted “to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Garcetti*, 547 U.S. at 419.

The distinction that *Abood* outlined between chargeable and non-chargeable expenses was grounded in this basic distinction. 431 U.S. at 232–37. And *Lehnert* aimed to build upon the same insight in holding that agency fees may not be used to fund “lobbying activities [that] relate not to the ratification or implementation of a dissenter’s collective-bargaining agreement, but to financial support of the employee’s profession or of public employees generally,” 500 U.S. at 520 (opinion of Blackmun, J.); *id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing that “the challenged lobbying expenses are nonchargeable”).

But the *Lehnert* plurality erred insofar as it suggested that chargeable fees may properly include union expenses for activities that take place “in legislative and other ‘political’ arenas.” *Id.* at 520 (opinion of Blackmun, J.) (quoting *Lehnert v. Ferris Faculty Ass’n*, 881 F.2d 1388, 1392 (6th Cir. 1989)). Such activities, even if they may redound to the benefit of represented employees, are not undertaken as part of the employment relationship. Accordingly, mandatory funding of those activities is not entitled to the judicial deference that attaches to actions taken by the government as employer. *See Garcetti*, 547 U.S. at 419 (when employees speak “as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”).

Whether the *Hudson* notice in this case indicates that petitioner may have been charged for some activities best characterized as lobbying or speech in a public forum is a narrow, fact-intensive inquiry that petitioner chose not to pursue. *See, e.g.*, Pet. App. 29a

(item 5: charge for “public advertising of AFSCME’s positions”); *id.* (item 6: charge for “[l]obbying for the negotiation, ratification or implementation of” CBA); Pet. App. 30a–31a, 32a (item 26: partial charge for lobbying for other purposes, subject to *Lehnert* criteria). Petitioner could have disputed these or other charges under Illinois law with a simple written challenge, *see* 80 Ill. Admin. Code § 1220.100; Pet. App. 40a–41a. If such a state-court challenge proved unsuccessful, or if a plaintiff presented an as-applied federal constitutional challenge to such charges on an adequate factual record, this Court would have an opportunity to revisit the line drawn in *Lehnert* between chargeable and non-chargeable expenses. *See generally* Fried & Post Amicus Br. 22–27.

Rather than challenge AFSCME’s *Hudson* notice, however, petitioner chose to argue in federal court that *all* agency fees violate the First Amendment, Pet. App. 22a–23a (¶¶ 64–67), and that the state laws authorizing them are unconstitutional both on their face and as applied, *id.* at 24a (¶ 72). As the next section of this brief explains, that argument—which includes within its sweep a broad range of contract negotiation, contract administration, and grievance adjustment activities—is wildly overstated and inconsistent with governing precedent. If adopted, it would unsettle First Amendment doctrine far beyond *Abood* and would threaten the States’ well-established prerogatives as employers to manage their workforces.

E. Petitioner’s arguments for subjecting all agency fees to heightened scrutiny are without merit.

Petitioner’s challenge to *Abood* rests on his assertion that every use of agency fees in the public sector is subject to heightened First Amendment scrutiny. Pet. Br. 10–26. This argument loses sight of the fundamental distinction between government as employer and government as regulator. Thus, for example, the cases cited by petitioner (Pet. Br. 19) in which the Court applied strict scrutiny to instances of compelled expressive association, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995), are inapposite because the government there acted not as an employer but, instead, as a regulator to substantially impair the ability of private groups to express their chosen messages to the public. Likewise, the cited cases involving compelled speech (Pet. Br. 20–21) and expenditures on political campaigns (Pet. Br. 21) are irrelevant, as they have nothing to do with the employment relationship.

Petitioner attempts to draw a parallel between agency fees and compelled political association (Pet. Br. 20), but the comparison is unpersuasive. The Court has invalidated patronage-based employment schemes only after concluding that the interests that motivate them “are not interests that the government has in its capacity as an employer” but “interests the government might have in the structure and functioning of society as a whole.” *Rutan v. Republican Party*, 497 U.S. 62, 70 n.4 (1990). For that reason, contrary to petitioner’s suggestion (Pet. Br. 20), this Court has

not applied “exacting scrutiny” to all political affiliation requirements. “[R]ather, the question is whether the hiring authority can demonstrate that party affiliation is an *appropriate requirement* for the effective performance of the public office involved.” *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (emphasis added); *see also Rutan*, 497 U.S. at 64 (First Amendment forbids patronage-based discharge “unless party affiliation is an *appropriate requirement* for the position involved”) (emphasis added); *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996) (“the inquiry is whether the affiliation requirement is a *reasonable one*”) (emphasis added).

The patronage schemes invalidated by this Court have extracted from objecting employees “a pledge of allegiance to another party,” *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion), and even required them to campaign for the election of that party’s candidates, *ibid.*; *see also Rutan*, 497 U.S. at 67 (employee punished for failing to work for political party); *O’Hare*, 518 U.S. at 715–16 (city terminated relationship with contractor who refused to contribute to mayor’s reelection campaign). Agency fees that support the employment-based activities of an exclusive representative share none of the objectionable attributes of a patronage system, as they are motivated by the government’s interests as an employer and neither coerce belief nor require overt speech or action in support of any position with which an employee disagrees. The political affiliation cases therefore provide no basis for the application of heightened scrutiny here.

Petitioner also relies on language from *Knox* and *Harris* (Pet. Br. 18–19), but those cases do not hold

that all public-sector agency fees are subject to heightened scrutiny. In *Knox*, a union imposed an extraordinary mid-year special assessment for *non-chargeable, political expenses* associated with a statewide special election. 567 U.S. at 303–305. Nonmembers who had failed to object to the most recent regular dues payment were not permitted to opt out of the special assessment, and those who had objected were required to pay the special assessment at the most recent agency-fee rate of 56.35%. *Id.* at 305–306, 314. Tellingly, the State did not attempt to defend the special assessment, even as an amicus. Finding “no justification” for this attempted expansion of *Abood*, *id.* at 314, 321, the Court held that the union was obligated to provide a fresh *Hudson* notice to enable nonmembers to decide whether to pay the assessment, *id.* at 322.

Similarly, in *Harris*, this Court declined to “approve a very substantial expansion of *Abood*’s reach,” 134 S. Ct. at 2634, that would have encompassed home health-care personal assistants who did not work together in the same public facility, *id.* at 2640; who were hired, supervised, and subject to discharge by a “customer” (often a close relative), *id.* at 2624, 2634; and whose union’s ability to bargain on their behalf was “sharply limited” by law, *id.* at 2635–36, 2637 n.18. Given all of these facts suggesting that the State was “not acting in a traditional employer role,” the Court held *Pickering* inapplicable, *id.* at 2642, and found that the State’s putative interests as an employer would be insufficient even if *Pickering* applied, *id.* at 2642–43. The Court expressly declined to revisit *Abood*. *Id.* at 2638 n.19. In short, neither *Knox* nor *Harris* applied heightened scrutiny to all

uses of agency fees to support a union's activities in a traditional public-sector workplace, as petitioner asks the Court to do here.

To the extent *Knox* and *Harris* contain language suggesting that all agency fees should be subject to heightened scrutiny, that language was unnecessary to those decisions and is at odds with controlling precedent. In *Knox*, for instance, the Court read *United Foods* as applying “exacting First Amendment scrutiny,” under which mandatory fees must be a “‘necessary incident’” of the government’s “‘regulatory purpose.’” *Knox*, 567 U.S. at 310 (quoting *United Foods*, 533 U.S. at 414); *see also Harris*, 134 S. Ct. at 2639 (relying on *Knox*). But *United Foods* does not apply—indeed does not mention—“exacting scrutiny.” *Knox* wrenched the “necessary incident” language out of context: the quoted passage from *United Foods* merely described the subsidy for the integrated bar association’s speech in *Keller* as a “necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity.” *United Foods*, 533 U.S. at 414. As *United Foods* made clear in its very next sentence, “[t]he central holding in *Keller* . . . was that the objecting members were not required to give speech subsidies for matters not *germane to the larger regulatory purpose* which justified the required association.” *Ibid.* (emphasis added).

Likewise, *Knox* misinterpreted this Court’s decision in *Roberts* to mean that “mandatory associations are permissible only when they serve a ‘compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.’” *Knox*, 567 U.S. at 310 (quoting *Roberts*, 468 U.S. at 623). *Roberts* held that heightened scru-

tiny applies when the government forces an *expressive* association “to accept members it does not desire,” which “may impair the ability of the original members to express only those views that brought them together.” 468 U.S. at 623. That holding has no application to associations that are brought together for reasons “independent from the speech itself,” *United Foods*, 533 U.S. at 415, or laws that merely require shared funding as opposed to mandating acceptance of unwanted members—let alone circumstances in which the government acts as an employer. The statements in *Knox* and *Harris* concerning heightened scrutiny are not controlling here.

II. Agency fees in support of a union’s representational activities are a permissible condition of public employment.

As explained, agency fees are a condition of public employment authorized by the State in its capacity as an employer. Such fees support the work of contract negotiation, contract administration, and grievance adjustment—transactional, employment-related activities that occur in specialized settings established by the State for the purpose of managing its workforce. To the extent this conduct by the exclusive representative is expressive, it is far removed from the core political speech in which public employees might wish to engage as citizens—and in which they remain free to engage, agency fees notwithstanding. As *Abood* recognized, such fees do give rise to a limited “impingement” on the First Amendment interests of employees who sincerely object to the union’s positions. 431 U.S. at 225. That impingement, however, is justified by the State’s substantial interest in dealing with a single representative and ensuring that

the obligation of funding that representative is borne fairly by all of the employees it has a duty to represent.

A. Agency fee provisions are justified by the State’s substantial interest in dealing with a fairly and adequately funded exclusive representative.

1. The State has a well-recognized interest as an employer in dealing with an exclusive representative.

Exclusive representation and the correlative duty to fairly represent all employees in the bargaining unit are central pillars of the system of industrial relations adopted by Congress more than 80 years ago in the National Labor Relations Act (NLRA). 29 U.S.C. § 159(a); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988). When Congress amended the NLRA in the Taft-Hartley Act of 1947, it outlawed the “closed shop,” in which an employer agrees to hire only union members. *Id.* at 748. But at the same time Congress recognized, as one of that Act’s authors put it, that “if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself.” *Ibid.* (quoting 93 Cong. Rec. 4887 (1947) (Sen. Taft)). To remedy that inherent collective action problem, Congress authorized employers to agree to “union-security provisions” that provide for agency fees. 29 U.S.C. § 158(a)(3). *See NLRB v. General Motors Corp.*, 373 U.S. 734, 740–41 (1963).

The NLRA does not cover public employees, 29 U.S.C. § 152(2), and for the first few decades after its

enactment most States did not bargain with their employees' unions. Most public-sector collective bargaining laws were passed in the 1960s and 1970s in response to increased unrest among public employees. Modeled on the NLRA, those laws protect the right of employees to designate an exclusive bargaining agent by majority vote and impose on that agent a corresponding duty to fairly represent all employees in a bargaining unit. Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962*, at 71–72 (2004).

This Court has repeatedly recognized the State's interest as an employer in dealing with an exclusive representative. See, e.g., *Knight*, 465 U.S. at 291 (“The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when negotiating.”) (internal quotation marks omitted); *Abood*, 431 U.S. at 220–21. Exclusive representation allows the government to consolidate the process of bargaining about individual terms and conditions of employment into a single collective endeavor. The representative organizes and channels the concerns and priorities of employees, reconciling conflicting views and conveying information about employee preferences to the government more efficiently and reliably than could be achieved if the employer sought to discover those preferences on its own. With the participation of an exclusive representative, the government can establish employment terms in a more durable and stable manner than if it imposed those terms unilaterally.

Exclusive representation in the public sector has also proven effective in avoiding strikes.³

The exclusive representative plays a crucial role in resolving workplace disputes. Disagreements that arise over working conditions or workplace discipline can be resolved more efficiently when the employee speaks through a union representative with experience in such matters. *See* JA 126–29 (CBA provisions detailing multiple steps grievant must take prior to arbitration). The representative can ensure that grievants with similar claims are treated similarly, and can help settle grievances at an early stage. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). If the representative were not available to assist in the process, “a significantly greater number of grievances would proceed to arbitration,” which “would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.” *Id.* at 191–192 (footnote omitted). Overall, as the Court recognized in *Harris*, “the duty to provide equal and effective representation for nonmembers in grievance proceedings . . . [is] an undertaking that can be very involved.” 134 S. Ct. at 2637.

³ *See, e.g.*, Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 520–21 (1994); Martin H. Malin, *Public Sector Collective Bargaining: The Illinois Experience* 4 (N.E. Ill. Univ. Ctr. for Governmental Studies Policy Profiles, Jan. 2002); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 Cornell J. of L. & Pub. Pol’y 735, 744 (2009).

Beyond the formal processes of contract negotiation and administration, the employer and the representative can build working relationships over the course of years, facilitating informal processes that benefit both sides. *See* JA 143–45 (providing for labor-management meetings to discuss and solve problems of mutual concern). Employers also get employee feedback through the representative that may otherwise be unavailable, as employees may be more candid when talking to a union representative than when speaking directly to management. The representative can often communicate the employer’s positions or priorities more credibly than the employer could do directly, and can generate buy-in for contract terms among rank-and-file employees. Studies support the conclusion that this collaborative process tends to produce greater employee acceptance of the employer’s policies, which in turn leads to fewer resource-consuming disputes, higher morale, and enhanced productivity.⁴

To ensure that the exclusive representative provides these benefits to public employers, the State imposes on the union a correlative duty of fair representation. Under Illinois law, the exclusive representative is “responsible for representing the interests of all public employees in the unit,” whether or not they are union members. 5 ILCS 315/6(d); 115 ILCS

⁴ *See, e.g.*, Sally Klingel & David B. Lipsky, Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention, at 4 (2010), goo.gl/eZ8Zr3; U.S. Secretary of Labor’s Task Force on Excellence in State and Local Gov’t Through Labor-Management Cooperation, Working Together for Public Service: Final Report (May 1996), at 2, goo.gl/Wi8kBz.

5/14(b)(1). Without a duty of fair representation, government employers would lose the benefit of bargaining with a single party that represents all employees, and would be faced with the workplace dissension and resentment that predictably would arise if unions could act solely in the interests of their own members.⁵

2. The State has a substantial interest in ensuring that the representative is fairly and adequately funded.

The important benefits that exclusive representation provides to public employees and their government employers do not come free of charge. As *Abood* noted, collective bargaining often requires the “services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel.” 431 U.S. at 221. Processing grievances entails costs for staff, legal representation, and the many expenses associated with arbitration. *See Vaca*,

⁵ Petitioner’s broadside constitutional challenge to the entire concept of exclusive representation (Pet. Br. 48–52) not only goes beyond the scope of the question presented but is unfounded. It is well-established that the State’s decision to bargain with a single employee representative does not restrain employees’ freedom “to associate or not to associate with whom they please, including the exclusive representative.” *Knight*, 465 U.S. at 288. Employees represented by an exclusive bargaining agent “are not compelled to act as public bearers of an ideological message they disagree with, accept an undesired member of any association they may belong to, or modify the expressive message of any public conduct they may choose to engage in.” *Hill v. Service Emps. Int’l Union*, 850 F.3d 861, 865 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 446 (2017) (quoting *D’Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016)) (internal punctuation omitted).

386 U.S. at 191 (describing arbitration as “the most costly and time-consuming step in the grievance procedures”). Agency fees help to assure that adequate funds are available to perform these duties.

Just as important, agency fees fairly distribute the costs of exclusive representation by ensuring that they are borne equally by all of the employees who receive the benefits of that representation. *Beck*, 487 U.S. at 748–50; *Abood*, 431 U.S. at 221–22; *General Motors*, 373 U.S. at 740–41. In the absence of an agency fee requirement, rational employees—including those who fully support the union’s positions and benefit from its efforts on their behalf—would have an economic incentive to opt out of paying their fair share of the costs of representation.

Petitioner tries to sidestep this common-sense conclusion by labeling himself a “forced rider[]” rather than a would-be free rider, Pet. Br. 53, but that label fundamentally misconceives the collective action problem that justifies agency fees. The free-rider problem is caused not only by the true dissenter but also by the rational employee who gladly accepts the benefits he derives from union representation and “wants merely to shift as much of the cost of representation as possible to other workers,” *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989). The problem, of course, is that if support for collective representation were made wholly voluntary it would be virtually impossible, as a practical matter, to distinguish the sincere objector from the opportunistic free rider.

Research confirms what an elementary understanding of economics and human nature suggests:

free-ridership greatly increases when unions cannot collect agency fees. See Jeffrey H. Keefe, *On Friedrichs v. California Teachers Association: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation*, Briefing Paper No. 411 (Econ. Pol’y Inst., Washington, D.C.), Nov. 2, 2015, at 4–6 (summarizing research). Prohibiting agency fees “inhibits the formation of labor organizations and increases the likelihood they will fail once they are established, since free-riding will deprive a union of essential resources.” *Id.* at 4, 8–13. In particular, evidence from States with so-called “right-to-work” laws shows that when employees have the option of becoming free riders, a great many of them do so, *including many who support the union*. See Raymond Hogler et al., *Right-to-Work Legislation, Social Capital, and Variations in State Union Density*, 34 Rev. Regional Stud. 95, 95 (2004) (empirical study concluding that right-to-work laws “have a strong, negative effect on union density that is independent of underlying attitudes toward unions”).

Truncating a sentence from *Harris*, petitioner argues that “[t]he mere fact that nonunion members benefit from union speech is not enough to justify an agency fee. . . .” Pet. Br. 36 (quoting 134 S. Ct. at 2636). But as Justice Scalia went on to explain in the very passage from his separate opinion in *Lehnert* that is quoted in the rest of that sentence, nonunion employees are distinctive because “*they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests.” 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphases in original). Unions,

unlike other voluntary associations, are legally forbidden to alleviate the free-rider problem by acting only in their members' interests. "Thus, the free ridership (if it were left to be that) would not be incidental but calculated, not imposed by circumstances but mandated by government decree." *Ibid.*

Petitioner's assertion that agency fees cannot be upheld if exclusive representation could survive without them, Pet. Br. 37–38, thus misses the point. As Justice Scalia recognized, the State has a "compelling . . . interest" in preventing the workplace "inequity" that would arise if it required unions to represent employees who did not pay their fair share for that representation. *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). If agency fees were eliminated, dues-paying union members—as a result of their own free associational choice—would be forced to subsidize their fellow employees who benefit from the union's representation but have chosen not to pay for it. A State may choose to enact that kind of intra-workforce cross-subsidy as a matter of public policy, but the First Amendment cannot sensibly be read to require it. At the very least, the State is entitled to prevent that unfair distribution of burdens—and reduce the risk of free-riding employees "stirring up resentment by enjoying benefits earned through other employees' time and money," *Ellis v. Railway Clerks*, 466 U.S. 435, 452 (1984)—by authorizing an agency fee requirement as a condition of employment.

In short, petitioner's contention that agency fees are unconstitutional because they are not necessary for exclusive representation, Pet. Br. 36, is both factually and legally unsound. Nothing on this record

supports that view, and the Court certainly cannot take judicial notice of it. Rather, it is beyond dispute that negotiating and administering a contract are costly tasks, *see Abood*, 431 U.S. at 221; *Vaca*, 386 U.S. at 191, and that a union cannot meet its representational obligations without sufficient resources. More broadly, this contention, like much of petitioner’s argument, proceeds from the faulty premise that agency fees are subject to heightened scrutiny. As an employer, the State is entitled to conclude that its capacity to manage its workforce would be severely compromised if the obligation to fund the union’s representational activities were not fairly borne by all employees. By the same token, petitioner’s assertion that the government can have an interest only in dealing with a “weak and submissive” union, Pet. Br. 61, is not only short-sighted from a managerial perspective but also is inconsistent with the deference owed to “the government acting ‘as proprietor, to manage [its] internal operation,’” *Engquist*, 553 U.S. at 598.

Petitioner also argues at length that exclusive representation confers benefits on unions, Pet. Br. 37–43, and that the costs of fair representation are overstated, Pet. Br. 45–47, but these arguments—beyond being unsupported by anything in the record—are similarly beside the point. Regardless of the precise costs entailed by the duty of fair representation, the inherent collective action problem remains, as does the State’s interest as an employer in ensuring that those costs are fairly distributed among all of the employees to whom the duty extends.

B. Agency fees represent a limited impingement on employees' First Amendment interests.

As *Abood* recognized, agency fees have an “impact upon [objecting employees’] First Amendment interests.” 431 U.S. at 222; *see also Knox*, 567 U.S. at 321; *Harris*, 134 S. Ct. at 2643. That impact, however, is limited in several decisive respects.

First, the speech that agency fees validly support occurs exclusively within the employment setting. Contract negotiation, contract administration, and grievance resolution take place in specialized channels of communication far removed from any traditional First Amendment forum. These processes occur behind closed doors, in a venue where the employer’s representative is the only audience for the union’s speech. *See* 5 ILCS 120/2(c)(2) (exception to Illinois Open Meetings Act providing that a public body may hold closed meetings to consider “[c]ollective negotiating matters between the public body and its employees or their representatives”); 5 ILCS 315/24 (“The provisions of the Open Meetings Act shall not apply to collective bargaining negotiations and grievance arbitration conducted pursuant to this Act.”). The public employer controls whom it will listen to, when the discussion will take place, and which topics will be discussed. *Knight*, 465 U.S. at 291; 5 ILCS 315/4 (“[e]mployers shall not be required to bargain over matters of inherent managerial policy”). The union’s speech in these settings thus “owes its existence to [the union’s] professional responsibilities” in an environment the “employer itself has commissioned or created.” *Garcetti*, 547 U.S. at 421. Moreover, both sides understand that the union is advancing

collective positions on behalf of the entire unit, not expressing the personal views of any employee. *Knight*, 465 U.S. at 276. And the overriding purpose of the representative's speech in these proceedings is to establish and enforce the terms and conditions of employment. *See id.* at 280 ("A 'meet and confer' session is obviously not a public forum."); *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.) (contrasting "collective-bargaining negotiations" with "public fora open to all").

It is true, as *Abood* acknowledged, that collective bargaining in the public sector can address issues of public concern. 431 U.S. at 222, 231. But under the constitutional test applicable to the government's actions as an employer, that is not enough to give rise to a First Amendment claim. *Borough of Duryea*, 564 U.S. at 386; *Garcetti*, 547 U.S. at 418. Even if the entirety of public-sector bargaining were thought to address matters of public concern, the union would still be speaking as an employee representative to government as an employer—not as a citizen to a sovereign—in negotiating terms and conditions of employment.

Moreover, many of the matters addressed at the bargaining table have no particular ideological or political valence, even in the aggregate. Thus, for example, the CBA at issue here addresses such prosaic workplace issues as the annual holiday schedule (JA 154–60); compensation for an employee who is required by job assignment to work through an unpaid lunch period (JA 166); when corrections officers will be paid for roll call (JA 191–92); what happens when Daylight Savings Time changes to Standard Time, and vice versa, during an employee's shift (JA 193);

the number and content of personnel files (JA 292); and the establishment of committees to identify and correct unsafe or unhealthy conditions such as inadequate lighting or inadequate first-aid kits (JA 295). Subjecting all of these routine workplace issues to heightened First Amendment scrutiny “would subject a wide range of government operations to invasive judicial superintendence.” *Borough of Duryea*, 564 U.S. at 390–91.

The same is even more self-evidently true of grievance adjustment, which deals exclusively with “employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations.” *Id.* at 391. Arbitrated grievances rarely involve matters of public concern. *See, e.g., Melanie Thompson*, 34 PERI ¶ 29, 2017 WL 3634394 (IELRB 2017) (grievance concerning change to sick leave policy); *Raymond Gora*, 30 PERI ¶ 91, 2013 WL 5973879 (IELRB 2013) (elimination of driver education hours); *SEIU, Local 73*, 31 PERI ¶ 7, 2014 WL 3108228 (ILRB 2014) (transfer of work location). And grievances that are resolved informally without arbitration are even less likely to involve the interests of anyone beyond the employee and his or her immediate workgroup. Petitioner’s characterization of the grievance process as intrinsically “political” (Pet. Br. 14–15) thus cannot be taken seriously.

Indeed, this Court has long established that an individual employee pursuing a workplace grievance does not speak as a citizen and seldom vindicates matters of public concern. *See Borough of Duryea*, 564 U.S. at 398 (“A petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to

advance a political or social point of view beyond the employment context.”); *id.* at 399 (“a complaint about a change in the employee’s own duties’ does not relate to a matter of public concern”). One of the central lessons of *Pickering* and its progeny is that the First Amendment does not empower public employees to “constitutionalize the employee grievance.” *Garcetti*, 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154); *see also Borough of Duryea*, 564 U.S. at 391 (holding that application of Petition Clause to grievances not raising matters of public concern “would raise serious federalism and separation-of-powers concerns” and “consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public”). Yet petitioner’s facial attack on agency fees seeks to do just that.

Second, an agency fee requirement does not restrict any employee’s freedom of expression. *City of Madison*, 429 U.S. at 175; *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.); *see also Abood*, 431 U.S. at 230 (a “public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint”). Petitioner remains free to speak out against the union both in public and in the workplace, oppose its recertification, associate with like-minded groups, and lobby his elected representatives to amend or repeal the IPLRA or its agency-fee provisions. Unlike the regulations invalidated in the cases cited by petitioner, agency fees do not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), or require employ-

ees to act as vehicles for the State’s ideological message, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Agency fee requirements thus pose “no threat to the free and robust debate of public issues” that the First Amendment is designed to protect. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation and internal quotation marks omitted).

Third, agency fees do not compel any expressive association between the union and a nonmember employee. Such an employee is, of course, already associated with the union in the sense that the State requires the union to represent all employees in the bargaining unit. But no reasonable observer, upon being informed that an employee had paid a mandatory agency fee while refusing to support the union’s political and ideological speech, would infer that the employee supported the union’s expression. Quite the contrary: the most logical inference would be that he opposes it. *Cf. Rumsfeld v. FAIR*, 547 U.S. 47, 65 (2006) (noting that “high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy”) (citing *Board of Ed. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).⁶

⁶ Even if this Court were to overrule *Abood* and adopt heightened scrutiny, it should not invalidate agency fee provisions in all their applications. Under such circumstances, the appropriate disposition would be to announce the governing standard and remand to give respondents the opportunity to satisfy the new test. *See, e.g., Johnson v. California*, 543 U.S. 499, 515 (2005). As Justice Powell recognized in *Abood*, the State’s interests are likely sufficient under heightened scrutiny to justify mandatory fees in support of many union activities,

III. There is no special justification for departing from *stare decisis*.

Abood was correctly decided. But even if the Court doubted that conclusion, *stare decisis* would counsel strongly against overruling a precedent that has stood for more than 40 years. To depart “from precedent is exceptional,” *Randall v. Sorrell*, 548 U.S. 230, 244 (2006), and “even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure . . . to be supported by some ‘special justification,’” *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996)). To satisfy his heavy burden, petitioner must articulate reasons for departing from *Abood* beyond his plea that the Court should decide it “differently now than [it] did then.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015). Rather than do that, petitioner rehashes critiques of *Abood* that could have been—and in many cases were—leveled at the time. See *Abood*, 431 U.S. at 254–64 (Powell, J., concurring in the judgment). The Court should reject this attempt to overturn settled precedent.

including collective bargaining on “narrowly defined economic issues” and the “processing of individual grievances.” 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment). Further fact-finding would be necessary here given the lack of an evidentiary record.

A. Overruling *Abood* would undermine the reliance interests of States, public employers, employees, and unions.

Abood has engendered exceptionally strong reliance interests on the part of States, public-sector employers, employees, and unions. Reliance is “at the core of” any *stare decisis* analysis, *United States v. Donnelly’s Estate*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring), and takes on “added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision,” *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). Overruling *Abood* would “dislodge settled rights and expectations” for millions of employees, and would “require an extensive legislative response” by 22 States, the District of Columbia, and the Commonwealth of Puerto Rico. *Ibid.*⁷

Following *Abood*, many States passed legislation enabling exclusive representatives to collect agency fees for collective bargaining, contract administration,

⁷ See Alaska Stat. § 23.40.110(b); Cal. Gov’t Code §§ 3502.5, 3513(k), 3515, 3515.7, 3546, 3583.5; Conn. Gen. Stat. Ann. § 5-280; Del. Code Ann. tit. 19, § 1319; D.C. Code § 1-617.07; Haw. Rev. Stat. § 89-4; 5 Ill. Comp. Stat. 315/6(e), 115 Ill. Comp. Stat. 5/11; Me. Rev. Stat. Ann. tit. 26, § 629; Md. Code Ann., State Pers. & Pens. § 3-502; Mass. Gen. Laws Ann. ch. 150E, § 2; Minn. Stat. Ann. § 179A.06; Mo. Ann. Stat. § 105.520; Mont. Code Ann. § 39-31-204; N.H. Rev. Stat. Ann. §§ 273-A:1, :3; N.J. Stat. Ann. § 34:13A-5.5; N.M. Stat. Ann. § 10-7E-4; N.Y. Civ. Serv. Law § 208(3); Ohio Rev. Code Ann. § 4117.09(C); Or. Rev. Stat. § 243.672(c); 43 Pa. Stat. & Cons. Stat. Ann. § 1102.3; P.R. Laws Ann. tit. 3, § 1451f; 6A R.I. Gen. Laws § 36-11-2; Vt. Stat. Ann. tit. 3, § 962 & tit. 16, § 1982; Wash. Rev. Code Ann. §§ 41.59.100, 41.80.100, 47.64.160.

and grievance adjustment. Several of these States, including Illinois, expressly relied on *Abood* in drafting such legislation. See 83d Ill. Gen. Assem., Senate Proceedings, June 27, 1983, at 32 (statements of Sen. Bruce); see also, e.g., N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977). Even States that support petitioner in this litigation, see Amicus Br. for States of Michigan, et al., relied implicitly on *Abood*'s holding in expressly carving out public-safety unions from their right-to-work legislation, see Wis. Stat. § 111.70(2); Mich. Comp. Laws § 423.210(4)(a)(i).

In Illinois, unwinding agency fees would require a substantial legislative response, as these fees are an integral part of the "comprehensive regulatory scheme for public sector bargaining" that has been in place for more than three decades. See *Bd. of Educ. of Cmty. Sch. Dist. No. 1, Coles Cty. v. Compton*, 526 N.E.2d 149, 152 (Ill. 1988) (internal quotation marks omitted). Initially, this system was crafted through "six months of concentrated effort of various segments of labor, public employees, public employers, mayors, attorneys, Chicago, . . . commerce and industry." 83d Ill. Gen. Assem., Senate Proceedings, June 30, 1983, at 97 (statements of Sen. Collins). Such reliance interests weigh in favor of according *stare decisis* effect here. See *Hohn v. United States*, 524 U.S. 236, 261 (1998) (Scalia, J., dissenting) ("While there is scant reason for denying *stare decisis* effect to *House*, there is special reason for according it: the reliance of Congress upon an unrepudiated decision central to the procedural scheme it was creating.").

Unions, state agencies, and courts have all become familiar with the line drawn in *Abood*. Illinois has

adopted specific regulations governing challenges to the agency fee process. *See* 80 Ill. Admin. Code § 1125.10–1125.100; *id.* § 1220.100. And familiarity with the *Abood* rule extends beyond unions and management to private industry as well: the American Arbitration Association, for instance, has adopted a specific set of rules to address the impartial determination of union fees. *See* Am. Arbitration Ass’n, Rules for Impartial Determination of Union Fees (1988).

Overruling *Abood* would affect an untold number of collective bargaining agreements containing agency fee provisions, as well as the interests of the employees, employers, and unions relying on those agreements’ terms. As with legislative reliance, “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights.” *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). In fact, so long as there is “a reasonable possibility that parties have structured their business transactions in light of [*Abood*],” there is “reason to let it stand.” *Kimble*, 135 S. Ct. at 2410.

B. *Abood*’s standard is workable.

Petitioner cannot show that the standard outlined in *Abood* is “unworkable,” *Payne*, 501 U.S. at 827, or that it has “defied consistent application by the lower courts,” *Pearson*, 555 U.S. at 235 (quoting *Payne*, 501 U.S. at 829–30). Following *Abood*, the Court has addressed the line between chargeable and non-chargeable expenses in the public sector twice, in *Lehnert*, 500 U.S. at 522, and *Locke v. Karass*, 555 U.S. 207 (2009). *Lehnert* was 8-1 as to several chal-

lenged expenditures and *Locke* was 9-0. Although the Court's division over the scope of chargeable expenses in *Lehnert* confirmed that line-drawing will be difficult in some cases, as *Abood* predicted, 431 U.S. 236–37, that is not nearly enough to label a legal doctrine unworkable.

Petitioner complains that *Lehnert* and *Locke* are “subjective” and “vague,” Pet. Br. 26, but on the rare occasions when the Court has invoked vagueness to find a doctrine unworkable in the past, it has pointed to the “experience of the federal courts” and the “inability of later opinions to impart the predictability that the earlier opinion forecast.” *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Petitioner does not offer any examples of such unpredictability. Similarly, petitioner's argument that the lower courts have “struggled repeatedly” with classifying union expenditures in the years following *Abood* is unsupported. Pet. Br. 27. Petitioner cites only three cases in conjunction with this argument, one of which is *Knox*. Pet. Br. 27 n.12. But *Knox* addressed an unusual special assessment, did not arise out of a circuit split, and did not reveal a longstanding struggle in the lower courts. In short, this is not a situation where “[a]ttempts by other courts . . . to draw guidance from [*Abood*'s] model have proved it both impracticable and doctrinally barren.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). And even if courts had difficulty applying the line drawn in *Lehnert*, the solution would be to clarify that line in an appropriate case, not to obliterate it altogether and jettison decades of precedent uphold-

ing agency fees for representational activities. *See supra* I.D.⁸

C. Overruling *Abood* would cast several lines of First Amendment jurisprudence into doubt.

Abood’s “close relation to a whole web of precedents means that reversing it could threaten others.” *Kimble*, 135 S. Ct. at 2411. Far from being undermined by the subsequent evolution of First Amendment law, *Abood*’s holding has repeatedly been relied on by the Court over the past four decades. Thus, *Keller* cited *Abood* in upholding mandatory fees to support the activities of an integrated bar. 496 U.S. at 13–14; *see also Southworth*, 529 U.S. at 230–31 (“*Abood* and *Keller*. . . provide the beginning point for our analysis.”). Likewise, *Glickman* relied on *Abood* to sustain mandatory fees for generic advertising as part of a comprehensive regulatory scheme. 521 U.S. at 472–73; *see also United Foods*, 533 U.S. at 413 (relying on “[a] proper application of the rule in

⁸ Petitioner’s argument that the *Abood* standard invites First Amendment abuses, Pet. Br. 27, is both speculative and incorrect. First, Illinois provides petitioner with a simple mechanism to challenge the union’s *Hudson* notice, 80 Ill. Admin. Code § 1220.100, but he evidently failed to do so, and his complaint does not allege that this mechanism was inadequate to protect his rights. Second, independent auditors are required to confirm that the expense characterizations in *Hudson* notices are fairly presented and do not contain material misrepresentations. *See* Certified Public Accountants Amicus Br. at 2–3. Finally, to the extent there is concern about the adequacy of the *Hudson* notice procedures, that concern should be addressed in an appropriate case on a fully developed factual record.

Abood"); *Johanns*, 544 U.S. at 558 (*United Foods* "concluded that *Abood* and *Keller* were controlling"). Overruling *Abood* would create needless and undesirable instability in these settled areas of First Amendment jurisprudence.

Petitioner correctly observes that the Court's opinions in *Knox* and *Harris* criticize aspects of *Abood*'s reasoning. Pet. Br. 18–19 (citing *Knox*, 567 U.S. at 310–11, and *Harris*, 134 S. Ct. at 2639). But as noted *supra* I.E, neither of those cases involved agency fees in support of the core employment-related activities of a union representing government employees in a traditional workplace. Indeed, in deciding not to approve a "very substantial expansion of *Abood*'s reach," *Harris* specifically declined to disturb *Abood*'s holding. 134 S. Ct. at 2634, 2638 n.19. The narrow holdings of *Knox* and *Harris* stand in stark contrast to the sweeping relief petitioner now seeks, which would invalidate public-sector agency fees in all their applications.

That contrast illuminates a crucial feature of this case: it is impossible to overrule *Abood* without departing from a principle this Court has acknowledged "[t]ime and again," that "the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large," *Nelson*, 562 U.S. at 148 (internal quotation omitted). A decision to overturn *Abood* would thus undermine the foundations of *Pickering*, *Connick*, *Garcetti*, *Borough of Duryea*, and many other settled precedents ranging far beyond the First Amendment. It would also deprive state and local governments of the flexibility our federal system has

conferred on them to manage their workforces in ways that meet local needs.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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JANUARY 2018

No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE STATES OF NEW YORK, ALASKA,
CONNECTICUT, DELAWARE, HAWAII, IOWA, KENTUCKY,
MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA,
NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA AND
WASHINGTON, AND THE DISTRICT OF COLUMBIA
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed that the Constitution permits States to adopt the model of collective bargaining that is widely used in the private sector pursuant to federal labor law. Under this model, a union that employees select to serve as their exclusive representative in collective-bargaining negotiations may charge all represented employees—including those who decline to join the union—an “agency fee” to defray the costs of the workplace services provided by the union. In reliance on *Abood*, twenty-three States and the District of Columbia have long authorized public-sector collective-bargaining arrangements that include agency-fee provisions.

Amici States address the following question raised by petitioners:

Whether *Abood* should be overruled, thereby forcing many States to abandon the labor-management arrangements that they have long used to ensure the efficient and uninterrupted provision of government services to the public?

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI STATES.....	1
STATEMENT OF THE CASE	3
A. This Court’s Longstanding Recognition That Private Employers May Require Employees to Fund the Workplace-Related Activities of a Union Designated to Act as Their Exclusive Representative.....	3
B. This Court’s Determination in <i>Abood</i> That States May Adopt Labor-Management Policies Similar to Those That Have Proved Effective in the Private Sector	5
C. <i>Abood</i> ’s Centrality to Public-Sector Workforce Management	7
D. Petitioner’s Challenge	8
SUMMARY OF ARGUMENT.....	9
ARGUMENT.....	10
THE STATES HAVE A SIGNIFICANT AND VALID INTEREST IN PRESERVING <i>ABOOD</i>	10
I. Agency Fees Are Important to Maintaining the Labor-Management Model That Many States Rely on to Ensure the Effective and Efficient Provision of Services to the Public.....	12
A. State Laws Authorizing Public-Sector Collective Bargaining Were Adopted in Response to Devastating Strikes and Labor Unrest by State and Local Government Employees.....	12

B. In Responding to These Crises, States Looked to the Labor-Management Model That Had Already Proven Effective in the Private Sector under Federal Labor Law.	17
1. An exclusive representative can provide services in the workplace that reduce labor unrest and yield other benefits for employers.....	19
2. Many States have determined that agency fees help them secure the full benefits of exclusive representation.	23
C. Petitioners’ Amici Misrepresent the Role of Public-Sector Collective Bargaining in Municipal Bankruptcies.....	28
II. Petitioner’s Constitutional Challenge Should Be Rejected.	30
A. The First Amendment Affords Public Employers Flexibility to Manage Their Workforces.	30
B. Petitioner’s Challenge Is Overbroad Because It Encompasses Agency Fees for Union Services to Which He Does Not Object.....	33
CONCLUSION	36

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	passim
<i>Allied-Signal, Inc. v. Director, Div. of Taxation</i> , 504 U.S. 768 (1992)	10
<i>Association of Surrogates & Sup. Ct. Reporters v. State</i> , 78 N.Y.2d 143 (1991)	14
<i>Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees</i> , 481 U.S. 429 (1987)	4
<i>Bush v. Vera</i> , 517 U.S. 952 (1996)	10
<i>Communications Workers of Am. v. Beck</i> , 487 U.S. 735 (1988)	4,24
<i>Connick v. Myers</i> , 461 U.S. 138 (1983)	31,32
<i>DiMaggio v. Brown</i> , 19 N.Y.2d 283 (1967)	14
<i>Ellis v. Railway Clerks</i> , 466 U.S. 435 (1984)	24
<i>Engquist v. Oregon Dep't of Agric.</i> , 553 U.S. 591 (2008)	31
<i>First Nat'l Maint. Corp. v. NLRB</i> , 452 U.S. 666 (1981)	4
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006)	1,31,32
<i>Harris v. Quinn</i> , 134 S. Ct. 2618 (2014)	7,11
<i>Hilton v. South Carolina Pub. Rys. Comm'n</i> , 502 U.S. 197 (1991)	10
<i>International Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961)	4,5,23
<i>Knox v. Service Emps. Int'l Union</i> , 567 U.S. 298 (2012)	7,11
<i>Lehnert v. Ferris Faculty Ass'n</i> , 500 U.S. 507 (1991)	34,35

	Page(s)
<i>Locke v. Karass</i> , 555 U.S. 207 (2009)	7
<i>Minnesota State Bd. for Cmty. Colls. v. Knight</i> , 465 U.S. 271 (1983)	21
<i>Nat’l Aeronautics & Space Admin. v. Nelson</i> , 562 U.S. 134 (2011)	31
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976)	17
<i>Navy Charleston Naval Shipyard v. Federal Labor Relations Auth.</i> , 885 F.2d 185 (4th Cir. 1989)	26
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932)	33
<i>Oil Workers v. Mobil Oil Corp.</i> , 426 U.S. 407 (1976)	25
<i>Public Workers v. Mitchell</i> , 330 U.S. 75 (1947)	32
<i>Railway Clerks v. Allen</i> , 373 U.S. 113 (1963)	5
<i>Railway Employees’ Department v. Hanson</i> , 351 U.S. 225 (1956)	5
<i>Shelby County v. Holder</i> , 133 S. Ct. 2612 (2013)	3
<i>United States v. International Bus. Machs. Corp.</i> , 517 U.S. 843 (1996)	11
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994)	31,32
Laws	
<i>Federal</i>	
Ch. 1220, 64 Stat. 1238 (1951)	4
5 U.S.C.	
§ 7106(a)(1)	26
§ 7131	26
29 U.S.C. §§ 151-169	4

	Page(s)
45 U.S.C. § 151 et seq.....	3
<i>State</i>	
Del. Code tit. 19, § 1301	17
Fla. Stat. § 447.201.....	17
Ill. Comp. Stat.	
ch. 5, 315/2.....	13
ch. 5, 315/6.....	8
Iowa Code § 20.1.....	17
Kansas Stat. § 75-4321.....	17
Mich. Comp. Laws § 423.210	26
N.Y. Civ. Serv. Law § 200	17
Neb. Revised Stat.	
§ 48-802.....	17
§ 81-1370.....	17
Or. Rev. Stat. § 243.656.....	17
Vt. Stat. Ann., tit. 3, § 901	18
Wis. Stat.	
§ 111.81.....	26
§ 111.85.....	27
§ 111.845.....	27
Miscellaneous Authorities	
AFSCME, <i>Steward Handbook</i> (2013), at https://tinyurl.com/AFSCME-StewardHandbook ...	20
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INTEREST OF THE AMICI STATES

Every day, millions of state and local government employees across the country perform varied functions in the service of varied communities. There is no one-size-fits-all approach for the government employers tasked with managing them. What works to attract and retain police officers in a small rural community is vastly different from what is required to attract and retain sanitation workers in a large urban area, or public school teachers in the suburbs.

Accordingly, this Court has long recognized that States' judgments about how best to manage their workforces warrant deference. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* held in relevant part that States may permit collective-bargaining arrangements under which state and local government employees who are represented by a union—including those employees who decline to become union members—may be charged an “agency fee” to cover the costs of the workplace services provided by the union. *Id.* at 221-22. In that context, the government is acting as an employer, and the Court has long recognized that the First Amendment permits government employers to adopt reasonable workforce-management policies to promote efficient and effective operation of the public sector workplace, *see, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006).

This amicus brief is filed on behalf of the States of New York, Alaska, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of

Columbia.¹ Amici States employ a wide range of different approaches for managing their workforces, but all have a significant interest in preserving the flexibility to structure public-sector labor relations that *Abood* allows.

As *Abood* recognized, the task of balancing the potentially divergent interests of public employers, public employees, and the public is delicate and difficult. And the stakes are high. In the decades before *Abood*, many States faced paralyzing public-sector strikes and labor unrest that jeopardized public order and safety. The relative success of state labor-relations systems in preserving public-sector labor peace should not be mistaken for evidence that the leeway afforded by *Abood* is no longer needed. To the contrary, that success is evidence that *Abood* works because it confirms that states and local governments have used the flexibility allowed by *Abood* to adopt policies best tailored to meet their needs in achieving labor peace. That flexibility is no less critical today than when *Abood* was decided. Now, as before, labor peace secures the uninterrupted function of *government itself* and is a necessary precondition for the secure and effective provision of government services.

Amici States also have a substantial interest in avoiding the vast disruption in state and local labor relations that would occur if the Court were now to overrule *Abood*'s approval of public-sector collective-bargaining arrangements utilizing agency-fee rules. That ruling is the foundation for thousands of contracts

¹ The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "Amici States."

involving millions of public employees in twenty-three States and the District of Columbia.

Aboud is permissive, not mandatory. Voters and elected officials in each State—including the States that support petitioner here—remain free to decide what policies should apply in public-sector labor relations for their communities. Petitioner and his amici should not be permitted to constrain those options by constitutionalizing a single approach to public-sector labor relations for all state and local governments nationwide. As this Court has recognized, the Constitution permits States “broad autonomy in structuring their governments” out of respect for the “integrity, dignity, and residual sovereignty of the States” and to “secure[] to citizens the liberties that derive from diffusion of sovereign power.” *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

STATEMENT OF THE CASE

A. This Court’s Longstanding Recognition That Private Employers May Require Employees to Fund the Workplace-Related Activities of a Union Designated to Act as Their Exclusive Representative

Labor-relations law in the United States has long been based on a model of exclusive representation accompanied by agency-fee authorization. The first federal law guaranteeing workers the right to organize was the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq. Enacted in 1926 after decades of labor unrest in the railroad industry, the RLA enabled railroad workers to select a union that would serve as

their exclusive representative in dealing with management, and imposed a corresponding duty of fair-representation on the union to represent all employees in good faith and without discrimination. See *Burlington N. R.R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 444 (1987); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961). The RLA was later expanded to specifically authorize “union-shop” arrangements that required employees to join the union designated as their exclusive-bargaining representative and to pay an “agency fee,” as a condition of continued employment. See Ch. 1220, 64 Stat. 1238 (1951) (amending 45 U.S.C. § 152).

Congress adopted a similar model in enacting the much broader National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, the federal statute that comprehensively regulates labor relations for most employees in the private sector. As with the RLA, Congress sought to end labor strife and to reduce the need for labor strikes by encouraging collective bargaining. And Congress once again identified exclusive-representation collective bargaining as the best model for achieving labor peace. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). The NLRA also authorized “agency shop” agreements that permitted employees to choose not to join the union that represented them, but required all represented employees to pay fees to the union for the collective-bargaining assistance and other workplace-related services that those employees received. See *Communications Workers of Am. v. Beck*, 487 U.S. 735, 738 & 744-45 (1988).

In a series of decisions beginning with *Railway Employees' Department v. Hanson*, this Court construed

the “union shop” and “agency shop” provisions of the RLA and NLRA as requiring only financial support for an employee-selected union, not compelled union membership by objecting employees. 351 U.S. 225, 238 (1956). This Court also determined that compulsory fees must be limited to compensating the union for actual collective bargaining and related activities, and could not be used to fund unrelated political lobbying. With those limits in place, the Court rejected claims that the First Amendment prohibited government legislation authorizing unions to impose a mandatory financial obligation on represented employees who chose not to join the union, to defray the union’s costs for collective bargaining and other workplace-related activities germane to labor-management relations. *See Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Street*, 367 U.S. at 749.

B. This Court’s Determination in *Abood* That States May Adopt Labor-Management Policies Similar to Those That Have Proved Effective in the Private Sector

In *Abood*, this Court recognized the important state interest in avoiding labor strife that could disrupt government operations and programs. The Court confirmed that States, acting as employers, should not be deprived of the ability to pursue labor peace and stability in the public workforce by adopting labor-management policies—such as exclusive-representation collective-bargaining funded through agency-fees—that federal law has long allowed private employers to utilize. *See* 431 U.S. at 229-33.

Abood involved a First Amendment challenge to a Michigan statute that authorized collective bargaining for local public school teachers under the same

exclusive-representation, agency-fee model authorized by federal law for the private sector. *Id.* at 212-14, 223-24. This Court, in rejecting that challenge, noted that government entities have a strong interest in providing for exclusive representation in light of “[t]he confusion and conflict that could arise” if government employers had to reach multiple, potentially varying agreements with different unions. *Id.* at 224; *see id.* at 220. And the Court further observed that the union’s “tasks of negotiating and administering a collective-bargaining agreement . . . often entail expenditure of much time and money.” *Id.* at 221. The Court recognized that agency fees address the inherent “free rider” problem created by exclusive representation: that is, employees who are guaranteed union representation may decline to share in the costs incurred by the union, creating the risk that unions will be underfunded and unable to fulfill their intended duties. *Id.* at 221-22.

Abood acknowledged that public-sector unionization was controversial as a policy matter and that there was widespread debate and disagreement about the utility of adopting private-sector models to manage public-sector workplaces. *Id.* at 224-25, 229. Partly for that reason, *Abood* deferred to state judgments about appropriate workforce policies to achieve stable public-sector labor relations. The Court noted that the “ingredients” of labor peace and stability were too numerous, complex, and context-dependent for judges to second-guess the wisdom of particular state choices. *Id.* at 225 n.20 (quoting *Hanson*, 351 U.S. at 233-34).

Abood and multiple later cases establish that the First Amendment permits agency fees to be imposed on public employees who do not wish to join the union

designated as their exclusive representative, so long as objecting employees are not charged for political or ideological activities unrelated to the union’s workplace services. *See, e.g., Locke v. Karass*, 555 U.S. 207, 213 (2009); *see also Knox v. Service Emps. Int’l Union*, 567 U.S. 298, 302 (2012). To be sure, the Court has concluded that a State’s desire to secure labor peace and prevent free-riding may not justify the imposition of an agency-fee requirement on persons who are not “full-fledged public employees.” *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014). But the Court has recognized that different considerations are implicated when a State—acting in its capacity as an employer—devises rules for managing its own workers. *Id.* at 2634.

C. Abood’s Centrality to Public-Sector Workforce Management

Abood’s framework is now central to state labor law. See Appendix, Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative. Forty-one States, the District of Columbia, and Puerto Rico authorize collective bargaining for at least some public employees, and all adopt the federal model of exclusive representation.² Twenty-three States and the District of Columbia also authorize agency fees (also known as

² These States are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. See Appendix.

“fair share” fees) to provide a mechanism for ensuring that represented employees contribute to the costs of workplace-related services that their exclusive representative provides. The majority of these statutes make agency-fee requirements a permissible subject of bargaining and authorize (but do not require) agency-fee provisions as part of public-sector collective-bargaining agreements.³ Many state agency-fee statutes were enacted in specific reliance on *Abood*.⁴

D. Petitioner’s Challenge

Illinois law permits public employees to select a union to act as their exclusive representative and authorizes the union to negotiate the inclusion of an agency-fee provision—called a “fair share” clause—in its collective-bargaining agreement to cover “the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment.” 5 Ill. Comp. Stat. 315/6(e); *see also id.* § 315/6(c). Petitioner Mark Janus is employed by the State of Illinois in a bargaining unit that is exclusively represented by Respondent AFSCME

³ These States are Alaska, California (for local and state employees), Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia. See Appendix.

⁴ *See, e.g.*, N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*); *see also* Sally Whiteside, Robert Vogt, & Sherryl Scott, *Illinois Public Labor Relations Laws: A Commentary and Analysis*, 60 Chi.-Kent L. Rev. 883, 924 & n.264 (1984) (Illinois Public Labor Relations Act was drafted by the Illinois Legislature to comport with *Abood*).

Council 31; the collective bargaining agreement covering his employment contains a fair-share clause to help the union defray its costs of collective bargaining and other workplace services. (Joint App'x ("J.A.") 68, 124.) Petitioner is not a member of the union and objects to paying his fair-share fee because he disagrees with the union's "one-sided politicking for only its point of view" and believes the union fails to "appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." (J.A. 87.)

SUMMARY OF ARGUMENT

In the 1960s and 1970s, many States experienced devastating public-sector work stoppages that disrupted the delivery of critical government services. In the wake of those disruptions, States reconsidered how best to manage their public workforces to avoid labor unrest. Many States adopted laws permitting public employees to elect an exclusive representative; some States also adopted laws permitting agency-fee arrangements to ensure adequate funding for the exclusive representative.

Aboud permitted States flexibility to make these judgments, and that flexibility should be preserved. As Amici States' experiences have shown, there is no one-size-fits-all approach to managing the millions of state and local public employees across the country. For some public employers, the services of an exclusive representative funded by agency fees may be unnecessary. For others, those services and the agency fees that support them may be critically important to ensure the delivery of core government services. Jurisdictions can disagree about how best to achieve

labor peace, and this Court should continue to respect those judgments as it did in *Abood*.

ARGUMENT

THE STATES HAVE A SIGNIFICANT AND VALID INTEREST IN PRESERVING *ABOOD*

Abood recognized that States have a significant and valid interest in being able to employ the models of collective bargaining that have proved successful for avoiding strikes in the private sector. And *Abood* deferred to the judgments of States that have chosen to permit use of the core elements of private-sector collective bargaining—exclusive representation and agency fees—to manage labor relations with state and local government employees.

In the decades since *Abood*, States have relied substantially on that decision when crafting their public-sector labor-management systems. Petitioner’s attack on *Abood* and its approval of public-sector agency-fee rules threatens the labor-relations systems of twenty-three States and the District of Columbia.⁵

Principles of *stare decisis* have special force where States have relied on this Court’s precedent in structuring their laws, because the resulting statutes would be invalidated if the Court’s precedent is overruled or altered. *See, e.g., Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785-86 (1992); *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202-03 (1991). Here, the *Abood* rule is deeply

⁵ See *supra* n.2, and accompanying Appendix.

entrenched, and is the foundation for thousands of contracts involving millions of public employees across the Nation. Even in constitutional cases, the doctrine of *stare decisis* carries such persuasive weight that this Court has “always required . . . special justification” for overruling settled precedent. *See, e.g., United States v. International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (quotation marks omitted).

Petitioner identifies no special justification for overruling *Abood*. Rather, he bases his call to revisit *Abood* on decisions declining to extend *Abood*’s reasoning to new and different contexts. For example, petitioner relies substantially on *Knox v. Service Employees International Union*, which holds that the First Amendment prohibits a union from charging the non-members it represents in collective bargaining a “special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set.” 567 U.S. at 303; *see also id.* at 318, 322. Petitioner also relies heavily on *Harris v. Quinn*, which holds that *Abood*’s rationale does not apply where the government seeks to impose an agency-fee requirement on persons who are not “full-fledged public employees,” 134 S. Ct. at 2638. Neither of those decisions addresses the different considerations that are implicated when a State—in its capacity as an employer—devises collective-bargaining rules for its own employees. *See Id.* at 2634; *Knox*, 567 U.S. at 311-12.

I. Agency Fees Are Important to Maintaining the Labor-Management Model That Many States Rely on to Ensure the Effective and Efficient Provision of Services to the Public.

After confronting devastating public-sector work stoppages that caused disruptions in critical government services, many States decided to authorize public-sector employees to select an exclusive union representative, recognizing—as private-sector employers had long understood—that such a representative could provide services in the workplace that would minimize labor unrest. Many States also decided to permit agency-fee arrangements to fund those services, having determined that a secure funding source was important to ensure the union’s ability to provide the full range of contemplated workplace services. Even some States that do not generally permit agency-fee arrangements for public-sector unions—including Michigan, which supports petitioner here—have made exceptions for police and firefighter unions in recognition of the especially destructive nature of labor unrest in those fields. These state experiences confirm that exclusive representation supported by agency fees can be an indispensable tool to protect the public from harmful disruptions to government services and programs, and foster efficiency in government workplaces.

A. State Laws Authorizing Public-Sector Collective Bargaining Were Adopted in Response to Devastating Strikes and Labor Unrest by State and Local Government Employees.

Public-sector collective-bargaining laws were enacted to protect the public from the harmful effects

of public-sector work stoppages and other disruptions in government operations. *See* David Lewin et al., *Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 13 (Mar. 16, 2011). Although strikes and other work disruptions by public workers are now rare, they were common at the time that the majority of States first adopted public-sector collective-bargaining laws. *See, e.g.,* David Ziskind, *One Thousand Strikes of Government Employees* 187 (1940) (documenting 1,116 strikes by employees in all sectors of government service through 1940). Much of the labor unrest occurred because state and local workers wanted “a greater voice” in determining the terms of their employment, and lacked other means to air grievances and settle disputes with management. *See* N.Y. Governor’s Comm. on Pub. Emp. Relations, *Final Report* 42, 55 (1966). States thus realized “that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment.” *Id.* at 9.⁶

Between 1965 and 1970, for example, there were over 1,400 separate work-stoppages by state and local public workers, involving well over a quarter million employees. *See* Richard Kearney, *Labor Relations in the Public Sector* 226-27 (3d ed. 2001); *see also* Morris

⁶ *See also* Pa. Governor’s Comm’n to Revise the Pub. Emp. Law, *Report and Recommendations* 6 (1968) (concluding that the “inability” of public employees to “bargain collectively has . . . led to more friction and strikes than any other single cause”); 5 Ill. Comp. Stat. 315/2 (declaring aim to establish “an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act”).

Horowitz, *Collective Bargaining in the Public Sector* 115 (1994). In the 1960s, “strikes by public employees” in New York alone were “too numerous to recall or record”; they included “strikes by transit workers, firemen, sanitation employees, teachers, ferry workers, [and] on other occasions, social workers, practical nurses, city-employed lifeguards, doctors and public health nurses, etc.” *DiMaggio v. Brown*, 19 N.Y.2d 283, 289 (1967).

Walkouts and other work stoppages occurred despite state laws that directly prohibited public employees from striking or punished them for doing so. See, e.g., *Association of Surrogates & Sup. Ct. Reporters v. State*, 78 N.Y.2d 143, 152-53 (1991) (recounting New York’s historical experience). The States found that direct prohibitions on strikes were ineffective and difficult to enforce, and failed to address the root causes of labor unrest. And it quickly became clear that labor unrest in the public sector had the potential to inflict vast public harm and disruption.

- In Baltimore, a 1974 strike by police officers, jail guards, and other municipal workers resulted in widespread “looting, shooting, and rock-throwing,” and “fires ran 150 percent above normal.” See Md. Dep’t of Labor, Licensing & Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 5 (1996) (recounting 1974 strike). State troopers had to patrol the streets to keep the peace. See Ben Franklin, *Troopers Patrol Baltimore to Bar Renewed Unrest*, N.Y. Times, July 13, 1974, at 1.
- In 1968, a series of public-school teacher walkouts in New York City resulted in more

than one million children being deprived of education for thirty-six school days. Parents had to physically occupy public schools to keep the schools open. Many children were denied key services provided through public schools. For example, while the city typically provided 400,000 free daily lunches to schoolchildren, only 160,000 were provided during the teacher strikes. *See Strike's Bitter End*, Time, Nov. 29, 1968, at 97.

- Between 1940 and 1980, strikes by public transport workers in Cleveland, Philadelphia, Atlanta, Chicago, Los Angeles, and New York City caused vast disruptions. *See Atlanta Buses Running Again*, N.Y. Times, June 25, 1950, at 50 (Atlanta's transit strike); *Bus Strike Imperils Chicago's Transit*, N.Y. Times, Aug. 26, 1968, at 25 (Chicago strike); *Strike Halts Most Public Transit Runs in Philadelphia*, N.Y. Times, Mar. 26, 1977, at 8 (Philadelphia strike); *Transit Workers Strike Los Angeles Area Bus System*, N.Y. Times, Aug. 27, 1979, at A15 (Los Angeles and Cleveland strikes). In 1966, private businesses suffered over \$100 million in losses daily during a twelve-day transit strike in New York City. *See Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33. Moreover, because people could not travel to hospitals to donate blood, the city's blood supply fell to a twenty-year low, causing the postponement of nonemergency surgeries. *Id.*
- During this same period, multiple strikes by sanitation workers caused uncollected trash to pile up on city streets, threatening a serious public-health emergency in many cities. *See*,

e.g., *Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 33; *see also* Joseph Sullivan, *Mediators Seek to Settle Newark Sanitation Strike*, N.Y. Times, Dec. 29, 1976, at 55 (discussing strike in Newark, N.J.); Ziskind, *supra*, at 91-94 (recounting strikes by sanitation workers across the country).

- In 1965, a strike by 8000 welfare workers in New York City forced two-thirds of the city's welfare centers to close for twenty-eight days and led to the interruption of services to more than 500,000 welfare recipients, many of whom were children or elderly. *See* Joshua Freeman, *Working-Class New York: Life and Labor Since World War II* 205-06 (2001); *see also* Emanuel Perlmutter, *Welfare Strike Due in City Today In spite of Writ*, N.Y. Times, Jan. 4, 1965, at 1.
- Strikes by workers at state mental hospitals also interrupted critical care for patients with mental illness. In 1968, a strike by mental-health workers at four state-run hospitals in New York forced patients to be sent home and led to a reduction in psychiatric treatment and rehabilitation services. *See* Ronald Donovan, *Administering the Taylor Law* 89-90 (1990); Damon Stetson, *Fourth Hospital Moves Patients*, N.Y. Times, Nov. 23, 1968, at 1. Care was likewise interrupted in Ohio in 1974 when half of the workers at the State's mental hospitals went on strike. *See* Louise Cooke, *Workers' Unrest Interrupts Municipal Service*, St. Petersburg Times, July 15, 1974, at 4-A.

As these examples illustrate, the harm of unresolved public-sector labor disputes can be

catastrophic. Public services such as police and fire protection, sanitation, and public-health tend to be provided uniquely by state and local governments, and the absence of those services threatens serious irreparable harm to the public. *See National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Even where private substitutes exist, state and local programs are often made available at no cost (such as public education) or are heavily subsidized (such as public transportation). As a result, disruption of these services especially threatens the most vulnerable citizens—low-income persons or those who have a special need for government support. The harms of public-sector labor breakdowns are thus difficult to predict or to control, and even short-term disruptions in particular services can have vast social and economic spillover effects.

B. In Responding to These Crises, States Looked to the Labor-Management Model That Had Already Proven Effective in the Private Sector under Federal Labor Law.

In the wake of these work stoppages, States sought to implement workforce-management strategies that would minimize the potential for interruption of government services.⁷ *See, e.g.*, N.Y. Governor's

⁷ *See, e.g.*, Del. Code tit. 19, § 1301 (collective-bargaining system for public employees is designed “to protect the public by assuring the orderly and uninterrupted operations and functions” of government); Fla. Stat. § 447.201 (same); Iowa Code § 20.1 (same); Kansas Stat. § 75-4321(3) (same); Neb. Revised Stat. §§ 48-802, 81-1370 (same); N.Y. Civ. Serv. Law § 200 (same); Or. Rev. Stat. § 243.656(3) (permitting collective

Comm., *supra*, at 9, 42. In undertaking this task, States understandably sought guidance in solutions that had already proven effective in minimizing labor unrest in the private sector—that is, by permitting employees to select an exclusive representative to deal with management.⁸ In fact, nearly every State has adopted the exclusive-representation model that Congress permitted for private employees. See Appendix. Many States did so only after careful study by expert commissions charged with examining the underlying reasons for public-sector labor unrest and devising appropriate solutions.⁹

bargaining safeguards “the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest”); Vt. Stat. Ann., tit. 3, § 901 (state employees’ labor relations act aims “to protect the rights of the public in connection with labor disputes”).

⁸ See, e.g., Harry Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885, 932 (1973) (noting “accelerating” trend among States towards using “private sector principles to guide the development of labor relations in the public sector”); Russell Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 Mich. L. Rev. 891, 897, 899, 901, 904 (1969) (noting that various state commissions relied on NLRA and other private-sector models in offering recommendations for public-sector labor relations policy in the State).

⁹ See, e.g., Milton Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor’s Commission, 1966-1967*, 21 Indus. & Lab. Rel. Rev. 541, 549 (1968); see also Conn. Interim Comm’n to Study Collective Bargaining by Municipalities, *Final Report* 7-8 (1965); Md. Dep’t of Labor, *supra*, at 3-6; Mass. Legis. Research Council, Report Relative to Collective Bargaining and Local Government Employees 8-11 (1969); Mich. Advisory Comm. Pub. Emp. Relations, *Report to Governor* (1967), reprinted in Gov’t Emp. Relations Report, No. 181 (Feb. 28, 1967); N.J. Pub. & Sch.

1. An exclusive representative can provide services in the workplace that reduce labor unrest and yield other benefits for employers.

As in the private sector, exclusive representation can advance a public employer's interest in maintaining workforce stability by providing services to workers that minimize labor unrest. One such service, of course, is collective bargaining. Giving workers a voice in the agreement that will govern the terms and conditions of their employment reduces the likelihood that they will resort to strikes and work stoppages to achieve their demands.¹⁰ Another such service is "grievance adjustment." *See Abood*, 431 U.S. at 225-26. Grievance systems vary among workplaces, but the exclusive representative's central role in administering those systems does not. The union's involvement begins before any grievance is filed, by communicating directly with workers about their concerns in the workplace. The union-trained shop steward, who typically fills this role, thus "plays a vital role in effecting peaceful union-management relations" by serving as "a front-line troubleshooter."

Emps.' Grievance Procedure Study Comm'n, *Final Report* 6, 15-17 (1968); N.Y. Governor's Comm., *supra*, at 34-35, 41-42; Pa. Governor's Comm., *supra*, at ii, 1.

¹⁰ *See, e.g.,* Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 530 (1994) (finding strike incidence highest where parties have "neither a duty to bargain nor dispute-resolution procedures"); Richard Freeman & James Medoff, *What Do Unions Do?*, at 7-10 (1984) (articulating "voice" function of union representation).

Carlton Snow & Elliot Abramson, *The Dual Role of the Union Steward: A Problem in Labor-Management Relations*, 33 Syracuse L. Rev. 795, 795 (1982). The steward investigates worker complaints, organizes and documents them, and then initially presents worker grievances to management. See AFSCME, *Steward Handbook* 21-39 (2013).¹¹ The union also typically provides representation throughout the grievance process. Professional union staff appear with the worker for meetings with management and prepare written submissions and oral presentation on the worker's behalf. If the dispute proceeds to formal arbitration or judicial proceedings, the union representative provides services similar to those that an attorney would provide in traditional civil litigation.

Union participation in the grievance process is an obvious benefit to workers. It increases the likelihood of a positive outcome, relieves the worker of a significant financial burden, and provides support through what can be a stressful experience.

But States' experiences show that a union's participation in grievance adjustment is also a significant benefit for employers. The existence of an advocate for workers who is independent of management means that workers are likely to communicate their concerns more freely, which advances organizational efficiency by reducing employee turnover and

¹¹ See also Paul Clark, *The Role of the Steward in Shaping Union Member Attitudes toward the Grievance Procedure*, 13 Lab. Stud. J. 3, 3-6 (Fall 1988); Glenn Miller & Ned Rosen, *Members' Attitudes Toward the Shop Steward*, 10 Indus. & Lab. Rel. Rev. 516, 517 (1957) (noting steward's responsibility to "convey information to the members" and to convey "to the officers the attitudes and point of view of members").

promoting workplace productivity. See Freeman & Medoff, *supra*, at 103-07, 169; see also E. Edward Herman, *Collective Bargaining and Labor Relations* 283-86 (3d ed. 1992). Employers benefit from facing a single advocate, whose experience with the workplace and institutional knowledge of the collective-bargaining agreement help facilitate timely and satisfactory dispute resolution. And by serving as the gatekeeper for worker disputes, a union alleviates the administrative burden of organizing, prioritizing, and raising issues in the workplace that would otherwise fall to the employer.

In addition to its role in the grievance process, an exclusive representative provides important services to workers and employers alike through its day-to-day administration of the collective-bargaining agreement. This may sometimes occur through formal means, such as by participating in joint labor-management committees formed under the auspices of a collective-bargaining agreement. (*E.g.*, J.A. 143-144.) In the experience of many States, such committees are an important and effective tool for improving public services. See, e.g., U.S. Dep't of Labor Task Force on Excellence in State and Local Government through Labor-Management Cooperation, *Working Together for Public Service: Final Report*, i, 2 (1996) ("*Task Force Report*").¹² For instance, in Connecticut, a labor-management committee created a workplace safety

¹² See also E. Edward Herman, *Collective Bargaining and Labor Relations* 311-12 (2d ed. 1987); Freeman & Medoff, *supra*, at 169; *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291-92 (1983) (recognizing state's "legitimate interest" in system of exclusive representation because it ensures that decisions by public employers will be based on "majority view" of its employees).

program that reduced workers' compensation expenses by five-million dollars through a forty-percent reduction in workplace injuries. *Id.* at 15. In Seattle, municipal government officials and a union of public-employee sewer workers worked collaboratively to identify a number of significant cost savings in the maintenance and repair of the City's underground transit tunnel, allowing the city to achieve concrete cost savings while also improving the quality of its transportation infrastructure. *Id.* at 19-20. And in New York City, local government and the sanitation workers' union negotiated to reduce the number of sanitation workers operating a sanitation truck, permitting the city to lower its labor costs by adopting cost-saving technologies. Lewin, *supra*, at 17. Indeed, particularly when faced with a looming economic crisis, government and unions have worked together to develop solutions that are mutually beneficial and ensure the continued provision of indispensable government services.

Administering the collective-bargaining agreement also involves a full range of informal services that the union provides in the workplace every day. These services include core human-resource functions like: (i) advising employees about their pay, benefits, or other contract rights, through published union bulletins and in in-person meetings; (ii) communicating with management to resolve errors in the processing of employee benefits, such as incorrect payroll deductions, leave accruals, or medical benefits reimbursements; (iii) reviewing management's day-to-day personnel decisions, such as setting shift schedules and granting leave requests, for compliance with the collective-bargaining agreement; and (iv) coordinating workplace inspections and worker health and safety

trainings mandated by law or the collective-bargaining agreement. The union's informal support of workers in the workplace plays an important role in improving their day-to-day experience and reducing the possibility that daily resentments will metastasize into full-scale labor unrest.

2. Many States have determined that agency fees help them secure the full benefits of exclusive representation.

In sum, an exclusive representative provides a wealth of services beyond contract bargaining, and a public employer could rationally conclude that those services can be an important ingredient in minimizing labor unrest and assuring a stable and effective public workforce. To ensure that an exclusive representative is able to provide its services in the workplace, many States' laws permit public employers—state or local—to include agency-fee arrangements in their collective-bargaining agreements. See Appendix. These laws typically do not *require* any public employee to pay an agency fee, or *require* any public employer to include an agency-fee arrangement in its contracts. Rather, States that have enacted such measures have decided to give government employers the flexibility to make that choice based on their own circumstances.

As those States have recognized, agency fees can be important to developing a collaborative labor-management relationship that promotes labor peace and ensures the delivery of high-quality services. First, agency fees are an effective way to address the free-rider problem long recognized to exist in this context. See, e.g., *Street*, 367 U.S. at 765-66.

A union needs significant resources to provide the full range of workplace services that States deem helpful for minimizing labor unrest. *See Abood*, 431 U.S. at 221 (recognizing that unions require “[t]he services of lawyers, expert negotiators, economists, and a research staff” to negotiate and administer a collective-bargaining agreement). But experience shows that many employees—even employees who would otherwise join the union—will choose not to pay for such services if they have the option to receive them without charge.¹³ This free-rider problem is particularly acute for governments with a history of labor unrest, as it erodes the union’s ability to provide the very services that government deems important to securing labor peace. State experiences show that a well-funded union is a more stable advocate for workers and that dealing with such a partner “lead[s] to greater labor peace and stability.” Md. Dep’t of Labor, *supra*, at 19.

Second, free-riding may itself create labor unrest, in light of the “resentment spawned by ‘free riders.’” *Beck*, 487 U.S. at 750. Without agency fees, union members would be required to pay more in union dues—and take home less pay than their colleagues—to subsidize the cost of providing workplace services to non-members. Such inequities create divisions in the workplace that corrode cohesion and morale. *See Ellis v. Railway Clerks*, 466 U.S. 435, 452 (1984). Agency fees eliminate this problem by ensuring that no

¹³ See Richard Kearney & Patrice Mareschal, *Labor Relations in the Public Sector* 79 (5th ed. 2014); see also Jeffrey Keefe, *On Friedrichs v. California Teachers Association: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation* 4 (Econ. Pol’y Inst. Briefing Paper No. 411, 2015).

employees receive “the benefits of union representation without paying for them.” *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976).

Furthermore, agency fees address the problems of free-riding with only minimal impact on workers’ rights of expression and association. Agency-fee arrangements do not require any worker to join a union or donate to a union’s political or ideological activities. Nor do they restrict an employee’s speech in any way. An employee remains free to speak against a union’s political agenda or negotiating positions, and to oppose the government officials responsible for negotiating the union’s contract. Agency fees merely require an employee to pay for services rendered. Thus, in practice, Amici States’ experience is that the “grievous First Amendment injury,” Pet. Br. 12, of which petitioner warns is not a valid practical concern.

Petitioner argues that an exclusive representative does not need mandatory agency fees to function because it can generate sufficient operating funds through other means. See Pet. Br. 37-43. The evidence is to the contrary. See *supra* n.13. In any event, this argument fails to recognize that—based on their different experiences—jurisdictions can reasonably disagree about an exclusive representative’s proper role in the workplace and the appropriate method to fund those activities.

For example, federal law permits federal public-sector workers to elect a union to serve as their exclusive representative without any attendant requirement that workers join or financially support the union, but that law also severely restricts the scope of issues that can be collectively bargained, and exempts key topics that would be covered by broader

state collective-bargaining regimes, such as wages and number of employees. *See* 5 U.S.C. § 7106(a)(1); *see also* *Navy Charleston Naval Shipyard v. Federal Labor Relations Auth.*, 885 F.2d 185, 187 (4th Cir. 1989). Having prescribed a restricted role, a jurisdiction could rationally conclude—as does the federal government—that agency fees are not necessary to guarantee the exclusive representative’s proper functioning. This is especially true because the federal government funds union activities through alternate means, for instance by compensating federal employees for time spent performing union-related functions. *See* 5 U.S.C. § 7131; *see also* U.S. Office of Pers. Mgmt., *Official Time Usage in the Federal Government, Fiscal Year 2014*, at 3 (2017).

Likewise, many jurisdictions with so-called “right-to-work” laws—that is, laws permitting exclusive representation but prohibiting mandatory agency fees—lack the history of labor unrest and disruption to government services that many States experienced before *Abood*. *See* Kearney, *supra*, at 65. A jurisdiction that has not experienced a history of public-sector labor unrest could rationally decide not to fund an exclusive representative’s services through mandatory agency fees. But that policy choice does not refute the benefits of different policy choices that other jurisdictions have made based on their own different experiences. Even jurisdictions that do not authorize agency fees for most public-sector workers recognize that a different policy might be appropriate in certain circumstances. For instance, Michigan and Wisconsin prohibit agency fees for some public unions but exempt local police and firefighter unions from that prohibition as a matter of public safety. *See* Mich. Comp. Laws § 423.210(3)-(4); Wis. Stat. §§ 111.81(9),

111.845, 111.85; *see also* Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011) (noting Wisconsin governor's comment, in enacting the exemption for public safety employees, that "there's no way we're going to put the public safety at risk"). Thus even the practices of petitioner's own amici call into question petitioner's proposed one-size-fits-all approach.

Aboud confirmed that States should have the leeway to adopt the labor-relations systems best suited to their individual circumstances and policy judgments. And States have relied on that flexibility. States have enacted more than one hundred statutes governing state and local labor relations, augmented by local ordinances, court decisions, attorney general opinions, and executive orders. *See* Kearney & Mareschal, *supra*, at 64-66.

Petitioner attempts to deprive States, and ultimately voters, of the ability to judge for themselves what labor-management policies are best suited for their public workforces. States like Illinois authorize agency-fee arrangements because a majority of duly elected representatives determined that affording government employers that flexibility was sound policy. Indeed, legislatures in Michigan and Wisconsin—two of petitioner's amici—also decided that, in some situations, public employers must have the ability to include agency-fee arrangements in their collective-bargaining agreements. This Court should view skeptically the efforts of these States and of petitioner himself to subvert the democratic decisions of voters by seeking to constitutionalize a contrary policy of their own preference.

C. Petitioners' *Amici* Misrepresent the Role of Public-Sector Collective Bargaining in Municipal Bankruptcies.

The States supporting petitioner attempt to justify a constitutional ban on agency fees by claiming that public-sector collective bargaining creates heightened risks of municipal bankruptcy. Br. of Amici Curiae States of Michigan, et al. in Support of Pet. ("Pet. States Amici") 11-19. There is, however, no clear correlation between collective bargaining and a municipality's fiscal health.

First, the vast majority of municipalities across the country have permitted collective bargaining for public-sector employees since the mid-1970s, *see* Kearney & Mareschal, *supra*, at 64-66, but only a very small percentage of municipalities—two-hundred-and-sixty-four in total—have filed for bankruptcy after that time, *see* Chapman & Cutler, LLP, *Primer on Municipal Debt Adjustment—Chapter 9: The Last Resort for Financially Distressed Municipalities*, app. C-1 (2012) (municipal bankruptcies between 1980 and 2012). And a number of those bankruptcies occurred in States that do not permit collective bargaining by state and local government employees or severely restrict it. Texas, for example, ranks third among all States in municipal bankruptcies but does not permit public-sector collective bargaining except by police or firefighters. *See id.* at app. C-2; *see also* Kearney & Mareschal, *supra*, at 66. There is thus nothing to support amici's speculation that it is *collectively bargained* public-sector employee benefits that drive municipal bankruptcies.

Second, municipal bankruptcies occur as a result of a complex mix of factors, often unique to each

locality’s particular history and circumstances, and cannot be explained simply as the product of high public-sector labor costs. Indeed, it is traditionally a decrease in revenues that causes a municipality to seek bankruptcy protection. The bankruptcy of Detroit, for instance, is typically attributed to a myriad of factors that depressed municipal tax receipts, such as declining population, poor economic performance, and reductions in state financial support. *See, e.g.,* Wallace Turbeville, *The Detroit Bankruptcy* 13-21, 33-34 (Dēmos Rep. 2013). And a similar story is true in Stockton and San Bernadino, California, whose financial distress and ultimate bankruptcies were driven largely by a unique vulnerability to the “double whammy of unbridled speculation, followed by steep losses of property value” as a result of the 2008 recession. Tracy Gordon et al., *Exuberance & Municipal Bankruptcy: A Case Study of San Bernardino, Stockton & Vallejo, CA* 15-16 (Goldman Sch. Pub. Pol’y Working Paper Series May 2017 draft).¹⁴ Amici’s simplistic narrative gloss that high public-sector labor costs cause municipal bankruptcies thus fails to grapple with—and indeed purposely obscures—the diverse causative factors that produced these complicated fiscal incidents.

Amici’s reliance on the purported “public impact” of the cost of public-employee pension plans is also misplaced. *See, e.g.,* Pet. States Amici 13. All States—regardless of whether they authorize collective

¹⁴ *See also* Sydney Evans et al., *How Stockton Went Bust: A California City’s Decade of Policies and the Financial Crisis That Followed* 2 (Cal. Common Sense. Rep. June 2012); The Pew Charitable Trusts, *The State Role in Local Government Financial Distress* 9-11 (July 2013).

bargaining in the public sector—establish the terms and conditions of their public-employee benefit plans by statute. It is the legislature, and not unions, that sets the scope of public-employee pension benefits.

II. Petitioner’s Constitutional Challenge Should Be Rejected.

Petitioner’s attempt to avoid paying his fair share for the services of his exclusive representative is grounded in two mischaracterizations of the nature and effect of agency fees. First, petitioner obscures the fact that agency-fee requirements are conditions of public employment that advance the government’s interest in managing its workforce. Second, petitioner confuses his objection to funding his exclusive representative’s collective-bargaining activities with a broader challenge to all of the services that an exclusive representative provides.

A. The First Amendment Affords Public Employers Flexibility to Manage Their Workforces.

Petitioner’s First Amendment challenge rests centrally on the premise that government may not require a person to support speech absent a compelling interest that is furthered by the narrowest means possible. *See* Pet. Br. 36. But this characterization obscures the fact that agency-fee arrangements are negotiated by the government *acting as an employer to manage its public workforce*. Contrary to petitioner’s contention, such a condition of employment is not subject to “strict” or “exacting” scrutiny under the First Amendment.

This Court has long recognized that the First Amendment permits States to adopt reasonable

workforce-management policies to promote effective government operations, even if those policies impact a public employee’s First Amendment rights. *See, e.g., Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 598-600 (2008); *Garcetti*, 547 U.S. at 417-20; *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality op.). As this Court has explained, the Constitution allows the government flexibility to fulfill its “mission as employer,” *Engquist*, 553 U.S. at 598 (quoting *Waters*, 511 U.S. at 674-75), and does not require that a government’s employment-related measures be “narrowly tailored to a compelling government interest,” *Waters*, 511 U.S. at 674-75; *see also National Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 153-55 (2011).

“[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate” and the government acting “to manage its internal operation[s].” *Engquist*, 553 U.S. at 598 (alteration and quotation marks omitted); *see also Connick v. Myers*, 461 U.S. 138, 143 (1983) (recognizing “the common sense realization that government offices could not function if every employment decision became a constitutional matter”). First, “[t]he government’s interest in achieving its goals as effectively and efficiently as possible” commands greater weight, being “elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” *Waters*, 511 U.S. at 675 (plurality op.). Second, the government’s “reasonable predictions of disruption” are entitled to “substantial weight . . . even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign [the Court’s] review of legislative

predictions of harm is considerably less deferential.” *Id.* at 673.

This Court has on many occasions confirmed that the First Amendment is not a mandate for lesser public efficiency. The Court has explained that when an individual “enters government service,” he or she “must accept certain limitations on his or her freedom,” including limitations that would be imposed in a private employment setting. *Garcetti*, 547 U.S. at 418. These limitations may and often do restrict speech or associational activities that the government could not limit outside of the employment relationship. *See, e.g., Connick*, 461 U.S. at 141 (rejecting employee claim that termination for views expressed in questionnaire distributed to coworkers violated First Amendment); *Public Workers v. Mitchell*, 330 U.S. 75, 99, 101 (1947) (upholding provision of federal statute prohibiting federal employees from active participation in political management or political campaigns).

Abood’s holding—that public employers may adopt a model of collective bargaining that utilizes agency fees in support of exclusive representation—is fully consistent with these principles and with the decisions in which the Court has applied them. *Abood* recognizes that the task of crafting a workable labor-relations system is complex and difficult, and requires balancing numerous potentially conflicting interests in areas where there is widespread debate and no clear answer. *Abood* accordingly does not mandate that any State enact any particular labor-relations law. It leaves States free to devise systems based on their own history and particular policy choices, and it gives voters in each State the ultimate say over changes or amendments to labor policy. *See* 431 U.S. at 224-25 & n.20.

The federal government's recent change of heart is strong proof that this Court should not constitutionalize one approach to public workforce management. For decades, the federal government defended *Abood* and the principle that the First Amendment affords States flexibility to adopt reasonable workplace management policies, even if federal policy was to the contrary. Now, the federal government has apparently changed its mind. But the strength of *Abood*—and of our federal system—is that it creates space for this kind of disagreement. *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). States whose experiences show the value of exclusive bargaining funded by mandatory agency fees should not be constitutionally bound to the federal policy currently in vogue.

B. Petitioner's Challenge Is Overbroad Because It Encompasses Agency Fees for Union Services to Which He Does Not Object.

Petitioner's First Amendment challenge conflates an exclusive representative's collective-bargaining activities—which petitioner challenges as unduly political—with the range of other workplace-related functions that an exclusive representative performs. Petitioner's request for a judgment categorically prohibiting the collection of agency fees for any purpose is therefore overbroad.

This Court recognized in *Abood* that requiring public employees to pay agency fees to cover the costs of an exclusive representative's services could impact employees' First Amendment rights. *See* 431 U.S. at 222. And the Court made clear that government's

interest as an employer justified this First Amendment injury only so long as those fees were not used for “ideological causes not germane to [the exclusive representative’s] duties as collective-bargaining representative.” *Id.* at 235; *see also Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1991). Petitioner seeks in effect to revisit that balancing. Thus, he alleges that he objects to the “positions that AFSCME advocates for in collective bargaining” (J.A. 87) and argues that “bargaining with the government is political speech,” Pet. Br. 10-11. Petitioner’s amici adopt this line of attack, arguing that an exclusive representative’s collective-bargaining activity “necessarily implicates matters of public policy.” Br. for the United States as Amicus Curiae Supporting Pet. 15.

But even if this characterization of public-sector collective bargaining were accurate—and it is not, *see, e.g., AFSCME Resp. Br.* 42-45—petitioner’s objection to funding his exclusive representative’s collective-bargaining activities would not justify his request for a ruling that, as a matter of law, “public employees cannot be forced to pay any union fees whatsoever,” Pet. Br. 61. As discussed above (*supra* Point I.B) an exclusive representative does more than collectively bargain on behalf of workers; the union can provide a range of services in the workplace that help to minimize labor unrest and promote stability in the workforce. Thus, even if petitioner can prove on remand the allegation that his exclusive representative’s collective-bargaining activities are unduly political, that would say nothing about the permissibility of collecting agency fees to cover other expenses of his exclusive representative, which petitioner does not label “political speech.” *See Abood*, 431 U.S. at 236

(political nature of non-chargeable expenses is a fact issue); *see also Lehnert*, 500 U.S. at 513.

Petitioner contends that adjusting grievances “is just as political an act as bargaining for that deal.” Pet. Br. 14. But petitioner’s complaint does not frame an objection to—or even mention—his exclusive representative’s grievance-resolution activities. (*E.g.*, J.A. 87.) And petitioner’s brief does not make a serious effort to substantiate his conclusion that the range of activities encompassed by “grievance-adjustment” constitute speech on matters of public concern. *See Abood*, 431 U.S. at 232. Nor is that conclusion self-evident. There is simply no conceivable speech objection, for instance, to a union’s receipt and investigation of a workplace-related complaint—steps taken long before the union even adopts a substantive position on the merits of a grievance. And this is true both for the vast majority of grievances, which implicate only the rights of the grievant, as well as for grievances with a potentially broader impact. What is more, grievance adjustment is only aspect of the non-collective-bargaining services that an exclusive representative provides. Petitioner does not articulate, either in his complaint or his brief in this Court, any First Amendment objection to paying for an exclusive representative’s informal daily services—for instance, advising workers about dental benefits or inquiring with management about incorrect leave accruals for another coworker.

A public employer could conclude that these services, and the agency fees that support them, are necessary to meet the needs of its workforce and to ensure uninterrupted provision of public services. This Court should respect those judgments and preserve governments’ flexibility to adopt labor-

management policies tailored to the unique circumstances confronting their workforces, as this Court did before in *Abood*.

CONCLUSION

This Court should decline to overrule *Abood*.

Respectfully submitted,

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January 2018

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Appendix

**Survey of State Statutory Authority for Public-Sector
Collective Bargaining by Exclusive Representative***

Alabama	No statutory authority
Alaska <i>Alaska Stat.</i>	<i>Public Employees – §§ 23.40.100, 23.40.110</i>
Arizona	No statutory authority
Arkansas <i>Ark. Code Ann.</i>	<i>Teachers – § 6-17-202</i>
California <i>Cal. Gov't Code</i>	<i>Local Government Employees – § 3502.5 State Employees – §§ 3515.5, 3515.7 Public School Employees – §§ 3543-3543.2, 3546 Higher Education Employees – §§ 3583.5, 3584</i>
Colorado <i>Colo. Rev. Stat.</i>	<i>Public Mass Transportation System Employees – §§ 8-3-104(12), 8-3-107</i>
<i>*Citations in bold indicate authorization for agency or fair-share fees. Some States combine authority for collective-bargaining and for fees in a single statutory provision.</i>	

Connecticut <i>Conn. Gen. Stat.</i>	<i>Municipal Employees – §§ 7-468 to 7-469</i> <i>State Employees – §§ 5-271, 5-280</i> <i>Teachers – § 10-153a</i> <i>Family Child Care Providers – § 17b-705a</i> <i>Personal-Care Attendants – § 17b-706b</i>
Delaware <i>Del. Code Ann.</i> <i>[tit.], [§]</i>	<i>Public Employees – 19, §§ 1303-1304, 1319</i> <i>Police Officers & Firefighters – 19, §§ 1603-1604</i> <i>Public School Employees – 14, §§ 4003-4004, 4019</i>
District of Columbia <i>D.C. Code</i>	<i>Public Employees – §§ 1-617.07, 1-617.10, 1-617.11</i>
Florida <i>Fla. Stat.</i>	<i>Public Employees – § 447.307</i>
Georgia <i>Ga. Code Ann.</i>	<i>Firefighters – § 25-5-5</i> <i>Collective-Bargaining Restriction on Teachers – § 20-2-989.10</i>
Hawai'i <i>Haw. Rev. Stat.</i>	<i>Public Employees – §§ 89-3, 89-4, 89-8</i>

Idaho <i>Idaho Code</i>	<i>Teachers – § 33-1273</i> <i>Firefighters – § 44-1803</i>
Illinois <i>[ch.] Ill. Comp. Stat. [§]</i>	<i>Public Employees – 5, § 315/6</i> <i>Educational Employees – 115, §§ 5/3, 5/10, 5/11</i> <i>Home Care & Home Health Workers – 20, § 2405/3</i>
Indiana <i>Ind. Code</i>	<i>Employees of Correctional Institutions – § 11-10-5-5</i> <i>Employees of State Institutions – § 12-24-3-5</i> <i>Employees of Soldiers' & Sailors' Children's Home – § 16-33-4-23</i> <i>Employees of the Schools for the Blind and for the Deaf –</i> <i>§§ 20-21-4-4, 20-22-4-4</i> <i>Employees of a School Corp. or Charter School – § 20-26-5-32.2</i> <i>Teachers – §§ 20-29-2-9, 20-29-5-2</i> <i>Some Local Public Safety Employees – § 36-8-22-7</i>
Iowa <i>Iowa Code</i>	<i>Public Employees – § 20.16</i>
Kansas <i>Kan. Stat. Ann.</i>	<i>Teachers – § 72-5415</i>

Kentucky <i>Ky. Rev. Stat. Ann.</i>	<i>City & Local Government Firefighters</i> – §§ 345.030, 345.040 <i>Local Government Police Officers</i> – §§ 67C.402, 67C.404 <i>Urban-County Police Officers, Firefighter Personnel, Firefighters & Corrections Personnel</i> – §§ 67A.6902, 67A.6903 <i>Housing Auth. of Louisville v. Service Emps. Int’l Union, Local 557</i> , 885 S.W.2d 692, 696-97 (Ky. 1994) (upholding fair-share fees)
Louisiana	No statutory authority
Maine <i>Me. Stat. [tit.] [§]</i>	<i>Municipal Employees</i> – 26, §§ 629, 963 , 965, 967 <i>State Employees</i> – 26, §§ 979-B , 979-D, 979-F <i>University of Maine Employees</i> – 26, §§ 1023, 1025, 1026 <i>Judicial Employees</i> – 26, §§ 1283 , 1285, 1287
Maryland <i>Md. Code Ann., [subject]</i>	<i>State Employees</i> – State Pers. & Pens., §§ 3-301, 3-407, 3-502 <i>Teachers</i> – Educ. §§ 6-404, 6-407 <i>School Employees</i> – Educ. §§ 6-504 , 6-505, 6-509 <i>Family Child Care Providers</i> – Fam. Law § 5-595.3 <i>Independent Child Care Providers</i> – Health-Gen. § 15-904

Massachusetts <i>Mass. Gen. Laws</i> <i>[ch.], [§]</i>	<i>Public Employees – 150E, §§ 2, 4, 5, 12</i> <i>Child Care Providers – 15D, § 17</i> <i>Personal Care Attendants – 118E, § 73</i>
Michigan <i>Mich. Comp. Laws</i>	<i>Public Police & Fire Dep't Employees – §§ 423.234, 423.210</i> <i>State Police Troopers & Sergeants – § 423.274</i>
Minnesota <i>Minn. Stat.</i>	<i>Public Employees – § 179A.06</i>
Mississippi	No statutory authority
Missouri <i>Mo. Rev. Stat.</i>	<i>Public Employees – §§ 105.510, 105.520; Schaffer v. Board of Educ. of City of St. Louis</i> , 869 S.W.2d 163, 166 (Mo. Ct. App. 1993) (finding implicit authority for fair-share provisions in § 105.520) <i>Personal Care Attendants – § 208.862</i>
Montana <i>Mont. Code Ann.</i>	<i>Public Employees – §§ 39-31-204, 39-31-205, 39-31-305, 39-31-401</i>

Nebraska <i>Neb. Rev. Stat.</i>	<i>Public Employees</i> – §§ 48-816, 48-838 <i>State Employees</i> – § 81-1372
Nevada <i>Nev. Rev. Stat.</i>	<i>Local Government Employees</i> – § 288.160
New Hampshire <i>N.H. Rev. Stat. Ann.</i>	<i>Public Employees</i> – §§ 273-A:3 , 273-A:11; <i>Nashua Teachers Union v. Nashua Sch. Dist.</i> , 707 A.2d 448, 451-52 (N.H. 1998) (§ 273-A:3(I) permits negotiation of agency fees)
New Jersey <i>N.J. Stat. Ann.</i>	<i>Public Employees</i> – §§ 34:13A-5.3, 34A:13A-5.5 , 34:13A-5.6
New Mexico <i>N.M. Stat. Ann.</i>	<i>Public Employees</i> – §§ 10-7E-9 , 10-7E-15 <i>Family Child Care Providers</i> – § 50-4-33
New York <i>N.Y. [subject] Law</i>	<i>Public Employees</i> – Civ. Serv. §§ 204, 208 <i>Child Care Providers</i> – Lab. § 695-d
North Carolina <i>N.C. Gen. Stat.</i>	Public-sector collective-bargaining restriction – § 95-98

North Dakota <i>N.D. Cent. Code</i>	<i>Meet-and-Confer Authorization for Teachers – § 15.1-16-13</i>
Ohio <i>Ohio Rev. Code Ann.</i>	<i>Public Employees – §§ 4117.04, 4117.05, 4117.09</i>
Oklahoma <i>Okla. Stat. [tit.] [§]</i>	<i>Municipal Firefighters & Police Officers – 11, § 51-103</i> <i>Rural Fire Protection District Firefighters – 19, § 901.30-2</i> <i>School Employees – 70, § 509.2</i>
Oregon <i>Or. Rev. Stat.</i>	<i>Public Employees – §§ 243.666, 243.672</i> <i>Home Care Workers – §§ 410.612, 410.614</i> <i>Family Child Care Workers – § 657A.430</i>
Pennsylvania <i>Pa. Stat. [tit.], [§]</i>	<i>Public Employees – 43, §§ 1102.3, 1101.606</i> <i>Police Officers & Firefighters – 43, § 217.1</i>
Puerto Rico <i>P.R. Laws [tit.], [§]</i>	<i>Public Employees – 3, §§ 1451b, 1451f, 1454a</i>

Rhode Island <i>R.I. Gen. Laws</i>	<i>State Employees – §§ 36-11-2, 36-11-7</i> <i>Employees, including Public Employees – § 28-7-14</i> <i>Municipal Firefighters – § 28-9.1-5</i> <i>Municipal Police Officers – § 28-9.2-5</i> <i>Teachers – § 28-9.3-3; Town of North Kingstown v. North Kingstown Teachers Ass’n, 110 R.I. 698, 706 (1972) (fair-share fees permissible)</i> <i>Municipal Employees – § 28-9.4-4</i> <i>State Police – § 28-9.5-5</i> <i>Statewide 911 Employees – § 28-9.6-5</i> <i>State Correctional Officers – § 28-9.7-5</i> <i>Family Child Care Providers – §§ 40-6.6-2, 40-6.6-4</i>
South Carolina	Public sector collective bargaining restriction
South Dakota <i>S.D. Codified Laws</i>	<i>Public Employees – § 3-18-3</i>
Tennessee <i>Tenn. Code</i>	<i>Meet and Confer Authorization for Local Public-School Teachers – § 49-5-608</i>

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West Virginia	No statutory authority
Wisconsin <i>Wis. Stat.</i>	<i>Public Safety Officers</i> – §§ 111.81 , 111.82, 111.85 , 111.825, 111.83
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No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,

Petitioner,

—v.—

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR *AMICUS CURIAE*
NEW YORK CITY SERGEANTS BENEVOLENT ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv
INTERESTS OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	7
I. NEW YORK’S COLLECTIVE BARGAINING STATUTE PURPOSEFULLY REGULATES RELATIONS BETWEEN WELL-FUNDED PUBLIC EMPLOYEE UNIONS AND THE GOVERNMENT IN ITS ROLE AS AN EMPLOYER	7
A. In Enacting the Taylor Law, the New York Legislature Chose to Replace Increasingly Frequent Public Employee Strikes with Structured Collective Bargaining	7
B. The Modern-Day Taylor Law Provides a Carefully Balanced Framework for New York’s Public Employees to Bargain with Their Government Employers through Well-Funded Unions.....	9
1. To ensure uniform and fair employee relations, New York law grants exclusive representation rights and adequate funding to its public sector unions	9

2. New York law limits collective bargaining to the terms and conditions of employment	11
3. New York's Public Employee Relations Board is authorized to refer bargaining parties to binding arbitration, insulating collective bargaining from political decision makers	12
4. Both the Taylor Law's ban on public employee strikes and its requirement that the government respect expired CBAs while negotiating new CBAs foster employment-focused negotiations	14
5. Striking down fair share fees will upset the Taylor Law's carefully balanced employee relations scheme.....	15
II. THE SBA'S EXPERIENCE AT THE BARGAINING TABLE CONFIRMS THAT THE TAYLOR LAW FOSTERS A SYSTEM THAT IS LIMITED TO EMPLOYMENT RELATIONS	16
A. Unions and Government Employers Bargain, Not to Set Policy, but to Determine the Employment Rules That Are Necessary to Implement Those Policies	16
B. Pattern Bargaining Limits the Scope of Labor Negotiations	18

C. Other Collectively Bargained Initiatives Are Further Removed from Politics.	20
III. BY BEING MORE THAN JUST A NEGOTIATOR, THE SBA PROVIDES SERGEANTS WITH AN ARRAY OF SERVICES AND A HELPING HAND IN TIMES OF NEED	21
A. The SBA’s Work on behalf of Sergeants and Their Families in Times of Need Demonstrates the Importance of Well-Funded Unions.....	21
B. Because It Is Well-Funded, the SBA Is Able to Provide Other Critical Services to Its Bargaining Unit	22
CONCLUSION	24
APPENDIX	1a

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977)	3, 4
<i>Bd. of Educ. v. Ambach</i> , 517 N.E.2d 509 (N.Y. 1987)	23
<i>City of Watertown v. State Pub. Emp't Relations Bd.</i> , 733 N.E.2d 171 (N.Y. 2000)	9, 17
<i>City of Yonkers v. Yonkers Fire Fighters, Local 628</i> , 988 N.E.2d 481 (N.Y. 2013)	15
<i>Civil Serv. Bar Ass'n, Local 237 v. City of New York</i> , 474 N.E.2d 587 (N.Y. 1984)	10
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<i>Patrolmen’s Benevolent Ass’n of N.Y. v. City of New York</i> , 767 N.E.2d 116 (N.Y. 2001)	13

Statutes

Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 842 (repealed 1967)	7
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219	18, 20, 23
N.Y. Civ. Serv. Law § 200	9
N.Y. Civ. Serv. Law § 201	11, 12
N.Y. Civ. Serv. Law § 203	11, 16
N.Y. Civ. Serv. Law § 204	10, 11, 16
N.Y. Civ. Serv. Law § 205	13
N.Y. Civ. Serv. Law § 208	11
N.Y. Civ. Serv. Law § 209	13, 14

N.Y. Civ. Serv. Law § 209-a	10, 15
N.Y. Civ. Serv. Law § 210	14
N.Y. Civ. Serv. Law § 211	15
N.Y. Civ. Serv. Law § 212	13
N.Y.C. Admin. Code § 12-126	17
New York City Collective Bargaining Law	
N.Y.C. Admin. Code §§ 12-301–12-316	10
N.Y.C. Admin. Code § 12-305	10
N.Y.C. Admin. Code § 12-306	10
N.Y.C. Admin. Code § 12-307	11, 12, 17
N.Y.C. Admin. Code § 12-312	14
Public Employees’ Fair Employment Act,	
ch. 392, 1967 N.Y. Sess. Laws 393	7

Other Authorities

“2011–2018” Sergeants Benevolent Association Memorandum of Agreement [attached hereto as Appendix].....	17, 18, 19, 20, 21
Citizens Budget Commission, <i>7 Things New Yorkers Should Know About Municipal Labor Contracts in New York City</i> (May 2013), https://cbcny.org/sites/default/files /REPORT_7ThingsUnions_05202013.pdf	19

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Ed Mullins, <i>SBA President’s Message</i> , Frontline (N.Y.C. Sergeants Benevolent Association), 2012, http://sbanyc.net/documents/extras/frontline/magazine/201205.pdf	22
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Kate Montgomery Swearengen, <i>Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining</i> , 44 Colum. J. L. & Soc. Probs. 513 (2011)	7
Kristin Guild, <i>New York State Taylor Law: History</i> , Cornell Univ., Restructuring L. Gov’t, http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law	7, 8
Petitioner’s Brief	3
Richard E. Casagrande et al., <i>Public Sector Bargaining in New York: Examining PERB’s Sunset Doctrine in a New Light</i> , 59 Alb. L. Rev. 481 (1995)	15

Ronald Donovan, Administering the Taylor Law: Public Employee Relations in New York (1990)	7, 8
William J. Bratton, The NYPD Plan of Action and the Neighborhood Policing Plan (2015), http://www.nyc.gov/html/ nypd/html/home/POA/pdf/Plan-of- Action.pdf	18
Widows and Children's Fund, https://sbanypd.nyc/ donate/widows-and- childrens-fund/ (last visited Jan 3, 2018).....	22

INTERESTS OF *AMICUS CURIAE*

Amicus New York City Sergeants Benevolent Association (“SBA”) files this brief in support of the respondents.¹

The SBA is the Nation’s largest police sergeants union. It is composed of over 13,000 members, including approximately 5,000 active sergeants in the New York City Police Department (“NYPD”).

On a daily basis, NYPD sergeants help keep New York City safe. As front line supervisors, NYPD sergeants spend the vast majority of their time in the field. They put their lives on the line by performing classic law-enforcement duties such as: patrolling neighborhoods, conducting investigations, and making arrests. Many of the SBA’s members were first responders during the tragic events of September 11, 2001.

The SBA traces its origins to sergeants’ fraternal organizations formed at the turn of the 20th century. Ultimately, the SBA won collective bargaining rights in the 1960s. On behalf of all NYPD sergeants, the SBA negotiates a collective bargaining agreement (“CBA”) with New York City, administers and processes grievances under the CBA, and provides representation and advice to sergeants in various key areas.

¹ The parties have filed with the Clerk of the Court letters consenting to the participation of *amici*. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

But the SBA views its role as extending well beyond collective bargaining and its mission as encompassing any available means to protect the overall well-being of NYPD sergeants. This includes a wide variety of programs designed to provide state-of-the-art benefits and protections for the sergeants and their families.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

New York has a carefully constructed collective bargaining law for public employee unions. Under New York law, the SBA is required to represent all NYPD sergeants in collective bargaining. To finance this work, sergeants are, at a minimum, required to pay “fair share fees” to the SBA. If the SBA is prohibited from receiving such fair share fees from every sergeant, it will be left without any ability to recoup the value of its services enjoyed by free riders—*i.e.*, sergeants who will choose not to pay for the SBA’s required representation of them but who will still take advantage of the benefits of that representation. The SBA will lose funding as a result, and thus will be handicapped in fulfilling its duties to represent sergeants in their employee-employer relations as well as in protecting sergeants’ overall well-being.

To create an effective collective bargaining process, states such as New York have enacted delicately balanced collective bargaining statutes. Those laws prescribe how negotiations over terms and conditions of employment are to be handled and depend on well-funded unions to be bargaining counterparties in those negotiations. New York, like

many other states, adopted fair share fees to counteract the free-rider problem and maintain unions as well-funded, exclusive bargaining counterparties.²

This Court upheld the fair share fee solution against a First Amendment challenge forty years ago in *Abood v. Detroit Board of Education*.³ The *Abood* Court permitted unions to charge nonmembers for negotiating and administering their CBAs as well as processing employee grievances—but not for the expression of ideological views such as politically oriented lobbying of the government.⁴ The Petitioner here seeks to revisit *Abood*, arguing that collective bargaining by public sector unions is indistinguishable from politically oriented lobbying.⁵

This Court should reject the Petitioner’s challenge, as the Petitioner fundamentally misapprehends the relationships both: a) between public sector unions and the government when engaged in collective bargaining; and b) between such unions and the workers whom they represent. As to the relationship between unions and the government, there is a principled distinction between lobbying and bargaining: Lobbying typically involves efforts to set or change public policy, such as New York’s various legislative or regulatory policies

² See *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) (“More than 20 States have enacted statutes authorizing fair-share provisions . . .”).

³ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁴ See *id.* at 235–36.

⁵ See Pet’r’s Br. 10–18.

governing how the City is policed. On the other hand, bargaining is the process of negotiating the employment-related details that implement those policies consistent with employment laws and workplace realities. Put another way, in the collective bargaining context, unions represent public employees in negotiating with the government in its role as an employer. And the parties negotiate acceptable solutions to employment-specific issues.

As to the relationship between unions and the workers they represent, outside the collective bargaining arena, effective unions like the SBA provide a wealth of benefits and protections to all sergeants that are in no sense political. For NYPD sergeants, these benefits range from advocating for up-to-date bulletproof vests to promoting the need for long-term healthcare for 9/11 first responders.

The Supreme Court has “long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising” its power as a sovereign and the government acting “in the context of public employment.”⁶ *Abood*’s distinction between political lobbying and collective bargaining tracks the distinction between the government’s role as a sovereign and the government’s role as an employer. When bargaining with its employees over employment terms, the government acts in its capacity as an employer—not as a sovereign. Thus, the distinction adopted in *Abood* between fees for political activities and fees for collective bargaining remains sound.

⁶ *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008).

Drawing on the SBA's experience negotiating under New York's collective bargaining statute, this *amicus* brief will demonstrate the employment-specific nature of collective bargaining, as well as the importance to this process of exclusive representation by well-funded public employee unions. Both were legislative policy choices that help insulate collective bargaining from politics.

Fifty years ago, New York chose collective bargaining as the solution to severe public sector labor strife that existed despite a state law banning strikes. The State's legislature enacted a collective bargaining statute—*i.e.*, the Taylor Law—that was deliberately designed to limit collective bargaining to employment issues. New York's legislature also decided to ensure that the government would bargain with well-funded unions that could effectively represent public employees, thereby reducing worker discontent, while also giving the government an exclusive bargaining partner.

By both law and practice, the SBA's collective bargaining with New York City is limited to employment issues and is confined by prior agreements. The City expects its unions to agree to wage increases that are equivalent for all unions and the law restricts unions from bargaining over policy decisions, leaving no room in the negotiations for politically oriented lobbying. Instead, much of these negotiations involve identifying cost savings for the City in order to pay for improved wage and benefits packages, as well as reaching mutually beneficial agreements on the employment aspects of policing policies. To demonstrate that negotiations are limited to employment issues, attached to this

amicus brief is the Memorandum of Agreement setting out the most recent CBA between the SBA and New York City. Beyond negotiating a CBA, the SBA also administers the CBA and pursues grievances under it, making sure the City respects the CBA and treats similarly situated employees the same.

The SBA needs sufficient funding to represent NYPD sergeants adequately, as the New York legislature intended. Such funding allows the SBA to provide robust representation and services to sergeants and their families. This includes effectively representing and supporting the health and well-being of sergeants who face tragic circumstances—such as 9/11 first responders, officers who are killed in the line of duty, and sergeants who are displaced from their homes by storms like Hurricane Sandy. It also permits the SBA to advocate for safe workplaces with state-of-the-art equipment and procedures. If the Court decides that fair share fees are unconstitutional, free riders will be able to avoid paying their fair share of the cost of securing these benefits. Such a result will upset the New York legislature’s carefully crafted collective bargaining statute, which seeks to improve employee relations through collective bargaining between government employers and well-funded unions.

ARGUMENT

I. NEW YORK'S COLLECTIVE BARGAINING STATUTE PURPOSEFULLY REGULATES RELATIONS BETWEEN WELL-FUNDED PUBLIC EMPLOYEE UNIONS AND THE GOVERNMENT IN ITS ROLE AS AN EMPLOYER

A. In Enacting the Taylor Law, the New York Legislature Chose to Replace Increasingly Frequent Public Employee Strikes with Structured Collective Bargaining

In New York, public sector collective bargaining is governed by the Taylor Law, which was enacted in 1967.⁷ Twenty years before the Taylor Law's enactment, New York had responded to labor unrest with a law that mandated severe punishments for public employee strikers.⁸ Despite this, there were 21 public sector strikes between 1947 and 1964.⁹ Shortly after a twelve-day transit

⁷ See Public Employees' Fair Employment Act, ch. 392, 1967 N.Y. Sess. Laws 393 (codified as amended at N.Y. Civ. Serv. Law §§ 200–214).

⁸ See Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 842 (repealed 1967); see also Ronald Donovan, Administering the Taylor Law: Public Employee Relations in New York 5–6 (1990); Kristin Guild, *New York State Taylor Law: History*, Cornell Univ., Restructuring L. Gov't, <http://www.mildredwarner.org/gov-restructuring/special-projects/taylor-law>.

⁹ Kate Montgomery Swearengen, *Tailoring the Taylor Law: Restoring a Balance of Power to Bargaining*, 44 Colum. J. L. & Soc. Probs. 513, 518 n.24 (2011).

strike shut down New York City in 1966,¹⁰ Governor Nelson Rockefeller created the Committee on Public Employee Relations, which was chaired by Professor George W. Taylor.¹¹

The Taylor Committee concluded that collective bargaining would be the best way to prevent public employee strikes, which “introduce[] an alien force in the legislative processes,” infringing on legislators’ ability to make decisions that are “responsive to the public will.”¹² The Committee thus proposed a law that struck a purposeful balance by both creating a formal collective bargaining system while preserving the ban on public employee strikes.¹³ The Taylor Law successfully established a comprehensive system to resolve employment disputes between public employees and their government employers so as to avoid strikes.

¹⁰ See Guild, *supra* note 8.

¹¹ Final Report, Governor’s Committee on Public Employee Relations, 9 (March 31, 1966) [hereinafter the “Taylor Report”], <http://www.perb.ny.gov/pdf/1966perr.pdf>. The Committee was established “to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.” *Id.*

¹² *Id.* at 15; *see id.* at 9 (“[P]rotection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment.”).

¹³ *See id.* at 6–8; Donovan, *supra* note 8, at 39–40.

**B. The Modern-Day Taylor Law Provides a
Carefully Balanced Framework for New
York’s Public Employees to Bargain with
Their Government Employers through
Well-Funded Unions**

Today, New York’s Taylor Law provides a carefully designed collective bargaining system through which public employees negotiate with their employers to resolve labor disputes.¹⁴ The legislature has amended the Law over time to recalibrate the balance between the public interest in uninterrupted government services and public employee rights. The current version of the Taylor Law reflects the legislature’s intent to establish a system that is focused on promoting fair employer-employee relations through bargaining between the government and well-funded unions.

1. *To ensure uniform and fair employee relations, New York law grants exclusive representation rights and adequate funding to its public sector unions*

Through the Taylor Law, New York purposefully structures its relationship with public sector employees so it can ensure uniform and fair employment contracts. To achieve uniformity, the

¹⁴ The Taylor Law’s stated purpose is “to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.” N.Y. Civ. Serv. Law § 200; *see also City of Watertown v. State Pub. Emp’t Relations Bd.*, 733 N.E.2d 171, 173 (N.Y. 2000) (“[T]he public policy of [New York] in favor of collective bargaining is strong and sweeping.” (internal quotation marks omitted)).

Law provides for public employee unions to serve as “the exclusive representative . . . of all the employees in the appropriate negotiating unit.”¹⁵ Exclusive representation is particularly important to public employers because it enables employers to negotiate uniform deals for similarly situated employees.¹⁶ It also promotes the public policy against strikes by placing responsibility on a single union for the conduct of all employees in the bargaining unit.¹⁷

Because it gives unions exclusive bargaining rights, the Taylor Law also requires unions to fairly represent all employees in their units, regardless of the employees’ membership status.¹⁸ However, such fair representation duties create the potential problem of free riders, *i.e.*, workers who choose not to pay their fees knowing that their unions are required to represent them regardless.¹⁹ To reduce this

¹⁵ N.Y. Civ. Serv. Law § 204; N.Y.C. Admin. Code § 12-305. The Taylor Law has a local option provision that “permits local governments to enact their own counterparts to certain sections of the Taylor Law.” *Mayor of N.Y. v. Council of N.Y.*, 874 N.E.2d 706, 708 (N.Y. 2007). Where relevant this brief will provide a parallel citation to the New York City Collective Bargaining Law, N.Y.C. Admin. Code §§ 12-301–12-316, which also governs the SBA’s collective bargaining with New York City.

¹⁶ See Taylor Report, *supra* note 11, at 29.

¹⁷ *Id.*

¹⁸ See N.Y. Civ. Serv. Law § 209-a(2)(c); N.Y.C. Admin. Code § 12-306(b)(3); *Civil Serv. Bar Ass’n, Local 237 v. City of New York*, 474 N.E.2d 587, 590–91 (N.Y. 1984) (noting that the “duty of fair representation on the part of public sector unions [is] predicated on their role as exclusive bargaining representatives”).

¹⁹ See *Harris*, 134 S. Ct. at 2656 (Kagan, J., dissenting).

problem and ensure proper funding of public employee unions, the Taylor Law provides a mechanism for those unions to finance their fair representation duties: *i.e.*, recognized unions can collect fair share fees from non-members in an amount equal to membership dues, provided that there is a procedure for non-members to request a refund of the portion of their fees that is used for political or ideological activities.²⁰ The Taylor Law also gives unions a simple way to collect such fair share fees and membership dues: *i.e.*, employees may authorize their employers to deduct such fair share fees or membership dues from their paychecks and pay them directly to the union.²¹ Thus, the New York legislature purposefully crafted a collective bargaining law that provides for exclusive but fair representation of public employees and ensures that public sector unions are well funded so they can effectively bargain with government employers.

2. New York law limits collective bargaining to the terms and conditions of employment

New York law expressly limits collective bargaining to employment issues. The Taylor Law specifically provides for collective bargaining over the “terms and conditions of employment.”²² The Law defines “terms and conditions of employment” to mean “salaries, wages, hours and other terms and

²⁰ N.Y. Civ. Serv. Law § 208(3); N.Y.C. Admin. Code § 12-307(a).

²¹ N.Y. Civ. Serv. Law §§ 201(2), 208; N.Y.C. Admin. Code § 12-307(a).

²² N.Y. Civ. Serv. Law §§ 203, 204.

conditions of employment.”²³ Thus, the collective bargaining forum is designed for negotiating employment issues—not policy matters.

While promoting negotiation over employment issues, the Taylor Law removes employer policy decisions from the bargaining table. Under the Law, “[a] public employer’s decisions are not bargainable as terms and conditions of employment where they are inherently and fundamentally policy decisions relating to the primary mission of the employer.”²⁴ In addition, New York City further restricts collective bargaining with its unions by explicitly enumerating issues that are not within the scope of collective bargaining.²⁵ By restricting negotiations to employment terms, New York law insulates collective bargaining from the political realm.

3. New York’s Public Employee Relations Board is authorized to refer bargaining parties to binding arbitration, insulating collective bargaining from political decision makers

The Taylor Law also created the Public Employment Relations Board (“PERB” or the “Board”), which is empowered to resolve impasses in

²³ *Id.* § 201(4). Benefits from the public retirement system are specifically excluded. *Id.*

²⁴ *Cty. of Erie v. State of N.Y. Pub. Emp’t Relations Bd.*, 903 N.E.2d 1163, 1165-66 (N.Y. 2009) (internal quotation marks and citation omitted) (alteration adopted).

²⁵ See N.Y.C. Admin. Code § 12-307(b). These issues include determining the standards of selection for employment, taking disciplinary action, relieving employees from duty, and maintaining efficient government operations. *Id.*

public sector collective bargaining, including through binding arbitration.²⁶ Either party may request the Board's assistance in resolving an alleged impasse.²⁷ PERB determines whether negotiating parties have reached an impasse and helps resolve that impasse.²⁸

For police and other uniformed unions, once PERB determines that an impasse exists, the Taylor Law authorizes the Board first to appoint a mediator to help the parties resolve the dispute.²⁹ If mediation fails to result in an agreement, the Board must refer the dispute to an arbitration panel consisting of one member chosen by the union, one member selected by the employer, and a third member jointly appointed by the two sides.³⁰ The panel's rulings are final and binding.³¹

Through PERB's impasse resolution process, the Taylor Law insulates collective bargaining from the political process. As a result, public employees and government employers are able to focus their collective bargaining on employment issues.

²⁶ N.Y. Civ. Serv. Law § 205; see *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 767 N.E.2d 116, 118 (N.Y. 2001).

²⁷ N.Y. Civ. Serv. Law §§ 209(3), (4).

²⁸ *Id.*

²⁹ *Id.* § 209(4)(a). New York City's police and fire unions may use the PERB rather than the City's counterpart board. See *id.* § 212(3).

³⁰ *Id.* § 209(4)(b–c).

³¹ *Id.* § 209(4)(c)(vii). For civilian unions, in lieu of binding arbitration, the Taylor Law authorizes PERB to appoint a fact-finding board. *Id.* § 209(3)(b). Those findings of fact are submitted to the legislature, which then may take action. *Id.* § 209(3)(e–f).

4. *Both the Taylor Law's ban on public employee strikes and its requirement that the government respect expired CBAs while negotiating new CBAs foster employment-focused negotiations*

The Taylor Law limits the options of the negotiating parties, further isolating employment as the singular focus of collective bargaining. Public sector unions are limited because the Law bans strikes³² and authorizes public employers to punish violating employees by deducting from their compensation double their daily salary.³³ The Taylor Law also provides that unions who violate the prohibition lose their right to be paid membership dues and fair share fees directly from the employer.³⁴ The Taylor Law further permits public employers to seek injunctions against strikes and punishments for violating those injunctions.³⁵ This robust strike ban encourages unions to focus on employment-related issues when negotiating with government employers.

³² See *id.* § 210; N.Y.C. Admin. Code § 12-312(e).

³³ N.Y. Civ. Serv. Law § 210(2)(f).

³⁴ *Id.* §§ 210(3)(a), (f).

³⁵ *Id.* § 211. Although strikes are rare under the Taylor Law, such punishments have included significant fines and jail time. See, e.g., *N.Y.C. Transit Auth. v. Transp. Workers Union of Am., AFL-CIO*, 822 N.Y.S.2d 579, 586 (N.Y. App. Div. 2006) (fining New York City transit workers' union \$2.5 million for a two-and-a-half day strike); *N.Y.C. Transit Auth. v. Transp. Workers Union of Am.*, No. 37469/05, 2006 N.Y. Misc. LEXIS 4046, at *21 (N.Y. Sup. Ct. Apr. 26, 2006) (sentencing the transit workers' union president to a 10-day jail term), *aff'd in part*, 37 A.D.3d 679 (N.Y. App. Div. 2007).

In turn, the Taylor Law limits government employers by requiring that the government “continue all the terms of an expired agreement until a new agreement is negotiated.”³⁶ This requirement “preserve[s] the status quo in situations where a CBA between a public employer and its employees has expired and a new one has yet to be agreed upon.”³⁷ This frees the parties from the possibility of employer manipulation of wages, hours, or benefits during negotiations, thereby focusing them on bargaining over the employment issues at hand.

5. Striking down fair share fees will upset the Taylor Law’s carefully balanced employee relations scheme

The New York legislature has purposefully crafted and periodically recalibrated the Taylor Law so as to provide a process that insulates collective bargaining from politics and promotes employment-focused collective bargaining between well-funded public employee unions and government employers. Reducing that funding will upset this carefully constructed statute by weakening the public employee unions and their ability to represent their members. For New York, at stake is 50 years of relative labor peace and rarely interrupted public services.

³⁶ N.Y. Civ. Serv. Law § 209-a(1)(e). See Richard E. Casagrande et al., *Public Sector Bargaining in New York: Examining PERB’s Sunset Doctrine in a New Light*, 59 Alb. L. Rev. 481, 485 (1995) (describing the requirement to honor expired CBAs as a “quid pro quo for the prohibition against public employee strikes”).

³⁷ *City of Yonkers v. Yonkers Fire Fighters, Local 628*, 988 N.E.2d 481, 484 (N.Y. 2013) (alteration adopted).

II. THE SBA’S EXPERIENCE AT THE BARGAINING TABLE CONFIRMS THAT THE TAYLOR LAW FOSTERS A SYSTEM THAT IS LIMITED TO EMPLOYMENT RELATIONS

A. Unions and Government Employers Bargain, Not to Set Policy, but to Determine the Employment Rules That Are Necessary to Implement Those Policies

In New York, collective bargaining is distinct from politically oriented lobbying. The Taylor Law explicitly limits collective bargaining to the “terms and conditions of employment.”³⁸ Policy decisions, on the other hand, are not mandatory subjects of bargaining.³⁹ Rather, during collective bargaining, public employee unions and employers negotiate mutually beneficial solutions for implementing the employment impacts of these policy decisions.⁴⁰

³⁸ N.Y. Civ. Serv. Law §§ 203, 204.

³⁹ See *Cty. of Erie*, 903 N.E.2d at 1165-66.

⁴⁰ See *id.* (noting the impacts of policy decisions are not exempt from bargaining); see also *City of Watertown*, 733 N.E.2d at 174–175 (holding that, while a city’s decisions under a statute were not mandatory bargaining subjects, the procedures for whether and how officers could contest those decisions were mandatory subjects); N.Y.C. Admin. Code § 12-307(a) (listing public employer decisions that are not within the scope of collective bargaining, but providing that “questions concerning the practical impact [of those decisions] on terms and conditions of employment . . . are within the scope of collective bargaining”).

For example, by law, New York City must pay for its employees' health insurance costs.⁴¹ As a result, collective bargaining is limited to negotiating the specifics of the health insurance plans, such as premium payments and co-pays.⁴² In its most recent CBA, the SBA agreed to set up a subcommittee to generate cost savings related to retiree health coverage.⁴³

The NYPD's policy decision to adopt community policing is another example of the government setting policy and working out the employment details during collective bargaining. Community policing (known in New York City as "neighborhood policing") requires sergeants to be available to community members, whether they are on duty or not.⁴⁴ Through bargaining, the City and the SBA agreed to employment rules that would bring the NYPD into compliance with the requirements of the Fair Labor Standards Act of 1938 ("FLSA"),⁴⁵ while supporting the NYPD's

⁴¹ N.Y.C. Admin. Code § 12-126.

⁴² See "2011–2018" Sergeants Benevolent Association Memorandum of Agreement [attached hereto as Appendix], 14a–18a (agreeing to work with the City to achieve savings of \$3.4 billion in healthcare costs across all of the City's unions). For the Court's benefit, the Memorandum of Agreement between the SBA and New York City setting out the amendments to the predecessor CBA that constitutes the new CBA is attached as an appendix to this *amicus* brief.

⁴³ See App. § 9.

⁴⁴ See William J. Bratton, The NYPD Plan of Action and the Neighborhood Policing Plan, 4 (2015) <http://www.nyc.gov/html/nypd/html/home/POA/pdf/Plan-of-Action.pdf>.

⁴⁵ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

community policing initiative.⁴⁶ As these examples show, public employee unions bargain with their government employers, not to lobby for policy changes, but to establish the employment-related details of policies that have already been adopted.

B. Pattern Bargaining Limits the Scope of Labor Negotiations

In practice, collective bargaining in New York is a limited negotiation between public employee unions and employers aimed at updating previous CBAs.⁴⁷ The City engages in what is known as “pattern bargaining” in order to streamline its negotiations with 144 unions that represent 337,000 public employees.⁴⁸ This means that the first union to reach an agreement establishes a pattern of wage increases during the agreement’s term that other unions are expected to respect in their subsequent negotiations.⁴⁹ This practice restricts unions from bargaining for better deals than the pattern has set. At a minimum, the pattern sets a baseline, requiring

⁴⁶ See App. § 13.

⁴⁷ As explained above, expired CBAs must be respected until there are new agreements. See, *supra*, Section I.B.4.

⁴⁸ See City of New York Office of Labor Relations, *State of the Agency 2014–2016*, 11–14 [hereinafter the “OLR Report”], <https://www1.nyc.gov/assets/olr/downloads/pdf/OLR/2014-2015-State-of-the-Agency-OLR.pdf>.

⁴⁹ See Citizens Budget Commission, *7 Things New Yorkers Should Know About Municipal Labor Contracts in New York City*, 3 (May 2013), https://cbcny.org/sites/default/files/REPORT_7ThingsUnions_05202013.pdf. In New York City there is one pattern for uniformed officers and another for civilian employees. See *id.*

unions to offer cost savings in other parts of the CBA in order to justify more generous wage increases and benefits enhancements.⁵⁰

For example, the most recent pattern in New York City included no wage increase in the first year of the CBA, followed by increases starting in the second year.⁵¹ The SBA thus had to negotiate cost-saving measures in other parts of its agreement in exchange for receiving a pay increase six months earlier than had been the pattern.⁵² The most important cost-saving measure specific to the SBA was an agreement for sergeants to arbitrate future FLSA claims against the City.⁵³ Sergeants had litigated with the City under the FLSA for nearly a decade before the Second Circuit agreed that sergeants were entitled to be paid overtime for their off-the-clock work.⁵⁴ Requiring future arbitration of such claims saved the City significant time and expense. The SBA also agreed to other cost-saving measures, including a reduction in welfare fund contributions,⁵⁵ as well as delayed increases to longevity payments.⁵⁶

⁵⁰ *See id.*

⁵¹ *See* OLR Report, *supra* note 48, at 13–14.

⁵² *See id.* at 14; App. § 4.a(i).

⁵³ *See* OLR Report, *supra* note 48, at 14; App. § 13.V.

⁵⁴ *See Mullins v. City of New York*, 653 F.3d 104, 105–06 (2d Cir. 2011).

⁵⁵ *See* App. § 7.

⁵⁶ *See* App. § 5. Longevity payments are salary bumps based on length of service.

Collective bargaining is more complex than is described above. However, the core negotiation over cost savings in exchange for wage increases demonstrates that collective bargaining is narrowly focused on employment issues—not political ones.

**C. Other Collectively Bargained Initiatives
Are Further Removed from Politics.**

In its most recent agreement, the SBA negotiated various changes that were only relevant to the government's role as an employer, many of which were cost-neutral and intended to provide sergeants with greater flexibility, improve morale, and effectuate the City's diversity initiatives. For example, the SBA and the City agreed to a pilot program for sergeants to exchange work days with each other.⁵⁷ Another pilot program allows sergeants to donate accrued leave days to co-workers who have exhausted their leave due to medical emergencies.⁵⁸ The SBA negotiated a third pilot program permitting pairs of sergeants who are married or domestic partners to coordinate their shifts to accommodate child care needs.⁵⁹

In the SBA's experience, collective bargaining is limited to negotiations over employment issues. Lobbying and policy-making occur outside of this process and are therefore distinct from it.

⁵⁷ See App. § 10.

⁵⁸ See App. § 11.

⁵⁹ See App. § 12.

III. BY BEING MORE THAN JUST A NEGOTIATOR, THE SBA PROVIDES SERGEANTS WITH AN ARRAY OF SERVICES AND A HELPING HAND IN TIMES OF NEED

A. The SBA's Work on behalf of Sergeants and Their Families in Times of Need Demonstrates the Importance of Well- Funded Unions

The SBA views its role as protecting the overall well-being of NYPD sergeants—not just negotiating for their labor contracts. This includes helping sergeants and their families through trying times. Two noteworthy examples are the SBA's work on behalf of 9/11 first responders as well as in the aftermath of Hurricane Sandy. Among its efforts for 9/11 rescue and recovery workers, the SBA educated the public about rare cancers that are linked to 9/11 exposure, including successfully demanding that the NYPD release medical records for a study of that link.⁶⁰ Further, in the aftermath of Hurricane Sandy, the SBA delivered food and supplies to displaced sergeants and helped them re-settle their families, hire contractors, buy new furniture, apply for federal funding, and make insurance claims.

The SBA assists sergeants in need on a daily basis. It administers a Widows and Children's Fund for the families of deceased sergeants, which pays for

⁶⁰ Ed Mullins, *SBA President's Message*, Frontline (N.Y.C. Sergeants Benevolent Association), 2012, at 3, 24, <http://sbanyc.net/documents/extras/frontline/magazine201205.pdf>.

their healthcare.⁶¹ The SBA also provides support to sergeants who are caring for sick family members. NYPD sergeants can turn to the SBA no matter their problem, and, as a well-funded union, the SBA can use its resources to assist them.

**B. Because It Is Well-Funded, the SBA Is
Able to Provide Other Critical Services to
Its Bargaining Unit**

Among the SBA's functions outside of collective bargaining, are the legal representation of sergeants, and the administration of bargained-for benefits. The SBA provides representation for sergeants whenever they need it, including: supporting sergeants' due process rights to representation anytime they are involved in a critical incident, internal affairs review, or disciplinary proceeding; and bringing litigation on behalf of sergeants, such as the FLSA litigation mentioned above.⁶² The SBA also administers bargained-for prescription drug plans, annuity and life insurance plans, and a wellness program that has been effective in reducing health issues linked to the stress of the sergeants' jobs.

Moreover, the SBA monitors the City's compliance with the negotiated CBA. As ambiguities and interpretation questions arise, the SBA makes sure that the agreement is administered as the parties intended it. The SBA seeks to ensure that the agreement is uniformly applied to all sergeants,

⁶¹ Widows and Children's Fund, <https://sbanypd.nyc/donate/widows-and-childrens-fund/> (last visited Jan 3, 2018).

⁶² *See, supra*, Section II.B.

so that similarly situated sergeants are treated the same. When the parties cannot reach an agreement, the SBA represents sergeants in bringing grievances.⁶³

The SBA further serves as an advocate for all NYPD sergeants. The SBA brings attention to issues including: whether sergeants' protective gear, such as bullet proof vests, are up-to-date; whether sergeants are trained in state-of-the-art law enforcement techniques; and whether NYPD policies are implemented so as to reduce the likelihood that sergeants are put in harm's way. Through its advocacy efforts, the SBA works to ensure that NYPD sergeants have the safest and most appropriate workplace that is conducive to their role as front line officers.

This work is not political in nature—rather, it simply protects the well-being of NYPD sergeants. Removing some of the SBA's funding by enabling free riders to game the system would hamper the union's efforts to support the overall well-being of NYPD sergeants. The SBA would thus become a weaker counterparty to the government and a less able representative of the sergeants. This would upset the legislature's carefully balanced collective bargaining statute, which relies on well-funded unions representing and supporting public employees in order to achieve labor peace and

⁶³ See *Bd. of Educ. v. Ambach*, 517 N.E.2d 509, 512 (N.Y. 1987) ("Grievance procedures . . . enable the union to participate in administering the contract it negotiated; they aid the employer by channeling grievances into one forum providing one set of remedies; and they permit efficient protection of employee rights.").

uninterrupted public safety services. NYPD sergeants put their lives on the line every day. They are entitled to the sort of comprehensive representation that the SBA provides without fear that free riders will take unfair advantage of these benefits without paying for them.

CONCLUSION

For the foregoing reasons and those set forth in the briefs of Respondents, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted.

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New York City Sergeants

Benevolent Association

January 19, 2018

APPENDIX

“2011 – 2018” Sergeants Benevolent Association
Memorandum of Agreement (“SBA MOA”)

MEMORANDUM OF AGREEMENT made this 24th day of February, 2015, (*“2011 – 2018 Sergeants Benevolent Association Memorandum of Agreement”*) by and between the Sergeants Benevolent Association (“the Union”) and the City of New York (“the Employer”);

WITNESSETH

WHEREAS, the undersigned parties desire to enter into collective bargaining agreements, including this *SBA MOA* and agreements successor to the existing unit agreement expiring on August 29, 2011, to cover the employees represented by the Union (“Employees”); and

WHEREAS, the undersigned parties intend by this *SBA MOA* to cover all cost-related matters and to incorporate the terms of this *SBA MOA* into the Successor Unit Agreement,

NOW, THEREFORE, it is jointly agreed as follows:

Section 1. Term.

The term of the Successor Unit Agreement shall be August 30, 2011 through August 29, 2018, eighty-four (84) months from the expiration date of the Predecessor Unit Agreement.

Section 2. Continuation of Terms.

All terms of the Predecessor Unit Agreement shall be continued except as modified pursuant to this *SBA MOA*.

Section 3. Prohibition of Further Cost-Related Demands.

No party to this *SBA MOA* shall make further cost-related demands during the term of this *SBA MOA*.

Section 4. General Wage Increase

- a. The general increases, effective as indicated, shall be:
 - (i) Effective August 30, 2011, Employees shall receive a rate increase of 1.0%.
 - (ii) Effective February 28, 2013, Employees shall receive an additional rate increase of 1.0%.
 - (iii) Effective February 28, 2014, Employees shall receive an additional rate increase of 1.0%.
 - (iv) Effective February 28, 2015, Employees shall receive an additional rate increase of 1.0%.
 - (v) Effective February 29, 2016, Employees shall receive an additional rate increase of 1.5%.
 - (vi) Effective March 30, 2017, Employees shall receive an additional rate increase of 2.5%.
 - (vii) Effective March 30, 2018, Employees shall receive an additional rate increase of 3.0%.
- b. The increases provided for in this Section 4 a. shall be calculated as follows:

3a

- (i) the increases in Section 4a. (i) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on August 29, 2011.
 - (ii) the increases in Section 4a. (ii) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 27, 2013.
 - (iii) the increases in Section 4a. (iii) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 27, 2014.
 - (iv) the increases in Section 4a. (iv) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 27, 2015.
 - (v) the increases in Section 4a. (v) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on February 28, 2016.
 - (vi) the increases in Section 4a. (vi) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on March 29, 2017.
 - (vii) the increases in Section 4a. (vii) shall be based upon the base rates (which shall include salary or incremental schedules) in effect on March 29, 2018.
- c. The increases provided in this Section 4 shall be applied to the base rates and salary grades fixed for the applicable title.

Section 5. Longevity Payments

Longevity payments will be increased with the increases listed in Section 4a. (iv)-(vii).

Section 6. Health Savings and Welfare Fund Contributions

The May 5, 2014 Letter Agreement regarding health savings and welfare fund contributions between the City of New York and the Municipal Labor Committee, will be attached as an Appendix, and is deemed part of this *SBA MOA* and incorporated in the Successor Unit Agreement.

Section 7. Welfare Fund Contributions

Effective May 1, 2015, welfare fund contributions for both active and retirees will be decreased by \$200 per annum.

Section 8. Terminal Leave Lump Sum Payment

The resolution of the Board of Estimate of the City of New York dated June 27, 1957, states the following:

Members of the Force shall be granted terminal leave with pay upon retirement not to exceed one month for every ten years of service, prorated for a fractional part thereof provided, however, that no terminal leave shall be granted to an employee against whom departmental disciplinary charges are pending.

Effective May 1, 2015, the parties agree that such employees as described in the Resolution above and are entitled to payment and who are members of the Union shall now be entitled to voluntarily choose the option of a one-time lump

sum payment as their terminal leave benefit in lieu of their current terminal leave benefit prior to retirement. Such payments shall be made as soon as practicable after retirement.

In the event that a change in legislation is needed to effectuate this agreement, the parties agree to jointly support the necessary legislation to implement the terms of this Section 8.

Section 9. Retiree Health Sub-Committee

There shall be a sub-committee with representatives of both the City and the Union to meet and discuss issues of health coverage for employees who retire prior to the age of 55 and have health benefits coverage from another employer. The parties shall share in the savings generated. The parties may agree to expand their discussion of issues regarding retiree health subject to mutual agreement.

Section 10. Exchange of Work Days (Mutuals)

Effective the date of ratification of this Agreement, the Department shall implement a Pilot Program for twelve (12) months that will permit sergeants of the same assigned command performing similar duties to exchange tours voluntarily when there is no interference with police service and provided that the program does not generate any FLSA overtime. This Pilot Program is subject to the following provisions:

1. Sergeants are not permitted to perform two consecutive tours. (e.g. perform duty on a third platoon followed by a first platoon).

6a

2. The exchanged tours may be on the same calendar day or on different calendar days (including RDOs).
3. The mutual must be completed within one FLSA cycle. (Tours cannot be exchanged from different FLSA cycles).
4. The mutual tour itself cannot generate overtime. A sergeant may receive pre-tour or post-tour overtime, but not overtime for performing the mutual tour (including a mutual tour on a RDO).
5. Both sergeants must be qualified to perform the necessary duty.
6. All mutual requests must be submitted at least five (5) days in advance and approved by the Commanding Officer. Requests for a mutual will not be unreasonably denied.
7. Once a mutual has been approved by the Commanding Officer, both sergeants are scheduled to work the mutual tour.
8. An absence on the first tour of a mutual does not void the second mutual tour. (The sergeant is still scheduled to perform the second mutual tour).
9. There is no Administrative Sick on a mutual tour. (Sergeant must report Regular Sick).
10. Detective Rescheduling Rules are triggered by an absence on a mutual tour and permits the Department to reschedule any sergeant without 24 hour notice or

the payment of contractual overtime to cover the mutual tour on any sergeant's scheduled work day.

Section 11. Annual Leave Donation Program

- A. The City of New York and the Sergeants Benevolent Association, in order to assist uniformed members of the service in the rank of sergeant who have exhausted all available leave and need to take a prolonged absence from duty due to the medical emergency of an immediate family member, have agreed to implement a Pilot Program entitled "Annual Leave Donation Program," which shall expire on August 29, 2018. Sergeants who anticipate using a significant amount of leave to resolve issues caused by a major illness or medical condition of an immediate family member, may apply. The Pilot Program will be sponsored by the Department.
- B. All sergeants are eligible to participate as donors or recipients. Donations of accrued annual leave must be made in full day increments and will be debited from the donor's annual leave balance after review of the form and credited to the annual leave bank as full days. Only accrued annual vacation leave may be donated. Lost time, chart days, terminal leave, or any time which is not vacation is not eligible for this program. All donations of accrued annual leave are voluntary. Donations cannot be directed to a particular sergeant. Donations will be included in a pool of annual leave to be dispersed by a joint Labor/Management

panel. Donations into the “Annual Leave Donation Program” are not permitted in the calendar year of a sergeant’s separation from the Department, and any such donations shall be retroactively withdrawn and returned to the individual.

- C. A sergeant must have donated at least one vacation day to the pool to be eligible for a disbursement during the life of the Pilot Program. A sergeant may donate a maximum of five vacation days per calendar year. A sergeant may receive a maximum disbursement equal to one year’s vacation time that would be accrued by the sergeant in the same year. In cases of extreme hardship, the Labor/Management Panel may waive the required donation to the “Annual Leave Donation Program” prior to a disbursement, as well as, the maximum disbursement and donation limits.
- D. All decisions concerning the implementation of the “Annual Leave Donation Program” and the eligibility of the donor/donee will be mutually agreed upon by the Labor/Management panel. All decisions must comply with IRS Revenue Ruling 90-29. The decisions of the Labor/Management panel are final and not subject to review, appeal or any grievance procedures. The Labor/Management panel shall consist of four members, two members each from the SBA and the Department. A majority vote is necessary to receive a disbursement from the program.

E. This “Annual Leave Donation Program” shall only be implemented in accordance with IRS Revenue Ruling 90-29 and as required by law.

Section 12. Coordination of Shifts with Spouses and/or Registered Domestic Partners

In an effort to assist sergeants who are experiencing child care/family issues and have a member of the department who is either their spouse or a registered domestic partner, the Department shall upon ratification of this Agreement implement a Pilot Program for twelve (12) months that will permit sergeants to request a change of tour within their assigned command or request transfer to a command with an opening on their desired tour. Sergeants requesting said accommodations must submit a UF 49 to their commanding officer detailing the reasons for the accommodation for a tour change within their command or submit a UF 57 to their commanding officer for submission to the Personnel Bureau detailing the reasons for the accommodation. The sergeant’s request will not be unreasonably denied.

Section 13. Fair Labor Standards Act Issues

Whereby, the parties intend to prevent potential future claims under the federal Fair Labor Standards Act (“FLSA”), the parties hereby agree as follows:

I. Right to Schedule Chart Time

(a) The NYPD shall have the right to schedule employee chart time in order to prevent sergeants from exceeding the FLSA overtime threshold in a 28-day cycle. This

provision does not waive any rights the NYPD has to schedule chart time in the absence of an agreement.

(b) The Union agrees to withdraw, with prejudice, the following cases and/or actions: Chart Time Improper Practice Petition (BCB-4086-14).

II. Staggered Tours

(a) The NYPD shall have the right to stagger the scheduled starting and finishing times of sergeants in order to prevent sergeants from performing off-the-clock work before the scheduled beginning of their tour. This provision does not waive any rights the NYPD has to alter starting and finishing times in the absence of an agreement.

(b) Sergeants are not permitted to perform any work before their scheduled starting time or after their scheduled finishing time without the prior approval of a superior officer.

III. Off-Duty Work

(a) Sergeants assigned to Detective Track Commands, as defined in Administrative Guide Procedure 320-35 and Operations Order No. 19 of 2011, shall receive a stipend of \$705 per year as compensation for up to one and one-half (1.5) hours of work each week performed off-duty via phone, e-mail, text, or in any other manner. The election of compensatory time is not available for off-duty work.

(b) No sergeant assigned to Detective Track Commands shall spend more than one and one-half (1.5) hours per week on off-duty work without the prior approval of a superior officer. In the event this limit is exceeded under circumstances that made it impossible to obtain prior approval (e.g., as a result of an emergency), the sergeant must so notify a superior officer within 24 hours thereafter.

(c) No sergeant assigned to any non-Detective Track Command shall spend any time on off-duty work without the prior approval of a superior officer. If a sergeant assigned to a non-Detective Track Command is contacted off-duty by a superior officer such approval is presumed.

(d) Time spent receiving notifications will not qualify as off-duty work under this section.

IV. Definition of a Superior Officer

For purposes of these paragraphs, a “superior officer” shall mean a person superior to that sergeant in that sergeant’s chain of command.

V. Resolution of Disputes

(a) All claims arising from the application of the matters described in paragraphs II(b) and III, above, alleging violations of the federal Fair Labor Standards Act involving claims of off-duty work or pre or post-shift work, and all other claims involving the interpretation or application of these paragraphs, shall be subject to the Agreement’s

grievance and arbitration procedure as the final, binding, sole and exclusive remedy for such violations, and employees covered by this Agreement shall not file suit or seek relief in any other forum. The parties will take all steps necessary to ensure that claims within the scope of this paragraph are resolved pursuant to and in accordance with the grievance and arbitration provision of the collective bargaining agreement.

(b) Arbitrators shall apply applicable law as it would be applied, and shall have such powers as would be exercised, by the appropriate court in rendering decisions on the claims covered by paragraph V(a), above.

(c) The claims subject to resolution in accordance with paragraph V(a), above, shall not be arbitrated by way of a group grievance. All claims between a member and the Department must be decided individually.

(d) The arbitrator shall have no authority or jurisdiction to process, conduct, or rule upon any group grievances, or to consolidate any individual claims in one proceeding absent mutual consent of the parties hereto.

V. Prohibition on Use in Any Proceeding

Other than the up to 1.5 hours per week of off-duty work described in paragraph III(a), nothing contained in paragraph III shall be used in any proceeding to establish the compensability of time worked.

Section 14. Conditions of Payment.

The general wage increases provided for in Section 4 of the *SBA MOA* shall be payable as soon as practicable upon execution of the *SBA MOA* and after the effective date of such increases.

Section 15. Approval of Agreements.

This *SBA MOA* and the successor unit agreement are subject to approval in accordance with applicable law.

Section 16. Incorporation of Certain Provisions into Other Agreements.

All applicable provisions of this *SBA MOA* shall be incorporated into the *Successor Unit Agreement*.

Section 17. Savings Clause.

In the event that any provision of this *SBA MOA* is found to be invalid, such invalidity shall not impair the validity and enforceability of the remaining provisions of this *SBA MOA*.

WHEREFORE, we have hereunto set our hands and seals this __ day of February 2015.

FOR THE CITY OF NEW YORK

By: /s/
ROBERT W. LINN
Commissioner of Labor Relations

FOR THE SERGEANTS BENEVOLENT
ASSOCIATION

By: /s/
EDWARD MULLINS
President

OFFICE OF LABOR RELATIONS

40 Rector Street, New York, N.Y. 10006-1705
nyc.gov/olr

[LETTERHEAD]

[Seal of the City of New York]

February 24, 2015

Edward D. Mullins, President
Sergeants Benevolent Association
31 Worth Street
New York, NY 10013

**RE: SBA MOA for the period August 30, 2011
to August 29, 2018**

Dear Mr. Mullins:

This letter confirms the parties' mutual understanding that the Sergeants Benevolent Association ("SBA"), in adopting the May 5, 2014 Letter Agreement regarding health savings and welfare fund contributions between the City of New York and the Municipal Labor Committee ("MLC"), does not waive any rights the SBA has regarding future MLC Agreements, or any rights the SBA has to negotiate any healthcare or welfare fund matters in future bargaining with the City of New York.

If the above accords with your understanding, kindly execute the signature line provided below.

Sincerely,

/s/
ROBERT W. LINN

ACCEPTED AND AGREED ON BEHALF OF SBA

BY: /s/
Edward Mullins, SBA President

**THE CITY OF NEW YORK
OFFICE OF LABOR RELATIONS**

40 Rector Street, New York, NY 10006-1705
<http://nyc.gov/olr>

[LETTERHEAD]

[Seal of the City of New York]

ROBERT W. LINN
Commissioner

May 5, 2014

Harry Nespoli
Chair, Municipal Labor Committee
125 Barclay Street
New York, NY 10007

Dear Mr. Nespoli:

This is to confirm the parties' mutual understanding concerning the following issues:

1. Unless otherwise agreed to by the parties, the Welfare Fund contribution will remain constant for the length of the successor unit agreements, including the \$65 funded from the Stabilization Fund pursuant to the 2005 Health Benefits Agreement between the City of New York and the Municipal Labor Committee.
2. Effective July 1, 2014, the Stabilization Fund shall convey \$1 Billion to the City of New York to be used to support wage increases and other economic items for the current round of collective bargaining (for the period up to and including fiscal year 2018). Up to an additional total amount of \$150 million will be available over the four year period from the Stabilization Fund for the welfare funds, the allocation of which shall be determined

by the parties. Thereafter, \$ 60 million per year will be available from the Stabilization Fund for the welfare funds, the allocation of which shall be determined by the parties.

3. If the parties decide to engage in a centralized purchase of Prescription Drugs, and savings and efficiencies are identified therefrom, there shall not be any reduction in welfare fund contributions.

4. There shall be a joint committee formed that will engage in a process to select an independent healthcare actuary, and any other mutually agreed upon additional outside expertise, to develop an accounting system to measure and calculate savings.

5. The MLC agrees to generate cumulative healthcare savings of \$3.4 billion over the course of Fiscal Years 2015 through 2018, said savings to be exclusive of the monies referenced in Paragraph 2 above and generated in the individual fiscal years as follows: (i) \$400 million in Fiscal Year 2015; (ii) \$700 million in Fiscal Year 2016; (iii) \$1 billion in Fiscal Year 2017; (iv) \$1.3 billion in Fiscal Year 2018; and (v) for every fiscal year thereafter, the savings on a citywide basis in health care costs shall continue on a recurring basis. At the conclusion of Fiscal Year 2018, the parties shall calculate the savings realized during the prior four-year period. In the event that the MLC has generated more than \$3.4 billion in cumulative healthcare savings during the four-year period, as determined by the jointly selected healthcare actuary, up to the first \$365 million of such additional savings shall be credited proportionately to each union as a one-time lump sum

pensionable bonus payment for its members. Should the union desire to use these funds for other purposes, the parties shall negotiate in good faith to attempt to agree on an appropriate alternative use. Any additional savings generated for the four-year period beyond the first \$365 million will be shared equally with the City and the MLC for the same purposes and subject to the same procedure as the first \$365 million. Additional savings beyond \$1.3 billion in FY 2018 that carry over into FY 2019 shall be subject to negotiations between the parties.

6. The following initiatives are among those that the MLC and the City could consider in their joint efforts to meet the aforementioned annual and four-year cumulative savings figures: minimum premium, self-insurance, dependent eligibility verification audits, the capping of the HIP HMO rate, the capping of the Senior Care rate, the equalization formula, marketing plans, Medicare Advantage, and the more effective delivery of health care.

7. Dispute Resolution

- a. In the event of any dispute under this agreement, the parties shall meet and confer in an attempt to resolve the dispute. If the parties cannot resolve the dispute, such dispute shall be referred to Arbitrator Martin F. Scheinman for resolution.
- b. Such dispute shall be resolved within 90 days.

- c. The arbitrator shall have the authority to impose interim relief that is consistent with the parties' intent.
- d. The arbitrator shall have the authority to meet with the parties at such times as the arbitrator determines is appropriate to enforce the terms of this agreement.
- e. If the parties are unable to agree on the independent health care actuary described above, the arbitrator shall select the impartial health care actuary to be retained by the parties.
- f. The parties shall share the costs for the arbitrator and the actuary the arbitrator selects.

If the above accords with your understanding and agreement, kindly execute the signature line provided.

Sincerely,

/s/
Robert W. Linn
Commissioner

Agreed and Accepted on behalf of the Municipal
Labor Committee

BY: /s/
Harry Nespoli, Chair

The Potential Demise of the Agency Fee and Its Impact on Management and Unions

**John H. Gross, Esq.
Ingerman Smith, LLP
150 Motor Parkway
Suite 400
Hauppauge, New York 11788**

This paper is based upon a presentation at the annual meeting of the Council of School Attorneys of the
National School Boards Association in Nashville, Tennessee, in 2014

Teachers unions have been part of the fabric of American society since the late 1800s. Beginning in 1857 with the creation of the National Education Association (“NEA”) until today, teachers unions have played an important role in shaping the public educational landscape in the United States. Like most private sector unions in the last two decades, teachers’ unions in many States have been faced with a dilemma of mortality; right to work statutes which undermine union finances by prohibiting union security agreements. Even in states like Wisconsin with long histories of public sector collective bargaining and permitted union security provisions such as agency fee, the future of labor unions has become seriously uncertain.

The Supreme Court was put to task in determining whether its seminal holding in *Abood v. Detroit Board of Education*,¹ which permitted the collection of compulsory agency fee dues to public-employee unions for non-political purposes, would remain the prevailing authority. Or, would it and its subsequent progeny be overturned by the facts of *Harris v. Quinn*² and a new “right to work” *qua* union described “free rider” normal be promulgated.

Ultimately, the Court in *Harris* declined to extend *Abood* to what the majority coined as “partial public employees” while for the time being upholding *Abood* to the extent that the First Amendment rights of those persons considered “full public employees” were not violated by a “fair share” requirement. However, the majority opinion written by Justice Samuel Alito, also sharply criticized *Abood*, opining that the analysis undertaken by the *Abood* Court was, “questionable on several grounds.”³ The majority’s apparent dissidence with *Abood* suggests that the continuing challenge raised first in *Friedrichs v. California Teachers Association*,⁴ and now in

¹ *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

² *Harris v. Quinn*, 573 U.S. ___, 134 S. Ct. 2618 (2014).

³ *Harris*, 573 U.S. at ___, (slip op. at 2), 134 S. Ct. at 2621.

⁴ *Friedrichs v. Cal. Teachers Assoc.*, -- U.S. ---, 136 S.Ct. 1083 (Mem) (2016).

Janus v. American Federation, et al. to compulsory union dues may lead to the demise this once-landmark decision and financially cripple public sector unions.

After the 4-4 deadlocked decision in *Friedrichs*, the challenge to compulsory agency fees on First Amendment grounds is pending a decision of the Court in *Janus v. American Federation*. On September 28, 2017 the Court granted Janus' Petition for writ of certiorari.⁵ The case was argued on February 26, 2018. This paper discusses the potential effects of overturning *Abood* and whether examines this judicial assault on public sector unions.

I. *ABOOD V. DETROIT BOARD OF EDUCATION*,⁶ ITS PROGENY, AND THEIR ALLEGED FALLACIES

Until recently, the holding in *Abood* has been black letter labor relations law since the Supreme Court promulgated its decision in 1977. *Abood's* seminal holding arose in an action in Michigan state court brought by public school teachers in Detroit. The plaintiff teachers opposed the various political and ideological activities of their union, and sought to declare the "agency shop" provision of their collective bargaining agreement invalid under state law and the United States Constitution as a deprivation of freedom of association protected by the First and Fourteenth Amendments.⁷ The clause, made permissible by a Michigan statute, required every member of the bargaining unit represented by the union, even if not a union member, to pay, as a condition of employment a service charge equal in amount to union dues.⁸ The litigant teachers argued that the First Amendment protected them from having to pay fees to a union which they did not support.⁹

⁵*Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 138 S.Ct. 54 (Mem) (2017). On November 13, 2017 the Court denied cert in a case seeking to impose a heightened First Amendment scrutiny test on a government declaration that a certain labor organization is the exclusive bargaining representative of employees. *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, 138 S.Ct. 446 (Mem) (2017).

⁶ *Abood*, 431 U.S. 209.

⁷ *Id.* at 209.

⁸ *Id.*

⁹ *Id.*

Ultimately, the Supreme Court upheld the constitutionality of the agency shop fees insofar as the agency fees charged to non-members were used for the purposes of financing collective bargaining, contract administration, and grievance adjustment purposes. The union was required as a quid pro quo for exclusivity to represent all bargaining unit members whether union members or not. The Court determined that the agency fees were justified by the need to prevent employees from “free riding” on the union’s collective bargaining activity, which also benefited non-members, and by the need to preserve “labor peace” by preventing dissension among competing unions.¹⁰ However, in order to address the First Amendment concerns raised by the Appellants, the Court also held that non-members were not required to subsidize expenditures by the organization which aided activities considered political or ideological in nature and which were only incidentally related to the terms and condition of employment.¹¹ Since the Court’s decision in *Abood*, it has remained a preeminent authority for the management of workforces by government entities.¹² Indeed, its holding has been applied in other circumstances including for instance state imposed mandatory bar association membership.¹³

Arguably, *Abood* and its progeny stand for the proposition that a public-sector collective bargaining agreement can only require a non-member to financially support the union’s collective bargaining within the confines of a “chargeable activity.” The agreement must also require the same non-members to “opt-out” of all other activities deemed political and/or ideological in nature. However, despite *Abood*’s over 40 year reign, recent decisions coming down from the *Roberts*’

¹⁰ *Id.* at 220-222.

¹¹ *Abood*, 431 U.S. at 210, 238-241; Although the Court in *Abood* did not define such political activities, later decisions by the Supreme Court parsed out such activities to include, compelling employees to fund, “legislative lobbying or political activities outside the limited context of contract ratification or implementation,” extra-unit litigation, or expenditures for the purpose of public relations. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 521, 526 (1991).

¹² *Harris*, 573 U.S. at ____, 134 S. Ct. at 2644-45 (Dissent of J. Kagen, Slip Op. at 2).

¹³ *Harris*, 134 S. Ct. at 2643 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 5, 110 S. Ct. 2228 (1990)).

Court have decidedly begun to rebuke the Court’s landmark decision and the foundation of its holding. For example, prior to *Harris* in 2012, the Supreme Court held in *Knox v. SEIU Local 1000*,¹⁴ that a union representing government employees may assess money from the employees whom it represents *only if* those employees first “opted-in” to support political expenditures.¹⁵ In that case, the union had come under legal fire after seeking to collect a special assessment fee deemed for political purposes in lieu of a mid-year notice.¹⁶ Non-members argued that the union was required to give them notice and a chance to “opt-in” to the special assessment and its failure to do so was tantamount to a violation of the non-members’ First Amendment rights. The Supreme Court agreed and no-longer was an annual “opt-out” notice in these instances constitutionally sound.¹⁷ Thereafter, in *Harris*, the Supreme Court’s most recent decision in this line of cases, the majority declined to extend compelled agency fees to workers considered, “partial public employees,” under the notion that the Court’s holding in *Abood* was “anomalous.”¹⁸ Ultimately, Justice Alito’s majority opinion all but extirpates *Abood*’s constitutional analysis for upholding compelled agency fees and, following closely on the heels *Knox*, has arguably left *Abood* and its legacy barely breathing.

II. *HARRIS V. QUINN*

On June 30, 2014 the Supreme Court handed down its decision in *Harris*.¹⁹ Although the holding in *Harris* left the Court’s decision in *Abood* operative, the dicta of the decision written by Justice Alito, suggests that a near or actual majority of judges now sitting on the Supreme Court

¹⁴ *Knox v. Serv. Employees Intern. Union, Local 1000*, 132 S. Ct. 2277 (2012).

¹⁵ *Knox*, 132 S. Ct. at 2293.

¹⁶ *Id.* at 2281.

¹⁷ *Id.* at 2282.

¹⁸ *See generally id.* at 2284.

¹⁹ *Harris*, 573 U.S. ____, 134 S. Ct. 2618 (2014).

raise serious question whether compulsory agency fee is constitutionally impermissible as a restraint on free speech for public employees.

In *Harris*, Appellant home healthcare workers in Illinois challenged the fair-share (agency fee) provision contained in their collective bargaining agreement, alleging that it violated their First Amendment rights by requiring a compelled fee to be paid to a union they did not politically support.²⁰ Appellants, hired as “personal assistants” for Medicaid recipients who would otherwise require institutionalization, were hired as part of a statewide rehabilitation program.²¹ In March 2003, Governor Blagojevich issued Executive Order 2003-08 which called for State recognition of a union as exclusive representative for the personal assistants, for the purpose of collective bargaining with the State.²² Following a vote, the SEIU Healthcare Illinois and Indiana (“SEIU-HII”) was designated as the exclusive representative for the State’s personal assistants and the union and the State subsequently entered into collective-bargaining agreements that required all non-union members to pay a “fair share” of the union dues.²³ These dues were deducted directly from each personal assistant’s Medicaid payments.²⁴

Ultimately, the Court rested upon the relationship between the personal assistant and the Medicaid recipient, considering the patient as a customer of the personal assistant, who retained control over most aspects of the employment relationship, including hiring, firing, training, supervision, and discipline of the personal assistants.²⁵ The Court held that since the State’s only role was to provide compensation to the personal assistants, the personal assistants were

²⁰ *Id.* at 2626-27.

²¹ *Id.* at 2623-26.

²² *Id.* at ____ (Slip Op. at 6), 134 S. Ct. at 2626. Several months later the Illinois Legislature codified Governor Blagojevich’s executive order by amending the Illinois Public Labor Relations Act (“PLRA”).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at ____ (Slip Op. at 3), 134 S. Ct. at 2624, 2636-37.

considered to be “partial public employees,” to which the agency shop provision was not applicable.²⁶

However, the critical importance of *Harris* is not necessarily the Court’s failure to extend *Abood* to this particular class of employees, but rather Justice Alito’s studied and rather tenacious attempt to undermine the core principles of this seminal case, in anticipation of the “right case” for finding agency fees unconstitutional appearing on the Supreme Court docket. In rationalizing its decision to both limit *Abood* and subvert its analysis, the Court first lays out the history behind, what it considers to be, *Abood*’s “anomalous holding,”²⁷ and then delves into the decision’s “questionable analysis.”²⁸

To begin, the *Harris* Court acknowledged that in order to determine why the Court’s analysis in *Abood* was incongruous, it was first relevant to determine how the *Abood* Court came to its decision. Its starting point: *Railway Employees v. Hanson*.²⁹ In *Hanson*, employees on the Union Pacific Railroad Company challenged a provision of their collective bargaining agreement which required employees to join, and remain members of the union as a condition of their continued employment. Employees who did not want to join the union argued that the provision violated the Nebraska Constitution, which guaranteed the “right to work.”³⁰ The employees also argued that such agreement, notwithstanding any state law, violated the First and Fifth Amendments of the Federal Constitution. The issue, which ultimately came before the Supreme Court, was whether the union-shop agreements were “germane to the exercise of the power under

²⁶ *Harris*, 573 U.S. at ____ (Slip Op. at 3), 134 S. Ct. at 2622.

²⁷ *Abood*, 431 U.S. at 210, 238-241. As the *Harris* Court points out, *Abood* is considered an anomaly. The Court found that in holding, “that the primary purpose of permitting union to collect fees from non-members...is to prevent non-members from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred,” the case was incongruous with the law because, as they set forth in *Knox* “...free-rider arguments...are generally insufficient to overcome First Amendment objections.” 132 S.Ct. at 2289.

²⁸ *Harris*, 573 U.S. ____ (Slip op. at 17), 134 S. Ct. at 2621.

²⁹ 351 U.S. 225 (1956).

³⁰ *Hanson*, 351 U.S. at 225.

the Commerce Clause.”³¹ The *Hanson* Court held, in an opinion written by Justice Douglas, that the challenged provision “stabilized labor-management relations” and thereby furthered “industrial peace.”³² Despite the First Amendment claims by employees, that a “union shop agreement forces men into ideological and political associations which violate their right to freedom...of association, and freedom of thought,”³³ the Court failed to explore this argument and dismissed it with a single sentence: “[o]n the present record, there is no more infringement or impairment of First Amendment rights than there would be in case of a lawyer who state law is required to be a member of the integrated bar.”³⁴ This determination had no basis in law at the time.³⁵ Next, the majority opinion analyzed the Court’s decision in *Machinist v. Street*.³⁶

In *Street*, employees of the Southern Railway System argued that their First Amendment rights had been violated because a substantial part of their dues were being used for political candidates and causes they did not support.³⁷ The *Street* Court, however, never reached the Constitutional question and instead, construed the Railway Labor Act to forbid unions from using compelled agency fees for causes not supported by employees.³⁸

Ultimately, using *Hanson* and *Street* as its authority, the *Abood* Court dismissed the constitutional issues at bar, holding that the judgments in those cases allowed, constitutionally, for such “interference as exists” justified by “the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”³⁹ However, as the decision in *Harris* points out, the *Abood* Court erred in using *Hanson* and *Street* as controlling;

³¹ *Hanson*, 351 U.S. 225, 233-234; *Harris*, 573 U.S. at ____ (Slip op. at 10), 134 S. Ct. at 2628.

³² *Id.*

³³ *Hanson*, 351 U.S. 225, 236; *Harris*, 573 U.S. at ____ (Slip op. at 11), 134 S. Ct. at 2628.

³⁴ *Hanson*, 351 U.S. 225, 236; *Harris*, 573 U.S. at ____ (Slip op. at 11), 134 S. Ct. at 2629.

³⁵ *Harris*, 573 U.S. at ____ (Slip op. at 11), 134 S. Ct. at 2629.

³⁶ 367 U.S. 740 (1961).

³⁷ *Street*, 367, U.S. at 742-765; *Harris*, 573 U.S. at ____ (Slip op. at 12-13), 134 S. Ct. at 2631-32.

³⁸ *Street*, 367, U.S. at 768-769.

³⁹ *Harris*, 573 U.S. at ____ (Slip op. at 15), 134 S. Ct. at 2631.

Street failed to reach the constitutional question and *Hanson*'s narrow holding, which simply *authorized* the imposition of an agency fee, was misconstrued.⁴⁰ Unlike either case before it, in *Abood*, the Detroit Board of Education, which actually *imposed* an agency fee was also a state instrumentality.⁴¹ This, the *Harris* Court determined, posited "a very different question" than that which was posed in either *Hanson* or *Street*, given the important differences between bargaining in the public and private sectors.⁴² Nevertheless, the *Abood* Court dismissed the constitutional question as already well-settled,⁴³ and instead, focused on upholding union-shop agreements based on the "desirability of labor peace" and the problem of "free-ridership."⁴⁴

Next, the *Harris* majority condemned the *Abood* Court for failure to appropriately distinguish between core union speech in the public and private sectors.⁴⁵ First, Justice Alito opined that the *Abood* Court failed to appreciate the differences between involuntarily subsidized speech in the public sector versus the private sector because in the public sector, core issues such as wages, pensions, and benefits are important *political issues* and in the private sector they are not.⁴⁶ However, given that state and local expenditures on employee wages and benefits "have mushroomed"⁴⁷ in recent years, the Court noted that this distinction is clearly *not* without a difference.⁴⁸ Along the same lines, Justice Alito opined that the *Abood* Court failed to anticipate the difficulty in demarcating between expenditures made for collective bargaining purposes and "those made to achieve political ends."⁴⁹ In the public sector, "both collective-bargaining and

⁴⁰ *Harris*, 573 U.S. at ____ (Slip op. at 17), 134 S. Ct. at 2631-32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Abood*, 431 U.S. at 220-222; *Harris*, 573 U.S. at ____ (Slip op. at 15), 134 S. Ct. at 2621.

⁴⁴ *Abood*, 431 U.S. at 220-222; *Harris*, 573 U.S. at ____ (Slip Op. at 15), 134 S. Ct. at 2621.

⁴⁵ *Harris*, 573 U.S. at ____ (slip op., at 17-18), 134 S. Ct. at 2621.

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Harris*, 573 U.S. at ____ (slip op., at 17-18), 134 S. Ct. at 2632.

political advocacy and lobbying are directed at the government”⁵⁰; the same is not true for the private sector.

Likewise, the majority opinion maintained that the *Abood* Court did not seem to anticipate that problems associated with classifying union expenditures as either “chargeable” or “non-chargeable,” including the problems that objecting non-members would face in challenging a Union’s declaration of expenditures both legally and substantively.⁵¹ Although the Court noted that there have been myriad attempts to define “chargeable activities,”⁵² the test often requires a judgment call on the part of the union due to the fluidity of defining “activities germane to collective bargaining.”⁵³ As such, given the lack of oversight as to the “correctness” of those categorizations, the majority opined that, employees who suspect that a union has wrongfully put expenses in the “germane” category, face a practically insurmountable legal battle which could be fiscally difficult and equally uncertain.⁵⁴ For example, although a union’s books must be audited, “auditors themselves do not review the correctness of the union’s categorization,” they simply “verify that the expenditures made, were in fact made for the purposes claimed....”⁵⁵

Ultimately, Justice Alito’s arguments seem to admonish *Abood* for failure to acknowledge that public sector collective bargaining wholly addresses matters of public concern, and therefore, the process itself is imbued with the very topics of political speech that the First Amendment is designed to protect in the first place, and for which compelled agency fees will burden regardless if the activity is deemed “chargeable” or not.

⁵⁰ *Id.*

⁵¹ *Harris*, 573 U.S. at ____ (Slip op. at 19), 134 S. Ct. at 2633.

⁵² *Harris*, 573 U.S. at ____ (Slip op. at 18), 134 S. Ct. at 2633.

⁵³ *Id.* at 19, 134 S. Ct. at 2633.

⁵⁴ *Id.*

⁵⁵ *Id.*; See also American Federation of Television and Recording Artists, Portland Local, 327 N. L. R. B. 474, 477 (1999).

Lastly, the Court takes issue with the *Abood* Court’s “unsupported empirical assumption ... that the principle of exclusive representation in the public sector is dependent on a union or agency shop fee.”⁵⁶ The *Harris* Court points out that the *Abood* Court’s reliance on “labor peace” as a justification for compelling the payment of agency fees misses the point; Appellants did not challenge the exclusive authority of the union to represent them, they simply maintained that they did not want to be forced to contribute to a union with which they politically disagreed.⁵⁷ Justice Alito also asserts that some federal agencies allow for exclusive representation but do not require an employee to join the union or pay union fees.⁵⁸ Ultimately, the Court’s majority opinion casts much doubt on the alleged “inextricable link” between exclusive representation and compelled agency fees as a policy justification to overcome any First Amendment infringement.⁵⁹

Consequently, the Court’s decision in *Harris* suggested that if certiorari is requested by a full-fledged public employee, at least four of the justices would grant such a review and seek full deliberation on the prospect of overturning *Abood* by ruling that compulsory union dues are prohibited under the First Amendment.

The first opportunity for review of *Abood* after *Harris* was presented to the Court in *Friedrichs v. California*.

III. *FRIEDRICHS V. CALIFORNIA*

In *Friedrichs v. California Teachers Association*, a group of public school teachers challenged the constitutionality of the California Education Employment Relations Act that authorizes agency shop fees in California’s public school districts. Like the appellants in *Harris*, the teachers claimed that agency shop fees violated their First Amendment rights of free speech

⁵⁶ *Harris*, 573 U.S. at ____ (Slip op. at 20), 134 S. Ct. at 2634.

⁵⁷ *Id.* at ____ (Slip op. at 31), 134 S. Ct. at 2621, 2640.

⁵⁸ *Id.*

⁵⁹ *Id.*

and association insofar as the agency shop arrangement forces them to contribute to union expenditures to which they do not agree.⁶⁰ Appellants also maintained that the union’s procedure, which required employees to “opt out” on an annual basis in order to avoid contributing to the union’s political and ideological causes, was unconstitutional. The Appellants in this case affirmatively acknowledged that *Abood* is the controlling precedent regarding compulsory agency fees for public sector employees and in a departure from *Harris*, specifically asked the Supreme Court to overturn the seminal case.⁶¹

Oral argument was held in January 2016.⁶² However, after the death of Justice Antonin Scalia in February 2016, the Court issued a deadlocked 4-4 decision issued in March 2016.⁶³ Thus, the judgment of the circuit court finding Supreme Court precedent controlled was affirmed.⁶⁴

a. Arguments Raised in *Friedrichs*

1. *The Agency Shop Fee*

Under California Law, a union becomes the exclusive bargaining unit for “public school employees” by demonstrating that it has the support of a majority of the employees in the unit.⁶⁵ Once a union becomes the exclusive representative it has the responsibility to represent all public school employees in the unit for collective bargaining purposes and is authorized to bargain over myriad terms and conditions of employment including, but not limited to wages, hours, health, and class size.⁶⁶ In California, teachers must join a recognized union or pay an agency shop fee as a condition of employment.⁶⁷ Non-union employees are required to pay fees to support union

⁶⁰ Brief for Plaintiffs-Appellants at 2, *Friedrichs v. Cal. Teachers Ass’n*, 2014 WL 10076847 (No. 13-57095) (9th Cir. 2014) (hereinafter, “*Friedrichs* Brief for the Appellant”).

⁶¹ See generally *Friedrichs* Brief for the Appellant.

⁶² *Friedrichs v. California Teachers Association*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/> (last visited March 12, 2018).

⁶³ *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016).

⁶⁴ *Id.*; *Friedrichs*, 2014 WL 10076847 (9th Cir. 2014).

⁶⁵ See CAL. GOV’T CODE §§ 3544, 3544.1.

⁶⁶ *Id.* at §3543.1(a).

⁶⁷ *Id.* at §3546(a).

activities that are “germane” to collective bargaining, however, under California regulations it is the union’s responsibility to determine which expenses incurred are considered not to be germane and therefore “non-chargeable.”⁶⁸

i. The Agency Shop Fee Violates Appellants’ First Amendment Rights

In *Friedrichs*, Appellants first argued that compelled agency shop fees for non-union bargaining unit members is a violation of the First Amendment because the bargained-for benefits in their collective-bargaining agreement are the same as those topically addressed in legislation, including health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, and employment-evaluation procedures.⁶⁹ Appellants asserted that, fundamentally, collective bargaining involves the exercise of protected First Amendment activities since government is petitioned.⁷⁰ Based on that notion, Appellants challenged the Court’s rationale for allowing mandated agency fees for topics that are collectively bargained, arguing that the topics should be “non-chargeable” given bargaining for a benefit that may be topically addressed in legislation *is the same act* as lobbying a public official to pass legislation.⁷¹ In both instances, Appellants reason, “the Unions are pressuring the government officials to take official action in service of public policies favored by the Union.”⁷²

Finally, the Appellants argued that even if local unions focus narrowly on collective-bargaining activities, and it is determined that collective bargaining falls outside of the exercise of First Amendment rights, national entities such as the California Teachers Association (“CTA”) or the National Education Association (“NEA”) should not be entitled to an affiliate fee.⁷³ According

⁶⁸ See generally REGS. OF CAL. P.E.R.B. § 32992(b)(1).

⁶⁹ *Friedrichs* Brief for the Appellant at 14.

⁷⁰ *Id.* at 14-15.

⁷¹ *Id.*

⁷² *Friedrichs* Brief for the Appellant at 15 (emphasis added).

⁷³ *Id.*

to Appellants, these entities generally claim that approximately 65% of their expenditures are “chargeable” – thus, germane to their duties of collective bargaining. However, given neither the CTA nor NEA actually collectively bargain within a particular school district, Appellants claim that the mandatory portion of the affiliate fee should not be charged.⁷⁴

ii. *Abood’s* Justifications for Allowing an Agency Shop are Untenable

Appellants next asserted that *Abood’s* justification for allowing an agency shop fee, in order to prevent “free riding” and promote “labor peace” does not justify its burden on the First Amendment.

First, Appellants contended that the Supreme Court, by its own accord, prohibits subsidies for lobbying “even though the potential for “free-riding” is the same as it is for bargaining.”⁷⁵ Given that “free-riding” in the context of lobbying is rejected and using the general notion that individuals cannot be forced to endow private group or private speech,⁷⁶ Appellants claimed that collective bargaining efforts which vicariously benefit non-members of a unit, should not be sufficient justification for compelled subsidization of those efforts.⁷⁷ Likewise, Appellants claimed that agency fees used for collective bargaining purposes, but for demands which non-members feel harm them in the workplace, although not an issue contemplated by *Abood*, burdens the First Amendment.⁷⁸ In other words, the very choices made by a union in asserting particular issues at the bargaining table may be seen by non-union unit members as harmful to them.

Second, the Appellants challenged the premise of exclusive representation, a hallmark of labor law for the last eighty years. Appellants argued that the unprecedented power bestowed on

⁷⁴ *Friedrichs* Brief for the Appellant at P. 16.

⁷⁵ *Friedrichs* Brief for the Appellant at 18; *See Generally Lehnert*, 500 U.S. at 522.

⁷⁶ *Friedrichs* Brief for the Appellant at 17; *See Knox*, 132 S. Ct. at 2295.

⁷⁷ *See generally Friedrichs* Brief for the Appellant at 17-18.

⁷⁸ *Friedrichs* Brief for the Appellant at P. 18-19. Issues such as including issues of compensation based on seniority and tenure and basic matters of education policy.

Unions to bind all employees in a bargaining unit to employment policies and conditions “that the union believes best serves most employees’ collective interests” is a blatant deprivation of non-members’ First Amendment rights to free association.⁷⁹ Appellants pointed out that “not only are non-members compelled to associate with the union *via* contract and accept (often disadvantageous) terms that the unions negotiate; they must *also* devote a portion of their wages to *support* the unwanted collective-bargaining efforts.”⁸⁰ Thus, compelled agency fees do not protect unions from free riders but in fact exacerbate the suppression of a non-member’s First Amendment rights.⁸¹

Lastly, Appellants claimed that compelled agency fees fail to invoke a so-called “labor peace.” In *Harris*, Justice Alito largely undermined the *Abood* Court’s justification for compelled agency fees as a means of promoting “labor peace,” by determining that given employees in other contexts, including certain federal agencies, are not required to join a union or pay union fees, “a union’s status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.”⁸² In that regard, and as previously noted, Justice Alito further opined that the respondents in *Harris*, largely miss the point with their “labor peace” argument because there, petitioners were not claiming that they had a First Amendment right to form a rival union nor were they challenging the authority of SEIU as the exclusive representative.⁸³ Based on this rationale, Appellants maintain that a “labor peace” justification for agency fees in their case also warrants no deference.⁸⁴ Appellants further argue that a State’s

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Friedrichs* Brief for the Appellant at P. 19. However, it is important to note that despite Appellants argument, the *Harris* Court’s opinion also notes that while “labor peace” for home health care workers is diminished due to the fact that participants do not work together in a common facility, “exclusion of a rival union may reasonably be considered as a means of insuring labor-peace within the schools.” *Perry Ed. Assn v. Perry Local Educators’ Assn.*

⁸² *Harris*, 573 U.S. at ____ (slip. op., at 31), 134 S. Ct. at 2640.

⁸³ *Id.*

⁸⁴ *Friedrichs* Brief for the Appellant; *Harris v. Quinn*, 573 U.S. at ____ (slip. op., at 31), 134 S. Ct. at 2640.

interest in bargaining with one union (as to prevent conflict amongst union members) fails to justify compelling non-union members to pay fees to such a union in order to establish labor-peace when the issue of conflict is rendered moot in the first instance by the conferral of exclusive representation on the union winning a majority vote of the members of a bargaining unit.⁸⁵

2. Appellants Challenge the “Opt-Out” Regime

Under an “opt-out” system, the union makes the assumption that all persons are members of the union unless and until he or she affirmatively “opts out” of the union. The Appellants argued that this practice is invalid for three reasons.

First, the “opt-out” requirement wrongfully places the burden on the party whose constitutional rights are at stake: the non-union employee. The Appellants maintained that the union’s presumptive entitlement to compelled agency fee funds flies in the face of both the First Amendment and a fundamental tenant of the Courts to not “presume acquiescence in the loss of fundamental rights.”⁸⁶

Second, Appellants argued that the “opt-out” system fails to serve a compelling interest of the State because “there is no state interest in shifting the advantage of ... inertia away from employees who wish to exercise their First Amendment rights and onto unions that have no right to non-members’ funds.”⁸⁷ As an example, Appellants point out that the State is not allowed to automatically transfer funds from employees’ paychecks to fund political agendas – they must request donations.⁸⁸ Thus, the same should be true for unions; unions should be required to ask for funds and not automatically benefit unless and until an employee decidedly opts out.

⁸⁵ *Friedrichs* Brief for the Appellant at 20.

⁸⁶ *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* 527 U.S. 666, 682, (1999).

⁸⁷ *Friedrichs* Brief for the Appellant at P. 22; *See also* *South Carolina v. Katzenback*, 383 US 301, 328 (1966), *Davenport v. Wash. Educ. Ass’n*, 551 US 117, 185 (2007) (internal quotations and citations omitted).

⁸⁸ *Friedrichs* Brief for the Appellant at. 22.

Lastly, Appellants reasoned that even in the event that the union had a legitimate interest in burdening non-members' First Amendment rights, such a compelling interest is "broader than necessary to serve that interest."⁸⁹ Given that the agency shop fee imposes a heavy burden on the First Amendment rights of objecting employees,⁹⁰ requiring employees to annually "opt-out" of the union provides an added burden to objecting employees.⁹¹ The Appellants suggested eliminating such a burdensome risk by requiring unions to obtain affirmative consent from all public employees before commandeering payments.⁹²

IV. Next Up: JANUS V. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES ("AFSCME")

This matter, involving the same statute as was reviewed in *Harris*, originally began in the United States District Court for the Northern District of Illinois on a complaint brought by Bruce Rauner, Governor of Illinois against labor organizations representing state employees, including AFSCME. The Governor sought a declaration that the "fair share contract provisions" of the Illinois Public Labor Relations Act, (IPLRA), 5 ILCS 315/6(e), were unconstitutional and violated the First Amendment "by compelling employees who disapprove of the union to contribute money to it."⁹³ The Governor had also issued Executive Order 15-13 directing the state agency that negotiates on behalf of the State not to comply with IPLRA or the collective bargaining agreement. By way of this action, the Governor sought a declaration that this Executive Order was enforceable.

The IPLRA provides that the labor organization chosen by a majority of public employees in a bargaining unit is the exclusive collective bargaining representative for the employees with

⁸⁹ *Knox*, 132 S.Ct. at 2291

⁹⁰ *Harris v. Quinn*, 573 U.S. at ____ (slip. op., at 37), 134 S. Ct. at 2643.

⁹¹ *Friedrichs* Brief for the Appellant at 22.

⁹² *Friedrichs* Brief for the Appellant at 23.

⁹³ *Rauner*, 2015 WL 2385698 at 2.

respect to rates of pay, wages, hours and other conditions of employment.⁹⁴ Employees are not required to join the union, but the statute’s “fair share provision” allows a labor organization to include in its collective bargaining agreement (“CBA”) a requirement that non-member employees covered by the CBA must “pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment.”⁹⁵ The statute further requires state agencies to deduct the proportionate share from the employees’ salary to pay to the union.⁹⁶ By its terms, the statute, and any CBA, prevail and control over any other law or executive order.

Non-union member public employees, including Mark Janus, sought to intervene as plaintiffs after the defendant labor organizations moved to dismiss the Governor’s complaint for lack of standing and for failure to state a claim. The federal district court dismissed the Governor’s complaint for lack of standing but to avoid the unnecessary delay and expense of requiring the employees to commence a new action, the district court allowed them to intervene and the case to proceed under the employees’ complaint.⁹⁷

Thereafter, the defendant unions moved to dismiss the employees’ second amended complaint that challenged the constitutionality of the compulsory collection of union fees on First Amendment grounds.⁹⁸ The defendants argued for dismissal based on *Abood*. The district court dismissed the employees’ action noting

Plaintiffs brought the suit hoping that Abood would be reversed in a matter then pending before the Supreme Court in which the continued validity of Abood was challenged. Friedrichs v.

⁹⁴ *Id.*, at 1.

⁹⁵ *Id.* at 2, *quoting*, IPLRA at 5 ILCS 315/6(e).

⁹⁶ *Id.*

⁹⁷ *Id.* at 3-4.

⁹⁸ *Janus and Trygg v. American Federation of State, County, and Municipal Employees, Council 31; General Teamsters/Professional & Technical Employees Local Union No. 916; Michael Hoffman, Director of the Illinois Department of Central Management Services, in his official capacity*, Order of Hon. Robert W. Gettleman U.S.D.J., Case No. 15 C 1235 (September 13, 2016) at 1.

California Teacher Association, __ U.S. ___, 126 S.Ct. 1083 (2016). In Friedrichs an equally divided Supreme Court affirmed the Ninth Circuit's decision upholding the fair share fees based on the reasoning in Abood. Id. As a result, Abood remains valid and binding precedent.⁹⁹

Plaintiffs Mark Janus and Brian Trygg appealed the dismissal of the case to the Seventh Circuit. The circuit court affirmed the district court's order of dismissal but distinguished the circumstances of the two plaintiffs. The court found that Trygg's claims warranted dismissal on the ground of claim preclusion. This plaintiff had previously brought a challenge to his compelled payment of the union's "fair share" fees claiming the Illinois statute allowed a person who has a religious objection to paying a union fee could instead pay the fee to a charity. Trygg was successful in that challenge and the Seventh Circuit determined that since Trygg could have raised the First Amendment claim in the previous action, he was now precluded from litigating again.¹⁰⁰

However, with respect to Janus' claim, the Circuit Court held his claim "was properly dismissed, though on a different ground: that he failed to state a valid claim because, as we said earlier, neither the district court nor this court can overrule *Abood*, and it is *Abood* that stands in the way of his claim."¹⁰¹

On September 28, 2017 the United States Supreme Court granted Janus' petition for certiorari.¹⁰² With the addition of Justice Neil Gorsuch to fill the seat made vacant by Justice Scalia's death in 2016, this term may see the end of *Abood* and compulsory agency fees.

In his petition for writ of certiorari ("Petition"), Janus characterized his challenge to the constitutionality of the Illinois statute as the same question that was before the Court in *Friedrichs*, *i.e.*, "should *Abood* be overruled and public-sector agency fee arrangements be declared

⁹⁹ *Id.*

¹⁰⁰ *Janus and Trygg*, 851 F.3d 746, 748 (7th Cir. 2017)

¹⁰¹ *Id.*

¹⁰² *Janus v. American Federation, et al.*, 138 S.Ct. 54 (Mem) (2017).

unconstitutional under the First Amendment?”¹⁰³ Janus noted in his petition that the Illinois statute “tracks” the framework in *Abood* that public employees may be required to pay a fee to a union for bargaining and administering the CBA but cannot be forced to pay for political or ideological union activities.¹⁰⁴ Janus is asking the Court to “overrule *Abood* and declare Illinois’ agency fee law unconstitutional.”¹⁰⁵ Janus points out in his petition that his case concerns the same statute as was challenged in *Harris* brought by “full-fledged” public employee.¹⁰⁶ Janus is not challenging the constitutionality of exclusive representation.¹⁰⁷

A review of the arguments presented to the Court by Janus and AFSCME in support and in opposition to the Petition for certiorari provides a guide to some of the issues that will be considered by the Court.

a. *Petition for Certiorari: Janus’ Arguments for Review of Abood*

Janus claimed in his Petition agency fees are “compelled speech and association” that should be required to satisfy heightened constitutional scrutiny. According to Janus, such fees “significantly impinges on the First Amendment Rights of each and every employee who did not choose to subsidize the union’s advocacy” and employees cannot choose the speech that is worthy of his or her support.¹⁰⁸ Janus alleged the fees “support speech designed to influence governmental policies.”¹⁰⁹ Janus pointed to language in *Harris* and *Knox* to argue that public sector labor issues, including wage and employment benefits, are political issues and the function of unions is “quintessential lobbying.”¹¹⁰

¹⁰³ Petition for Cert. at (i), *Janus v. American Federation of State, County and Municipal Employees, Council 31, et al.*, 2017 WL 2546472 (U.S.).

¹⁰⁴ *Id.* at 6-7.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Janus urged that *Abood* must be reconsidered and overruled because it failed to apply the proper level of scrutiny to compelled agency fees and is thus not consistent with the Court’s decisions regarding the constitutional scrutiny applicable to compelled association and speech. Janus argued that an agency fee statute should serve a “compelling state interest” or be subject to “strict scrutiny.”¹¹¹ Janus further argued that the judicial tests for determining which union activities can be covered by compelled fees is unworkable and presents “administrative problems.”¹¹²

After arguing that agency fee statutes should be required to satisfy heightened constitutional scrutiny, Janus then went on to posit that such statutes cannot meet that higher, more rigorous standard. Interestingly, Janus does not challenge the statute’s exclusive representation requirement. Rather, the challenge is to compulsory agency fees since, according to Janus, such fees “are not necessary” because exclusive representation and the benefits of that exclusivity assist the union in recruiting and retaining members.”¹¹³

Finally, Janus argued that *Abood* was incorrect in stating that agency fees fairly distribute the costs of a union’s activities and counteract an incentive for an employee to become a “free rider” by refusing to contribute while obtaining the benefits of union representation.¹¹⁴ Janus suggested that employees should instead be considered “forced riders” who are required to subsidize unwanted advocacy by the bargaining agent.¹¹⁵ According to Janus, “[o]verall *Abood* got it backwards by presuming that exclusive representation burdens unions and benefits nonmember employees.”¹¹⁶

¹¹¹ *Id.* at 9-10.

¹¹² *Id.* at 9-10.

¹¹³ *Id.* at 11.

¹¹⁴ *Id.* at 13.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 14.

b. AFSCME's Opposition to the Petition

AFSCME opposed the Petition and overruling *Abood* on various jurisdictional and substantive grounds. AFSCME first argued in its Brief in Opposition to the Petition, as an initial matter, that the Court lacks subject matter jurisdiction given the peculiar origins of the case where the district court allowed the employee plaintiffs' intervenor case to continue even though the Governor's underlying complaint was dismissed for lack of standing. AFSCME also argued against granting the Petition since there was no factual record developed by the district court and no analysis by the Court of Appeals.¹¹⁷

On the merits, AFSCME took the position that *Abood* was correctly decided and should remain settled law: "*Abood's* rule is sound and underlies important and longstanding tenets of this Court's First Amendment jurisprudence. At its core, *Abood* acknowledges that certain labor-relations interests justify the small intrusion on employees' First Amendment interests that fair-share payments represents."¹¹⁸ AFSCME claimed fair share provisions fall within the government's authority to regulate speech when it acts as an employer. According to AFSCME, "[t]he constitutional balance struck in *Abood* accords with the balancing test for considering the employment-related First Amendment claims of public employees...."¹¹⁹ AFSCME also argued that the government interest in "labor peace" supports any limited infringement on constitutional rights of nonmembers and that the decision established a First Amendment principal that the government may require union fees as a condition of employment.¹²⁰

¹¹⁷ Brief in Opposition For Respondent American Federation of State, County and Municipal Employees, Council 31 at 11-12, 16, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 54 (2017) (No. 16-1466), 2017 WL 3500027.

¹¹⁸ *Id.* at 17.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.*

AFSCME also pointed to the application of *Abood* outside the context of union dues contending the decision has been recognized “for the principle that, where the government is constitutionally permitted to advance valid government interests through private associations (*e.g.*, state bars), it may also oblige the beneficiaries to share the costs of supporting the endeavor’s core purpose.”¹²¹ According to AFSCME, *Abood* correctly held the vital policy interests of public employers “in fairly allocating the costs of the services provided by the union outweigh the comparatively modest limitations on public employees’ expressive freedom.”¹²²

Oral argument for the *Janus* case was held on February 26, 2018.¹²³ Based on the questions asked and comments made during oral argument, one can determine that the Justices are sticking to the positions they held in the *Harris* decision and in the *Friedrichs* tie. Those positions are as follows: Chief Justice Roberts and Justices Kennedy, Thomas, and Alito leaning toward overruling *Abood*, and Justices Ginsburg, Breyer, Sotomayor, and Kagan defending agency fees.

However, the newest Justice, Justice Gorsuch, who essentially will be the deciding vote, chose to remain silent on the issue by not commenting or asking any questions during oral argument. Therefore, his views remain unknown. During his closing remarks, the attorney for Respondent AFSCME warned of an “untold specter of labor unrest throughout the country” if *Janus* prevails.¹²⁴ Unfortunately, we will have to wait until a decision is rendered sometime near the end of June to find out whether that argument will prove effective with the Court, or whether the “deciding” Justice, Justice Gorsuch, will instead follow in the footsteps of Justice Scalia, whom Justice Gorsuch succeeded.¹²⁵

¹²¹ *Id.* at 19.

¹²² *Id.* at 21.

¹²³ Transcript of Oral Argument, *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 1050563 (U.S.).

¹²⁴ *Id.* at 67-68.

¹²⁵ Amy Howe, *Argument Analysis: Gorsuch Stays Mum on Union Fees*, SCOTUSBLOG (Feb. 26, 2018, 3:23 PM) <http://www.scotusblog.com/2018/02/argument-analysis-gorsuch-stays-mum-union-fees/>.

V. *HILL v. SEIU, et al.*¹²⁶

This case also sought to overturn *Abood* however the issues presented in *Hill* included 1) whether the government may declare an organization the “exclusive representative” of employees for any rational basis or only if it satisfies heightened First Amendment scrutiny, and 2) if exclusive representation is subject to First Amendment scrutiny whether it is constitutional for the government to require employees who are not full-fledged public employees to accept an exclusive representative.¹²⁷ The case also challenged the same Illinois statute as involved in *Janus* and was brought by workers who no longer have to pay dues and are not subject to automatic deductions from their earnings as a result of the Court’s decision in *Harris*.

The Seventh Circuit Court of Appeals affirmed the lower court’s dismissal of the complaint for failing to state a claim holding that the statute’s exclusive bargaining provisions did not create constitutionally problematic associations and thus was not subject to heightened scrutiny under the First Amendment. The Circuit Court further noted that “[n]egotiating with one majority-elected exclusive bargaining representative seems a rational means of serving these interests.”¹²⁸ On November 13, 2017 the Supreme Court denied the Petition for a writ of certiorari.¹²⁹

VI. THE POTENTIAL EFFECTS OF OVERTURNING *ABOOD*

Janus is requesting a tall-order from the Supreme Court: a finding that agency fees statutes are unconstitutional under the First Amendment. If the Supreme Court ultimately finds in his favor - the equivalent to overturning *Abood* - the face of labor relations will vastly change in the United States.

¹²⁶ *Hill v. Service Employees International Union (SEIU)*, 850 F.3d 861 (7th Cir. 2017).

¹²⁷ Petition for Cert. at (i), *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, 2017 WL 2591420 (U.S.)

¹²⁸ *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, 850 F.3d 861, 865 (7th Cir. 2017).

¹²⁹ *Hill v. Service Employees International Union, Healthcare Illinois, Indiana Missouri Kansas et al.*, --- S.Ct. ----, 2017 WL 2559023 (Mem).

The Supreme Court's decision in *Abood* has stood at the heart of First Amendment jurisprudence for over forty years. Thus, overturning the decision and elimination of agency fees will have substantial impact on the well-settled doctrine *Abood* has generated, including a potential destabilizing impact on all unions across the country and a decline in union strength, resources, membership, and political power.¹³⁰ Ultimately, the overturning of the core tenants of *Abood* would create a regime akin to a national right-to-work law. However, if the Court also declares exclusive representation unconstitutional, the consequences could dramatically change the workplace.¹³¹

a. *The Impact on Public Sector Organization*

If the Supreme Court decides to rule in favor of Janus, the decision's impact could be substantial. If the Supreme Court overturns *Abood* and finds agency fees unconstitutional, the impact on organizing in the public sector and the delivery of union services will ostensibly mirror States which currently have right-to-work laws.

i. *A National Right-to-Work Regime?*

If a decision by the Supreme Court determines that compelled agency fees regimes are unconstitutional, States which are currently considered to have "forced unionism" will quickly find themselves operating under the same norms as States which are exclusively "right-to-work." Based on that assumption, one likely consequence of the Supreme Court's determination would be a decline in public union membership and financial resources; although arguably the two premises are inextricably linked.¹³² First, unions would no longer have the ability to compel

¹³⁰ JANIE SCULL, AMBER M. WINKLER & DARA ZEEHANDELARR, *How Strong are U.S. Teacher Unions? A State by State Comparison*, Thomas B. Fordham Institute (October 2012).

¹³¹ Charles Morris, *Members-Only Collective Bargaining, Get Ready For an Old Concept with a New Use* (August 2, 2013) <http://portsIde.org/print/2013-08-02/members-only-collective-bargaining-get-ready-old-concept-new-use#sthash.G7vrdjun.dpuf>

¹³² See generally SCULL ET. AL, *supra* note 88.

financial support from employees. Although employees may still pay voluntarily, unions will be barred from using threat of unemployment as a means to coerce both fees and membership. As a result, presumably the fiscal resources of unions will decline and union-represented members, who believe they do not benefit from their union-negotiated contract, will not be incentivized to join resulting in a decrease in resources to the union. The same would be true for teachers unions. For example, after Michigan recently passed its right to work law in August 2014, an estimated 1% or 1,500 teachers immediately “opted out” of their teachers union.¹³³ Although the number may appear paltry, the union expects the numbers to grow, given the initial “opt-out” deadline was not publicized. Similarly, after Wisconsin passed its “right-to-work” law in 2011, approximately one-third of teachers dropped their union membership.¹³⁴ The same is true after right-to-work laws were passed in Oklahoma, Indiana, and Iowa.¹³⁵ Ultimately, the fiscal advantage that unions now enjoy in mandatory-bargaining states could be reduced by as much as 60%, causing them to engage in the same amount of work with substantially less funding.¹³⁶ As a result, union presence in the States could decline and leave States with a resulting boon in management.

Correspondingly, there is a potential impact to the balance of political power. As Justice Alito’s majority decision points out, “*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see...[b]ut in the public sector, both collective bargaining and political advocacy and lobby are directed at the government.”¹³⁷ Although this part of the decision stands for the

¹³³ Aaron Crowe, *State of the Unions This Labor Day: Losing Battles in the States*, (August 29, 2014, 3:42 PM) <http://www.dailyfinance.com/2014/08/29/state-of-the-unions-labor-day-losing-battles-states/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209.

logic that given the confluence of the issues, coercing union dues from public employees, inherently means forcing them to engage in political speech they may not want to support, it also stands for the proposition that a decline in union resources can create a reduction in the amount of money that can be spent on union political activities leading to a decrease in the leverage of a local union.¹³⁸ Without proposing a sequence of events in perpetuity, the reduction of political leverage at the local level could theoretically create a trickle-up effect to state organizations which would ultimately lessen those organizations' power. As a result, State organizations would be unable to infuse political power back to their local affiliates and thus provide them with additional strength to expand bargaining rights – and so on.¹³⁹

On the contrary, there is research to suggest that a union can maintain their prevalence through other means. A recent study, which engaged in a state-by-state comparison of teachers unions, has shown that even in light of the foregoing, no single attribute of a union defines its strength.¹⁴⁰ Rather, the strength of a union results from an amalgam of leadership, relationships, initiatives, prior effectiveness, and resources.¹⁴¹ For example, in States which allow agency fees, unions are enabled to accumulate increased financial resources than their counterparts.¹⁴² However, due to the interrelationship between these attributes, it is also possible that a union, without significant financial compensation may acquire strength through closed-door conversations with their adversaries.¹⁴³ For example, although Alabama prohibits agency fees and is firmly anti-labor, its teachers union has one of the highest organization rates and generates a significant amount of revenue per teacher. In fact, even after Alabama passed its right-to-work

¹³⁸ SCULL ET. AL, *supra* note 88 at 25.

¹³⁹ *Id.* at 38.

¹⁴⁰ *Id.* at 20.

¹⁴¹ *See generally*, SCULL ET. AL, *supra* note 88.

¹⁴² *Id.* at 22.

¹⁴³ *Id.*

laws, 80% of teachers voluntarily maintained their union membership.¹⁴⁴ Consequently, while a Union's ability to garner extensive resources is significant, and the inability to collect agency fees may weaken a union, there is evidence to suggest that States which are right-to-work are able to amass resources and exert authority using other channels of influence.¹⁴⁵

b. *The Impact on Management Organizations*

Not only will a decision by the Supreme Court determining that compelled agency fees regimes are unconstitutional have a major impact on unions, but it will also affect management organizations and government employers. The United States Supreme Court has already recognized an employer's interest in dealing with an exclusive representative when establishing workplace terms and conditions. The Court specifically noted in *Minnesota State Board for Community Colleges v. Knight* that "the goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when negotiating."¹⁴⁶ The Court in *Abood* also noted that "confusion and conflict" could result from negotiating with multiple groups of employees.¹⁴⁷

Exclusive representation provides many benefits to employers that will be lost if agency fees are declared unconstitutional, such as consolidation of the "process of bargaining about individual terms and conditions of employment into a single collective endeavor," preventing strikes in the public sector, and efficiently resolving workplace disputes and labor issues through an experienced union representative.¹⁴⁸ Management's ability to efficiently resolve labor issues,

¹⁴⁴ *Teachers Can No Opt Out of Unions* (August 29, 2014), News Channel 3.
<http://www.wwmt.com/news/features/top-stories/stories/Teachers-can-now-opt-out-of-unions-28984.shtml#.VKQNmnnu19B>.

¹⁴⁵ SCULL ET. AL, *supra* note 88 at 25.

¹⁴⁶ *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 291 (1984).

¹⁴⁷ *Abood*, 431 U.S. at 220-21.

¹⁴⁸ Brief for Respondents Lisa Madigan and Michael Hoffman, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31* at 38-39, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 481593.

particularly grievances, will be injured if agency fees are declared unconstitutional because experienced and knowledgeable union representatives help facilitate a timely and satisfactory resolution of the dispute since they organize and prioritize employees' concerns in the workplace.¹⁴⁹ An exclusive representative is specifically beneficial to the collective bargaining process because he/she efficiently and reliably conveys information about employee preferences to government employers by organizing and channeling the concerns and priorities of employees, and reconciling conflicting views.¹⁵⁰ Furthermore, exclusive representatives enable the government and other employers to establish employment terms in a more durable and stable manner than if those terms were imposed unilaterally.¹⁵¹

Under the exclusive representation model of collective bargaining, unions must equally, and in good faith, represent every employee in a bargaining unit, whether the employer is a union member or not.¹⁵² Although not sought in *Janus*, if exclusive representation is ultimately eliminated by the Supreme Court in a subsequent case, or by state statutory amendment of bargaining duties, then the duty of fair representation likely gets eliminated with it. “Without [the] duty of fair representation, government employers would lose the benefit of bargaining with a single party that represents all employees, and would be faced with the workplace dissension and resentment that predictably would arise if unions could act solely in the interests of their own members.”¹⁵³ In strongly pro-labor states like New York the Taylor Law will continue to exist. Should significant membership disaffection grow, will public sector unions seek to be released

¹⁴⁹ Brief for the State of N.Y. et al. as Amici Curiae in Support of Respondents at 19-21, *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 529839.

¹⁵⁰ Brief for Respondents Lisa Madigan and Michael Hoffman, *supra* note 148, at 38.

¹⁵¹ *Id.*

¹⁵² Rachel Levinson, *The Duty of Fair Representation*, (AAUP July 2007), available at, <https://www.aaup.org/NR/rdonlyres/522E23C3-FF7E-443C-A843-AE1527B3EBF8/0/DFR.pdf>; Civil Service Law § 209-a(2); *Matter of Minaya*, 39 PERB 4601 (2006).

¹⁵³ Brief for Respondents Lisa Madigan and Michael Hoffman, *supra* note 148, at 41.

from the responsibilities of exclusivity? Will there then grow a plethora of unions for management to deal with?

Another problem that arises for management if the collection of agency fees are declared unconstitutional is employers will have to determine if collective bargaining agreements remain valid and binding in the absence of agency-fee provisions.¹⁵⁴ Determining whether or not a contract remains valid and binding is a very complex question that involves the interpretation of severability clauses and state-law principles in contract law.¹⁵⁵ Therefore, if the Supreme Court rules in favor of Janus it will beg the questions: what does management do with contracts that are currently in effect? Do employers risk a contract violation or a violation of the First Amendment? In order to avoid such violations, employers and government agencies may choose to renegotiate collective bargaining agreements, which is very costly and will divert management's attention from other pressing matters.¹⁵⁶ Additionally, a decision declaring compelled agency fees as unconstitutional will destabilize labor-management relations that union security clauses in contracts were created to promote.¹⁵⁷ Such a decision has the potential to damage business operations by "sowing disharmony in ... workforces and allowing free riders to enjoy the benefits and securities provided by labor agreements without paying their fair share for representation."¹⁵⁸

Lastly, if the Supreme Court declares compelled agency fees to be unconstitutional, such decision is likely to cause a breakdown in collective bargaining which will in turn damage important public services like education. For example, in 2011, the State of Wisconsin decided to

¹⁵⁴ Brief for Governor Tom Wolf, State and Local Officials, and Local Gov'ts as Amici Curiae in Support of Respondents at 11, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 527962.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 11-12.

¹⁵⁷ Brief for Crown Bldg. Maint. Co. & Crown Energy Servs., Inc. et al. as Amici Curiae in Support of Respondents at 12, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 527959.

¹⁵⁸ *Id.*

restrict bargaining and eliminate agency fees, which led to lower compensation rates, an increase in turnover rates, and a drop in teacher experience.¹⁵⁹ Furthermore, the elimination of compelled agency fees will predictably strain workplace relations and undermine the effective management of schools.¹⁶⁰ Such elimination will lead to a substantial decrease in revenue for unions, which means teacher unions will need to focus on generating additional revenue rather than improving teaching and learning.¹⁶¹ As a result, the collaborative relationships that currently exist between teachers and school administrators will likely become impaired, less cooperative, and possibly even confrontational.¹⁶²

IV. POTENTIAL STATUTORY AMELIORATIVES TO THE SUPREME COURT'S DECISION IN JANUS

As stated above, if the petitioner in *Janus* receives a favorable decision from the Supreme Court, *Abood* will be reversed and as a result the open shop will become a federal constitutional mandate. In other words, a ruling in Janus' favor would require public sector unions to represent non-members for free, while still being subject to duty of fair representation claims by dissatisfied non-members. There are certain statutory remedies that states may take in order to ameliorate the effect of the potential *Janus* decision. For example, states may follow the statutory approaches that are currently used in Florida and California.

The state of Florida is an open shop state. However, Florida's public sector collective bargaining law includes a provision that modifies exclusive representation by not requiring a union to process or arbitrate grievances by non-members.¹⁶³ Such modification, lessens the financial

¹⁵⁹ Brief for the Nat'l Educ. Ass'n et al. as Amici Curiae in Support of Respondents, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, Council 31, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 529843.

¹⁶⁰ Brief for Am. Fed'n of Teachers as Amici Curiae in Support of Respondents, *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, Council 31 at 30, 138 S. Ct. 54 (2017) (No. 16-1466), 2018 WL 529841.

¹⁶¹ *Id.* at 28, 30.

¹⁶² *Id.* at 30-31.

¹⁶³ Fla. Stat. Ann. § 447.401 (West 2017).

burden on a union in an open shop state with respect to non-members. Section 447.401 of the Florida State Labor Law specifically states “that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.”¹⁶⁴ The language of the Florida statute grants wide discretion to public sector unions in determining whether to provide representation for grievances filed by non-dues-paying unit members.¹⁶⁵ Additionally, since unions are granted wide discretion under the Florida law, a union may decide “to pursue a grievance by a non-member or ... intervene in an arbitration when the [end result] might have unit-wide consequences.”¹⁶⁶ States who choose to follow the Florida law model may wish to expand such model by amending public sector collective bargaining laws to grant more discretion to unions. For example, states may wish to include in their laws that a union is “not required to represent a non-member during disciplinary interrogations and hearings, during meetings with supervisors, or with respect to the pursuit of statutory workplace claims.”¹⁶⁷

Another alternative model states may consider adopting is the model used in California. Under section 3556 of the California Government code, public employers are required to provide exclusive representatives with notice and access to new employee orientations.¹⁶⁸ This law requires the parties to negotiate the structure, time, and manner of access to new employee orientations, and it also mandates the reopening of all existing contracts for “the limited purpose of negotiating an agreement regarding access ... to new employee orientations.”¹⁶⁹ Should the parties’ negotiations concerning access result in an impasse, the issue shall be resolved through

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ National Center for the Study of Collective Bargaining in Higher Education and the Professionals, *January 2018 E-Note Newsletter*, HUNTER THE CITY UNIVERSITY OF NEW YORK, <http://myemail.constantcontact.com/January-2018-E-Note--News--Updates--and-Analysis.html?soid=1102372137664&aid=hZ8nn-tOyaI#A5> (last visited March 12, 2018).

¹⁶⁷ *Id.*

¹⁶⁸ Cal. Gov’t Code § 3556 (West 2017).

¹⁶⁹ *Id.* § 3557.

compulsory interest arbitration, which can be demanded by either party.¹⁷⁰ The California law also mandates public employers to provide all unions representing a bargaining unit with information about all new and current employees in the unit, such as each member's name, address, job title, department, work location, telephone numbers, and any personal email address on file.¹⁷¹ The information concerning new employees must be provided to the union within 30 days of the date of hire or by the first pay period of the month following commencement of employment.¹⁷² Additionally, such information must be provided to the union every 120 days unless the parties have negotiated an agreement stating otherwise.¹⁷³ California's statutory grant of union access to new employee orientations and certain information has the potential to lead to more employee participation in collective activities concerning workplace issues.

V. CONCLUSION

In declining to extend *Abood* to the Appellants in *Harris v. Quinn*, the Supreme Court's majority opinion openly suggests that given the right circumstances the Court may hold that *Abood* and its progeny are no longer decisive. As the Court prepares to decide *Janus*, a case that seeks to overturn decades of judicial decisions, the future ramifications are still unclear. Most pertinent are the imminent effects to established public-union organizations and collective bargaining paradigms currently in use in over twenty states.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* § 3558.

¹⁷² *Id.*

¹⁷³ *Id.*

IN THE
Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

**BRIEF FOR RESPONDENT
AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
COUNCIL 31**

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QUESTIONS PRESENTED

1. Whether this Court lacks subject-matter jurisdiction under *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914), which held that a new plaintiff’s intervention cannot be used to “cure” the lack of federal subject-matter jurisdiction over the original case.

2. Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which this Court has repeatedly reaffirmed and which forms the basis for public-sector “agency shop” arrangements in States and localities across the United States, should be overruled.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
STATEMENT.....	2
A. Legal Background	2
B. Background Of Agency-Shop Arrangements	5
C. Collective Bargaining And Contract Admin- istration In Illinois	8
D. Procedural History	12
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THIS COURT LACKS SUBJECT- MATTER JURISDICTION	16
II. OVERRULING <i>ABOOD</i> IS INCON- SISTENT WITH THE FIRST AMEND- MENT'S ORIGINAL MEANING.....	17
A. The Framers Believed It Uncontro- versial That The Government Could Condition Public Employment On The Relinquishment Of First Amendment Rights	17
B. Respect For The First Amendment's Original Meaning Justifies Reaffirm- ing <i>Abood</i> , Not Overruling It	19
III. OVERRULING <i>ABOOD</i> IS INCONSIS- TENT WITH THE GOVERNMENT'S PREROGATIVE AS EMPLOYER	20

A. Neither Strict Nor Exacting Scrutiny Applies When The Government Acts As Employer.....	20
1. Workplace Speech.....	21
2. Political Patronage	25
3. Forum Analysis	27
4. Compelled Speech and Association	27
B. <i>Knox</i> And <i>Harris</i> Do Not Justify Strict Or Exacting Scrutiny When The Government Acts As Employer.....	29
C. This Court’s Longstanding Fair-Share Jurisprudence Appropriately Balances Employees’ Workplace Speech Rights Against The Government’s Legitimate Interests As Employer	31
1. Fair-Share Fees Implicate Speech by Government Employees as Employees.....	31
2. The Government Has Legitimate Interests in Preventing Unfair Free-Riding by Non-Members.....	34
3. The Government Also Has Legitimate Interests in a Well-Funded Exclusive Representative.....	36
D. Petitioner’s Contention That All Collective Bargaining, Contract Administration, And Grievance Procedures Are Equivalent To Political Lobbying Is False	41

1. The Long-Recognized Distinction Between Collective Bargaining and Political Lobbying Is Sound	41
2. Contract Administration and Grievance Procedures Are Wholly Unlike Lobbying	45
3. In an Appropriate Case, This Court Can Reconsider the Line Drawn in <i>Lehnert</i>	46
IV. OVERRULING <i>ABOOD</i> IS INCONSISTENT WITH <i>STARE DECISIS</i>	47
A. <i>Stare Decisis</i> Principles Support Affirmance	47
1. <i>Abood</i> 's Longevity and Repeated Reaffirmance Compel <i>Stare Decisis</i>	48
2. Petitioner Does Not Seriously Dispute That Overruling <i>Abood</i> Would Upend Significant Reliance Interests	50
3. <i>Abood</i> Has Proved Workable	51
4. There Is No Exception to <i>Stare Decisis</i> Applicable Here	52
B. Petitioner's Arguments Concerning <i>Abood</i> 's Vitality Depend On Assertions Of Contested (And Incorrect) Facts, And This Case Lacks A Factual Record	53
C. Overruling <i>Abood</i> Would Disrupt Other Long-Settled First Amendment Doctrines	55

V. PETITIONER’S REQUEST FOR AN AFFIRMATIVE CONSENT REQUIRE- MENT SHOULD BE REJECTED	57
A. The Scope Of Required Consent Is Outside The Question Presented	57
B. Any First Amendment Interest Against Compelled Subsidization Is Properly Protected By A Right To Opt Out	58
CONCLUSION.....	59

TABLE OF AUTHORITIES

	Page
CASES	
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977)	<i>passim</i>
<i>Adler v. Board of Educ.</i> , 342 U.S. 485 (1952)	18
<i>Air Line Pilots Ass’n v. Miller</i> , 523 U.S. 866 (1998)	7
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	56
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984)	52
<i>Board of Cty. Comm’rs v. Umbehr</i> , 518 U.S. 668 (1996)	22, 30, 53
<i>Board of Regents v. Southworth</i> , 529 U.S. 217 (2000)	49
<i>Borough of Duryea v. Guarnieri</i> , 564 U.S. 379 (2011)	3, 22, 23, 28, 32, 34, 37, 44
<i>Boy Scouts of Am. v. Dale</i> , 530 U.S. 640 (2000)	28
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	26
<i>Brown v. Entertainment Merchants Ass’n</i> , 564 U.S. 786 (2011)	2
<i>Brown v. Glines</i> , 444 U.S. 348 (1980)	41
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986)	7, 46, 48, 51
<i>Christian Legal Soc’y Chapter of Univ. of California v. Martinez</i> , 561 U.S. 661 (2010)	58
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	28, 51

<i>City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n</i> , 429 U.S. 167 (1976)	27
<i>Communications Workers v. Beck</i> , 487 U.S. 735 (1988)	5, 36, 58
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	2, 17, 18, 21, 23, 32, 38, 41, 45
<i>Curtis, Ex parte</i> , 106 U.S. 371 (1882)	3, 18
<i>Davenport v. Washington Educ. Ass'n</i> , 551 U.S. 177 (2007)	6, 48, 58
<i>Dickerson v. United States</i> , 530 U.S. 428 (2000).....	47
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	19, 51
<i>Ellis v. Brotherhood of Ry. Clerks</i> , 466 U.S. 435 (1984)	46, 48, 51
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	26
<i>Engquist v. Oregon Dep't of Agric.</i> , 553 U.S. 591 (2008)	20
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	54
<i>Friedrichs v. California Teachers Ass'n</i> , 136 S. Ct. 1083 (2016).....	57
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	14, 18, 19, 21, 22, 23, 24, 25, 31, 33, 39, 40, 41-42
<i>Gentile v. State Bar of Nevada</i> , 501 U.S. 1030 (1991)	41
<i>Gilpin v. AFSCME</i> , 875 F.2d 1310 (7th Cir. 1989).....	55

<i>Glickman v. Wileman Bros. & Elliott, Inc.</i> , 521 U.S. 457 (1997)	49
<i>Grupo Dataflux v. Atlas Global Grp., L.P.</i> , 541 U.S. 567 (2004)	17
<i>Harris v. Quinn</i> , 134 S. Ct. 2618 (2014)	29, 30, 37, 38, 51, 55
<i>Hilton v. South Carolina Pub. Rys. Comm'n</i> , 502 U.S. 197 (1991)	50
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston</i> , 515 U.S. 557 (1995)	28
<i>International Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961)	36
<i>Johanns v. Livestock Mktg. Ass'n</i> , 544 U.S. 550 (2005)	49
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990)	48, 49
<i>Kimble v. Marvel Entm't, LLC</i> , 135 S. Ct. 2401 (2015)	47, 48, 50, 56, 57
<i>Knox v. SEIC</i> , 567 U.S. 298 (2012)	29, 30, 54
<i>Lane v. Franks</i> , 134 S. Ct. 2369 (2014)	18
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961)	40
<i>Lehnert v. Ferris Faculty Ass'n</i> , 500 U.S. 507 (1991)	7, 15, 31, 34, 38, 45, 46, 47, 48, 49, 52
<i>Locke v. Karass</i> , 555 U.S. 207 (2009)	48, 51
<i>McAuliffe v. City of New Bedford</i> , 29 N.E. 517 (Mass. 1892)	2

<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009)	59
<i>Minnesota State Bd. for Cmty. Coll. v. Knight</i> , 465 U.S. 271 (1984)	27, 39, 43, 57
<i>Mollan v. Torrance</i> , 22 U.S. (9 Wheat.) 537 (1824)	17
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007)	41
<i>NASA v. Nelson</i> , 562 U.S. 134 (2011)	20, 30
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963)	5
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937)	5
<i>O'Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996)	25
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015)	19, 20, 53
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	47
<i>Perry Educ. Ass'n v. Perry Local Educators'</i> <i>Ass'n</i> , 460 U.S. 37 (1983).....	22
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	58
<i>Pickering v. Board of Educ.</i> , 391 U.S. 563 (1968)	14, 15, 18, 20, 21, 22, 23, 24, 25, 44, 56
<i>Riley v. National Fed'n of the Blind of North</i> <i>Carolina, Inc.</i> , 487 U.S. 781 (1988).....	28
<i>Rumsfeld v. Forum for Academic & Institu-</i> <i>tional Rights, Inc.</i> , 547 U.S. 47 (2006).....	29

<i>Rutan v. Republican Party of Illinois</i> , 497 U.S. 62, 98 (1990)	25, 26, 30
<i>Sabri v. United States</i> , 541 U.S. 600 (2004)	54
<i>Smith v. Arkansas State Highway Emps.</i> , 441 U.S. 463 (1979)	23, 24
<i>Snepp v. United States</i> , 444 U.S. 507 (1980)	3, 56
<i>United States v. IBM Corp.</i> , 517 U.S. 843 (1996)	17, 52
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	46
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001)	29, 49
<i>United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers</i> , 413 U.S. 548 (1973) ...	3, 24
<i>United States ex rel. Texas Portland Cement Co. v. McCord</i> , 233 U.S. 157 (1914)	14, 16, 17
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986)	47
<i>Washington State Grange v. Washington State Republican Party</i> , 552 U.S. 442 (2008)	53
<i>West Virginia Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	28
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	28
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992)	39

ADMINISTRATIVE DECISIONS

CMS v. AFSCME, Council 31, Case Nos. S-CB-16-017 *et al.*:

Admin. Law Judge's Recommended Decision and Order, PDF at 28-287 (Ill. Labor Relations Bd. Sept. 2, 2016), <i>adopted in relevant part</i> , Decision and Order of the Illinois Labor Relations Board State Panel, PDF at 1-26 (Ill. Labor Relations Bd. Dec. 13, 2016), PDF <i>available at</i> https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf	9, 11, 42
Decision and Order of the Illinois Labor Relations Board State Panel, PDF at 1-26 (Ill. Labor Relations Bd. Dec. 13, 2016), PDF <i>available at</i> https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf	11

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const.:

Art. III.....	12
Amend. I.....	<i>passim</i>
Act of Apr. 10, 1806, ch. 20, § 1, Art. 5, 2 Stat. 359, 360.....	3
Hatch Act, 5 U.S.C. § 7321 <i>et seq.</i>	3, 24
National Labor Relations Act, 29 U.S.C. § 151 <i>et seq.</i>	5, 6
29 U.S.C. § 152(2)	6

Railway Labor Act, 45 U.S.C. § 151 <i>et seq.</i>	5, 58
Taft-Hartley Act, 29 U.S.C. §§ 141-187	35, 36
5 U.S.C. § 7131	37
Del. Code Ann. tit. 19, § 1304	6
Illinois Public Labor Relations Act, 5 ILCS	
315/1 <i>et seq.</i>	8, 11, 31, 54
5 ILCS 315/2	8
5 ILCS 315/3(s)(1)	8
5 ILCS 315/4	32
5 ILCS 315/6(a)	44, 58
5 ILCS 315/6(b)	38
5 ILCS 315/6(c)	8
5 ILCS 315/6(d)	6, 8, 35, 38
5 ILCS 315/6(e)	10
5 ILCS 315/7	32, 40, 43
5 ILCS 315/7.5	32
5 ILCS 315/8	32
5 ILCS 315/24	27
43 Pa. Stat. Ann. § 1101.606	6
5&6 Gul. & Mar. c. 20, § XLVII (1694)	3
12&13 Gul. III c. 10, § LXXXIX (1700)	3
22 Geo. III c. 41, § XLI (1782)	3
5 C.F.R. § 734.306	24

LEGISLATIVE MATERIALS

93 Cong. Rec. 4887 (1947)	36
H.R. Rep. No. 81-2811 (1950)	5
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Ian Kullgren, <i>Politico Pro Q&A: Jacob Huebert, Mark Janus' Attorney</i> (Dec. 27, 2017)	33
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Compl. for Decl. J., Dkt. #1 (filed Feb. 9, 2015).....	12
Illinois Att’y Gen.’s Supp. Mem., Dkt. #114 (filed Apr. 30, 2015)	12
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David Ziskind, <i>One Thousand Strikes of Government Employees</i> (Colum. Univ. Press 1940).....	5

INTRODUCTION

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed the constitutionality of “fair-share fees” to finance collective-bargaining activities of unions obligated under state law to represent both union members and non-members. *Abood* should be reaffirmed.

Abood accords with the First Amendment’s original meaning, which afforded public employees *no* rights against curtailments of free speech in the workplace setting. Overturning *Abood* would thus mark a radical departure from the original understanding of the Constitution. *Abood* also aligns with more recent jurisprudence deferring to government management decisions by upholding public employers’ rights to limit employee speech as contrasted with citizen speech. This Court’s application of *Abood* to other non-employment contexts highlights its stature as foundational First Amendment precedent.

Nearly half the States have relied on *Abood* in their labor-relations systems. Currently, 22 States permit fair-share fees for public employees, two (Michigan and Wisconsin) permit agency fees for some public employees, and 26 States prohibit fair-share fees or public-sector collective bargaining completely. As this diversity of viewpoints reflects, the Framers’ design functions well when States are “laboratories of democracy.” State legislatures often debate these issues and periodically change their policies. Overruling *Abood* would remove this issue from the people and their elected representatives and override their policy judgments about managing public workforces.

Petitioner asks this Court to upend the collective-bargaining systems of many States – in a jurisdiction-

ally flawed case without any record – based on numerous unsupported and inaccurate factual assertions. For example, petitioner claims all collective bargaining is inherently political and employees choose not to join unions because they object to the union’s collective-bargaining positions. Those assertions are false – and unsupported by an evidentiary record.

This Court’s jurisprudence should rest on evidence, not fiction, and arise out of cases over which the Court has subject-matter jurisdiction, which is lacking here. If the Court considers re-evaluating *Abood* necessary, it should await a case with a factual record that does not require overruling or ignoring a century-old jurisdictional rule.

STATEMENT

A. Legal Background

1. “As originally understood, the First Amendment’s protection against laws ‘abridging the freedom of speech’ did not extend to *all* speech.” *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting). To the Framers and for another 150 years after the Founding, public employees’ speech did *not* fall within the First Amendment’s ambit. Rather, “the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights.” *Connick v. Myers*, 461 U.S. 138, 143 (1983). In Justice Holmes’s formulation, a public employee “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

That perspective arose out of laws restricting government employees’ rights from 17th-century England, where Parliament banned certain government

officers from electioneering, 5&6 Gul. & Mar. c. 20, § XLVII (1694); 12&13 Gul. III c. 10, § LXXXIX (1700), and ultimately disenfranchised them, 22 Geo. III c. 41, § XLI (1782). In the United States, Congress restricted government employees' rights as early as 1789. *See Ex parte Curtis*, 106 U.S. 371, 372-73 (1882) (recounting many laws restricting activities of government employees between 1789-1870); *see also* Act of Apr. 10, 1806, ch. 20, § 1, Art. 5, 2 Stat. 359, 360 (forbidding soldiers and officers to "use contemptuous or disrespectful words against the President of the United States, against the Vice President thereof, against the Congress of the United States"). With the first presidential administration change, the government removed public employees based on their political speech. *See* Carl R. Fish, *The Civil Service and the Patronage* 19 (1905). In 1800, Thomas Jefferson directed Executive Branch department heads to forbid government employees from electioneering. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973) ("*Letter Carriers*").

More recently, the Hatch Act of 1939 prevents most Executive Branch employees from engaging in certain forms of political speech. *See, e.g.*, 5 U.S.C. § 7321 *et seq.*; *Letter Carriers*, 413 U.S. at 559-61. And this Court has recognized the government's authority as an employer to restrict employee speech to further a range of significant interests, from the government's "effective operation," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386-87 (2011), to protecting "secrecy" and "national security," *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (*per curiam*).

2. During the Warren Court era, this Court began recognizing limited protections for public-employee

speech that departed from the First Amendment's original meaning. Yet even under that more expansive modern conception, the First Amendment leaves public employers free to regulate speech by public employees in the workplace setting. *Abood* stems from that jurisprudential line.

In *Abood*, the Court addressed a government acting as employer of a workforce that democratically elected a union as the exclusive representative to negotiate and administer a collective-bargaining agreement ("CBA"). Under state law, the union had to represent all workers but could charge non-members their fair share of costs associated with "collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. Though such fees implicate the First Amendment, the Court explained, collection of them is justified by States' strong interest in promoting labor peace through collective bargaining and avoiding the "free rider" incentive that arises when non-member employees can avoid paying *any* fees while retaining the benefits of representation by an informed and expert agent. *See id.* at 224-26. However, the Court held, the government could *not*, consistent with the First Amendment, compel non-members to pay for union expenditures relating to "political and ideological purposes unrelated to collective bargaining." *Id.* at 232.

For more than four decades, *Abood* has served as foundational law in numerous States and thousands of localities – as well as for thousands of public-sector employment contracts – that authorize the payment of agency fees to public-sector representatives for expenditures germane to collective bargaining.

B. Background Of Agency-Shop Arrangements

1. For much of the Nation's history, workers formed self-help organizations that pressed employers to ameliorate depressed wages, harsh working conditions, and excessive hours. See Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 1-3 (5th ed. 2014) ("Kearney & Mareschal"); Richard B. Morris, *Government and Labor in Early America* 200 (Northeastern Univ. Press 1981). Economically disruptive conflict between these organizations and employers "abundantly demonstrated" that a formal mechanism for bargaining regarding the terms and conditions of employment was "an essential condition of industrial peace." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); see Kearney & Mareschal at 1-6. See also David Ziskind, *One Thousand Strikes of Government Employees* (Colum. Univ. Press 1940).

To eliminate "industrial strife" caused by "[r]efusal to confer and negotiate," Congress enacted the National Labor Relations Act ("NLRA"), which guarantees private-sector employees' rights to self-organization and collective bargaining. *Jones & Laughlin Steel*, 301 U.S. at 41-42. The NLRA and the Railway Labor Act ("RLA") amendments confirm Congress's determination that agency-shop agreements (1) "'promote[] stability by eliminating 'free riders,'" "*NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963) (quoting S. Rep. No. 80-105, pt. 1, at 7 (1947)); and (2) implement the "'firmly established . . . national policy" of permitting agreements requiring all employees to pay their fair share of collective-bargaining costs, *Communications Workers v. Beck*, 487 U.S. 735, 750 (1988) (quoting H.R. Rep. No. 81-2811, at 4 (1950)).

The NLRA expressly excludes States and their political subdivisions from its definition of “employer.” 29 U.S.C. § 152(2). Indeed, “States [are] free to regulate their labor relationships with their public employees.” *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 181 (2007). In a small minority of States, public employers unilaterally impose terms and conditions of employment, allowing employees no formal role in the process. See Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962*, at 196 (2004). Responding to the same forces at play in the private sector – employee self-organization, assertion of grievances, and willingness to disrupt operations to have disputes addressed – most States have followed the NLRA model and bargain collectively with their workers. See *id.* Such States determine which topics can be subjects for collective bargaining and the non-public settings in which those subjects are discussed. Those States have decided that fairness and efficiency demand that unions represent every employee – union and non-union – equally in the negotiation and administration of employment terms. See, e.g., 5 ILCS 315/6(d); Del. Code Ann. tit. 19, § 1304; 43 Pa. Stat. Ann. § 1101.606.

Unions incur significant costs in representing employees. To negotiate effectively for better wages, benefits, and working conditions and to represent adequately all employees in grievance proceedings, unions employ lawyers, economists, negotiators, and research staff. And, pursuant to CBAs, unions work with employers to promote job training, education, occupational health and safety, and worker retention.

By permitting CBAs that require non-union workers to contribute to collective-bargaining costs, agency-shop statutes prevent “financial instability of the

duly-elected bargaining agent [that] may jeopardize meaningful collective bargaining.” Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 189 (1975). Agency-shop arrangements facilitate that financial support through payments shared by *all* union-represented employees to avoid the predictable collective-action problem that results when employees receive services but paying for them is optional. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 811-12 (2012).

2. Pursuant to *Abood*’s distinction between union expenditures “germane” to collective bargaining and other expenditures that non-members cannot be required to pay, unions in jurisdictions that authorize agency fees must itemize annually their expenses to identify non-chargeable expenses. See *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 874 (1998).¹ That exercise is overseen and “verifi[ed] by an independent auditor,” *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), which must conduct a “rigorous[.]” review (CPAs Br. 16), approach the union’s accounting with “professional skepticism” (*id.* at 8), and question not merely unlawful classifications but even “aggressive” or “questionable” ones (*id.* at 15). Once it confirms the union’s classifications, the auditor also must confirm proper *application* of those standards by reviewing “supporting documentation of relevant expenses.” *Id.* at 19.

¹ “[C]hargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1991); accord App. 30a-32a.

After the audit, unions issue a “*Hudson* notice,” which informs non-members of the chargeable and non-chargeable expenses the union incurred, the resulting fee expressed as a percentage of dues, and how to challenge the union’s accounting of those charges. *See, e.g.*, App. 28a-41a.

C. Collective Bargaining And Contract Administration In Illinois

1. Illinois requires collective bargaining with duly selected public-sector unions and authorizes those unions to charge agency fees to represented non-members. Under the Illinois Public Labor Relations Act (“IPLRA”), “wages, hours and other conditions of employment” are subject to collective bargaining “to provide peaceful and orderly procedures for protection of the rights of all.” 5 ILCS 315/2; *see also* JA114-15. Employees in a bargaining unit² may democratically select a labor organization to be “the exclusive representative for the employees of such unit for the purpose of collective bargaining.” 5 ILCS 315/6(c). A selected organization must “represent[] the interests of all public employees in the unit,” including non-members, in both collective bargaining and grievance proceedings. 5 ILCS 315/6(d).

2. The CBA at issue is between the Illinois Department of Central Management Services (“CMS”) and respondent American Federation of State, County, and Municipal Employees, Council 31 (“AFSCME” or “the Union”). Under the CBA, AFSCME represents public employees including cor-

² State law defines a “[u]nit” as “a class of jobs or positions that are held by employees whose collective interests may suitably be represented by a labor organization for collective bargaining.” 5 ILCS 315/3(s)(1).

rections officers, firefighters, crime-scene investigators, maintenance and clerical employees, and child-welfare specialists such as petitioner Mark Janus. AFSCME represents those employees in negotiations over labor-management issues such as wages, career advancement, overtime, paid time-off, safety and protective equipment (*e.g.*, stab vests and riot gear for corrections officers, or fire protection gear for firefighters), disciplinary procedures, parking, grooming standards, lunch-break schedules, and eligibility for bereavement leave. *See generally* ALJ *CMS v. AFSCME* Decision³ at 18-97.

The Union's various locals solicit views on topics for collective bargaining at open meetings attended by members and non-members. Non-members have every opportunity to speak and be heard at those meetings. To reflect the representative nature of the process, the Union sends representatives from each local unit to attend the bargaining sessions with Executive Branch management. Those sessions, which involve hundreds of management and labor representatives, occur over a multi-month period and are closed to the public. Before 1984, the State paid CBA representatives for the days they missed work to participate in that process; under the current system, the representatives take unpaid leave, which the union reimburses through union dues and fair-share fees. *See* Agreement Between State of Illinois and

³ *See* Admin. Law Judge's Recommended Decision and Order, *CMS v. AFSCME, Council 31*, Case Nos. S-CB-16-017 *et al.*, PDF at 28-287 (Ill. Labor Relations Bd. Sept. 2, 2016) ("ALJ *CMS v. AFSCME* Decision"), *adopted in relevant part*, Decision and Order of the Illinois Labor Relations Board State Panel, PDF at 1-26 (Ill. Labor Relations Bd. Dec. 13, 2016) ("ILRB *CMS v. AFSCME* Decision"), PDF available at <https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf>.

AFSCME, Art. VI, § 3 (1981-1983); Agreement Between State of Illinois and AFSCME, Art. VI, § 3 (1984-1986).

Petitioner Janus became a state employee in 2007, approximately two decades after the current fair-share system had been enacted. He claims he “does not agree with what he views as the union’s one-sided politicking” and that “AFSCME’s behavior in bargaining does not appreciate the current fiscal crises in Illinois.” App. 18a. However, this litigation is, to AFSCME’s knowledge, the first time Janus has ever voiced disagreement with any aspect of the Union’s bargaining position. Although many non-member employees attend meetings to share opinions with the Union and propose views on bargaining positions, AFSCME possesses no record of Janus ever voicing an opinion or seeking to change a position in collective bargaining. Nor does AFSCME have any record of Janus disclaiming any raise or economic benefit the Union has obtained for public employees during his tenure as a state employee.

Consistent with Illinois law, *see* 5 ILCS 315/6(e), the CBA requires CMS to deduct from each non-member’s paycheck a *pro rata* portion of that employee’s “cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment.” JA124. Non-members are not charged for so-called “non-chargeable” expenses.

AFSCME’s *Hudson* notice provides non-members the Union’s agency-fee calculations. The notice identifies expenditures in which non-members share to the dollar, App. 28a-32a, 34a-39a, and expenditures the fee “does not include,” App. 32a-33a. It explains that non-members may challenge the Union’s calculations

before an American Arbitration Association arbitrator at the Union’s expense. App. 40a-41a. The Union bears the burden in such proceedings “of proving that the fair share fee is proper.” App. 41a. AFSCME represents approximately 65,000 employees in Illinois, of whom about 5 to 10 (0.007% to 0.014%) initiate arbitral challenges to the agency-fee calculation each year.⁴

3. “In the more than 40 years” AFSCME has been bargaining with CMS, the parties “have reached more than two dozen CBAs with administrations of six different governors, three Democrats and three Republicans.” ALJ *CMS v. AFSCME* Decision at 10. AFSCME has been unable to negotiate a successor CBA with the current administration. On the first day AFSCME and CMS began negotiations, Governor Bruce Rauner issued an executive order directing CMS to “immediately cease enforcement of the Fair Share Contract Provisions” in its public-sector CBAs and to hold “all fair share deductions in an escrow account.” *Id.* at 123.

In December 2016, despite concessions by the Union and its expressed willingness to continue bargaining, the Illinois Labor Relations Board (on Governor Rauner’s request) found the parties had reached a bargaining impasse and the State had violated the IPLRA in withholding from AFSCME “information necessary and relevant to its role as the employees’ exclusive bargaining representative.” ILRB *CMS v. AFSCME* Decision at 8.

⁴ AFSCME has no record of petitioner ever challenging the Union’s calculation.

D. Procedural History

The same day Governor Rauner ordered the escrowing of agency-fee payments, he filed a declaratory judgment action in federal court against the State’s public-sector unions seeking to have the State’s statutory provisions authorizing agency fees declared unconstitutional. See Compl. for Decl. J., *Rauner v. AFSCME, Council 31*, No. 1:15-cv-01235, Dkt. #1 (N.D. Ill. filed Feb. 9, 2015).

The unions moved to dismiss, and the Illinois Attorney General intervened to defend state law. In addition to arguing that *Abood* required dismissal on the merits, respondents argued that the court lacked Article III jurisdiction because the Governor did “not allege an invasion of *his own* First Amendment rights” and thus lacked standing to sue. JA49. Respondents further contended the court did not have federal-question jurisdiction under the well-pleaded-complaint rule because the First Amendment argument arose only as an anticipated defense to a suit by the unions seeking to compel fair-share-fee withholding under state law. See JA46-47.

While the motions to dismiss the Governor’s lawsuit were pending, Mark Janus and two other non-member state employees (Marie Quigley and Brian Trygg) (collectively, “Employees”) sought leave to intervene as plaintiffs. The Attorney General opposed the intervention, arguing that the court’s lack of jurisdiction over the case precluded it from deciding – much less granting – the Employees’ motion to intervene. See Illinois Att’y Gen.’s Supp. Mem. at 7-8, *Rauner*, Dkt. #114 (N.D. Ill. filed Apr. 30, 2015).

On May 19, 2015, the court ruled that Governor Rauner lacked standing and had not raised a federal question. JA107. The court agreed that the Governor

had “no personal interest at stake” in the lawsuit and had raised no federal question (other than the anticipated constitutional defense). JA108. It thus granted the defendants’ motions to dismiss the case.

The court also granted the Employees’ motion to intervene. JA112. The court acknowledged that “a party cannot intervene if there is no jurisdiction over the original action.” JA110. It “ha[d] no power” to grant the motion to intervene and could not “allow the Employees to intervene in the Governor’s original action because there is no federal jurisdiction over his claims.” *Id.* The court nonetheless observed that “some courts” have held that a court may “treat pleadings of an intervenor as a separate action” to reach the merits of those claims. JA111. The court granted the motion to intervene on that basis, JA112, and then granted the unions’ motion to dismiss under *Abood*, App. 6a-7a.

On appeal, the Seventh Circuit acknowledged that the district court “granted the employees’ motion to intervene” even though, “[t]echnically, of course, there was nothing for Janus and Trygg to intervene in.” App. 3a. With respect to Janus,⁵ however, the court held that allowing intervention despite the lack of subject-matter jurisdiction was “the efficient approach.” *Id.* It then affirmed the dismissal under *Abood*. *Id.*

⁵ The Seventh Circuit affirmed the dismissal of Trygg’s lawsuit because his claim was precluded. App. 3a-4a. Quigley, the third original intervenor, voluntarily dismissed her claims.

SUMMARY OF ARGUMENT

I. The courts below undisputedly lacked jurisdiction over Governor Rauner’s lawsuit, and petitioner’s intervention could not “cure th[at] vice in the original suit.” *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914). Petitioner fails to address this jurisdictional defect or to justify overruling *McCord*.

II. Overruling *Abood* and applying exacting scrutiny to the government’s decisions as employer is inconsistent with the First Amendment’s original meaning, which imposed no barrier to conditions on public employees’ free-speech rights. Deviating further from the Framers’ original intent unjustifiably removes policy decisions regarding the management of public workforces from the democratic realm.

III. Even under the Court’s more expansive view of public employees’ First Amendment rights beginning with the Warren Court, this Court has never applied strict scrutiny when the government acts as employer. As the Court held in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), when a public-sector employee engages in speech *as an employee*, strict scrutiny does not apply, even if the employee is speaking on a matter of public concern.

Those principles preclude strict scrutiny here. By statute, the State chooses to administer its employment function, in substantial part, through a collective-bargaining system. It selects every topic for collective bargaining. It creates a controlled environment for deciding typical employment issues, such as wages and benefits. Fair-share fees implicate employee speech, not citizen speech, because they derive from the government’s decision about how to manage

its workforce. Indeed, individuals pay these fees only because they accepted state employment in the relevant bargaining unit.

Abood correctly held that, giving appropriate deference to the government's broad managerial prerogatives, agency fees pass First Amendment muster because they prevent free-riding, support workplace fairness, and maintain labor peace. Those managerial prerogatives apply when the government compels, as when it limits, employee speech. Moreover, petitioner's assertions – made primarily without any factual support – fail to displace legislative findings and this Court's judgments that those interests are compelling and justify reasonable restrictions on employees' speech rights.

The distinction between collective bargaining and lobbying is sound. The mere fact that certain collective-bargaining topics affect the public fisc or touch on matters of public concern does not erase this distinction. Many collective-bargaining topics are mundane employment conditions. Contract *enforcement* and *administration* generally do not raise matters of public concern, yet consume significant union resources. If any employee speech over a personnel matter or grievance were deemed citizen speech on a matter of public concern based on its potential cost, little would be left of *Pickering*'s longstanding recognition of the need for deference to public managerial discretion on employment matters.

Even if petitioner shows that *certain* currently chargeable Union activities are entitled to greater First Amendment protection, the proper course is to clarify (or revise) the chargeability standard last assessed in *Lehnert*, not to overrule *Abood*.

IV. *Stare decisis* also strongly counsels in favor of reaffirming *Abood*. No “special justification” exists to overturn it. The Court should be especially cautious discarding a 40-year-old precedent based on factual assumptions without an evidentiary record. Overruling *Abood* would also upend several strains of First Amendment law, including cases governing employee speech, the integrated bar, and other compelled subsidies.

V. Even if the Court determines that certain currently required payments violate the First Amendment, whether those fees may be charged subject to employee objection is not presented here. If the Court reaches that question, it should affirm the longstanding rule that individuals must assert their own constitutional rights.

ARGUMENT

I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION

This Court long has held that “[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action,” because intervention “presupposes the pendency of” a properly brought lawsuit. 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1917, at 581 (3d ed. 2007); see *McCord*, 233 U.S. at 163-64. That principle, which petitioner does not question (Pet. i), requires dismissal, because Governor Rauner undisputedly lacked standing to sue and failed to raise a federal question. See AFSCME Opp. 14-15.

The district court nonetheless allowed the intervenors to pursue the lawsuit in their own name while “simultaneously dismissing the Governor’s original complaint.” JA112. The courts below had no right to

ignore *McCord*. This Court has never endorsed an exception to *McCord* – relief no party has requested. And it should not now endorse an exception without the benefits of adversarial briefing and a more fulsome lower-court analysis. See *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996) (counseling “against overruling a longstanding precedent on a theory not argued by the parties”); AFSCME Opp. 16-17 & n.9.

McCord should not be overturned. It embodies the fundamental principle “that ‘the jurisdiction of the court depends upon the state of things at the time of the action brought.’” *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). The “time-of-filing rule is hornbook law (quite literally),” and it is strictly applied, “regardless of the costs it imposes.” *Id.* (footnote omitted). Accordingly, this case should have been dismissed.

II. OVERRULING *ABOOD* IS INCONSISTENT WITH THE FIRST AMENDMENT’S ORIGINAL MEANING

A. The Framers Believed It Uncontroversial That The Government Could Condition Public Employment On The Relinquishment Of First Amendment Rights

The Founders recognized that public employees had “no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights.” *Connick*, 461 U.S. at 143. Consequently, the Republic’s first 150 years are replete with government curtailments of public employees’ free-speech rights, including on issues of public concern. See *supra* p. 3.

That original understanding was so well-settled that a challenge to a restriction on government-employee speech did not reach this Court until 1882. In *Ex parte Curtis*, this Court upheld a law restricting government employees' ability to make political contributions, stating that the restrictions raised no constitutional concerns. 106 U.S. at 373-75. In the 1950s, the Court explained that, although public-school teachers "have the right under our law to assemble, speak, think and believe as they will . . . [,] they have no right to work for the State in the school system on their own terms." *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952).

Only in the Warren Court era did this Court begin to depart from the original First Amendment understanding and hold that the government may not "leverage" public employment on the sacrifice of "liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419; see *Connick*, 461 U.S. at 144 (discussing cases). Even then, however, the Court carefully excluded from First Amendment oversight employment decisions regulating speech that the government *acting as employer*, like any employer, may make in managing its workforce. The Court enshrined its narrow workplace speech doctrine in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which holds that, unless an employee is speaking *both* "as a citizen" *and* "on a matter of public concern," "the employee has no First Amendment cause of action." *Garcetti*, 547 U.S. at 418; see *Lane v. Franks*, 134 S. Ct. 2369, 2378-80 (2014) (treating speech "as a citizen" and "on a matter of public concern" as distinct elements). In that situation, "liberties the employee might have enjoyed as a private citizen" yield to the

employer’s need to “exercise . . . control” of its workforce and “manage [its] operations.” *Garcetti*, 547 U.S. at 421-22.

B. Respect For The First Amendment’s Original Meaning Justifies Reaffirming *Abood*, Not Overruling It

“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them,” even if “future legislatures or (yes) even future judges” prefer a broader or narrower scope. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (Scalia, J.). Thus, like the Second Amendment addressed in *Heller*, the Court should be mindful of the First Amendment’s original meaning in revising the scope of “the freedom-of-speech guarantee that the people ratified” with respect to speech in the public-sector-employment context; that original meaning did *not* contemplate that public employees had a constitutional right to curtail workplace conditions on free speech. *Id.* at 635.

In seeking a substantial expansion of the First Amendment beyond its original understanding, petitioner asks this Court to depart from its judicial role and assume a “legislative – indeed, *super*-legislative – power; a claim fundamentally at odds with our system of government.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting). Such a usurpation of legislative power is not just improper, but ineffectual: “[f]ederal courts are blunt instruments when it comes to creating rights.” *Id.* at 2625 (Roberts, C.J., dissenting). Because they decide “concrete cases,” courts lack a legislature’s “flexibility” to “address concerns” or “anticipate problems” that a new right may occasion. *Id.*

Both petitioner and the Solicitor General wholly ignore the First Amendment’s original meaning. Fidelity to the First Amendment supports reaffirming *Abood*, which correctly honors the Framers’ limited vision of the First Amendment’s applicability to public employees and leaves the relationship between the government and public employees in “the realm of democratic decision.” *Id.*

III. OVERRULING *ABOOD* IS INCONSISTENT WITH THE GOVERNMENT’S PREROGATIVE AS EMPLOYER

A. Neither Strict Nor Exacting Scrutiny Applies When The Government Acts As Employer

This Court has *never* applied strict or exacting scrutiny in a case involving the government acting as an employer to regulate its employees’ speech. Even after partially departing from the First Amendment’s original meaning with respect to public-sector employees’ speech, this Court consistently recognized “that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” *Pickering*, 391 U.S. at 568. As the Court recently explained, “the Government has a much freer hand in dealing ‘with citizen employees than it does when it brings its sovereign power to bear on citizens at large.’” *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (quoting *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 599 (2008)). Thus, what petitioner terms (at 18) *Abood*’s “failure” to apply heightened scrutiny is no failure at all.

1. Workplace Speech

a. Balancing – not strict scrutiny – has guided this Court’s cases regarding workplace speech. In *Pickering*, this Court announced a framework for analyzing government restrictions on employees’ speech. Under that framework, government regulation of an employee speaking as an employee rather than “as a citizen on a matter of public concern” receives no First Amendment scrutiny. *Garcetti*, 547 U.S. at 418. As to citizen speech on matters of public concern, the Court should “balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568.

In *Connick*, the government’s interest in workplace harmony was found to outweigh the employee’s interest in speech that “touched upon matters of public concern in only a most limited sense,” even though the employee’s speech did not “impede[] [the employee’s] ability to perform her responsibilities.” 461 U.S. at 151, 154. In balancing the government’s interest against the employee’s, this Court believed it critical not to impose too “onerous [a] burden on the state.” *Id.* at 149-50.

Abood’s holding comports with *Pickering* and its progeny. The Court determined after weighing individual employee interests that fair-share fees for activities germane to collective bargaining are “constitutionally justified” by “the important contribution of the union shop to the system of labor relations.” 431 U.S. at 222-23. But it held that the balance of employer and employee interests supported the opposite

conclusion regarding the imposition of fees for political or ideological activities. *See id.* at 225-26. Indeed, this Court has long situated *Abood* and *Pickering* together as applications of the Court’s balancing framework to specific contexts. *See Board of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 674-76 (1996).

b. In *Garcetti*, this Court applied *Pickering* balancing to employee speech that “owes its existence” to the employee’s “professional responsibilities” and held that such speech is not protected by the First Amendment. 547 U.S. at 421-22; *see also Guarnieri*, 564 U.S. at 389-90 (“Government must have authority, in appropriate circumstances, to restrain employees who . . . frustrate progress towards the ends they have been hired to achieve.”). As the Court explained, when employees engage in speech “pursuant to . . . official duties,” they “are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications.” 547 U.S. at 421.

Abood’s holding comports with *Garcetti* because agency fees embody speech engaged in as part of the employee’s “official duties.” Collective bargaining is part of the government’s internal operations. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 n.9 (1983) (union acting as exclusive representative “assume[s] an official position in the operational structure of the District’s schools”). States that permit agency fees effectively make majority-elected union representation – and concomitant fair compensation – conditions of employment, as part of their “discretion to manage their operations.” *Garcetti*, 547 U.S. at 422. The Solicitor General’s conclusory assertion (at 27) that labor-management negotiations are “far removed” from an individual’s job duties ignores collective bargaining’s centrality to the

government’s management of its workforce. When a public employer has established a collective-bargaining system as part of its internal administrative operations, it can require that employees provide the support needed for that system to operate efficiently.

The Solicitor General’s narrow reading of *Garcetti* also ignores its rationale. This Court’s “emphasis . . . on affording government employers sufficient discretion to manage their operations,” 547 U.S. at 422, applies not just to managing an employee’s day-to-day work, but also – and more forcefully – to setting the terms or rules of employment. *See Guarnieri*, 564 U.S. at 389 (“a cautious and restrained approach to the protection of speech by public employees” is justified by the interest in “the efficient and effective operation of government”). The government’s decision to require its employees to present bargaining positions through a democratically elected representative – and not allow tens of thousands of employees to bargain one-by-one or impose terms of employment unilaterally – plainly serves “the efficiency of the public services [the government] performs through its employees.” *Pickering*, 391 U.S. at 568. Employee speech in the CBA context concerns government-prescribed topics and procedures for administering the statutorily mandated contract to govern employment conditions. It thus represents the kind of expression over which “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Connick*, 461 U.S. at 146.

c. This Court has recognized that the State’s design of its labor-management relations system implicates its core prerogative as an employer. In *Smith v.*

Arkansas State Highway Employees, 441 U.S. 463 (1979) (per curiam), for example, the Court rejected a union’s First Amendment challenge to the Arkansas State Highway Commission’s policy of refusing to entertain grievances filed by a union rather than directly by the employee. Although the First Amendment protects employees’ rights as citizens to “speak freely and petition openly,” it does not impose any obligation on the State “to listen, to respond, or . . . to recognize the [union] and bargain with it.” *Id.* at 465. Rather, in managing their workforce’s operations, public employers may structure grievance procedures in their discretion, free from constitutional regulation. *See id.* at 464 (“[T]he First Amendment is not a substitute for the national labor relations laws.”).

d. The Court has employed the same deferential approach when the government regulates the entire workforce’s speech prophylactically. In *Letter Carriers*, for example, the Court applied *Pickering* balancing to uphold the Hatch Act’s prospective restriction of nearly all public employees’ free speech. *See* 413 U.S. at 564-65. The Court observed that, under the Hatch Act, as under the agency-fee statute at issue here, an employee remains free to “express his opinion as an individual privately and publicly on political subjects and candidates.” *Id.* at 579 (alteration omitted); *see* 5 C.F.R. § 734.306.

Critically, *Garcetti* protects the government’s authority as proprietor *even if* the speech “implicates matters of public policy” or public concern. U.S. Br. 15; *see* Pet. Br. 10-18; *Garcetti*, 547 U.S. at 414-15, 425 (acknowledging that prosecutor’s speech involved “[e]xposing governmental inefficiency and misconduct” – “a matter of considerable significance”). The

fact that fair-share fees may support a union’s collective bargaining on subjects that touch on public policy does not change the fact that those fees are paid to support speech in which the State requires workers to engage as part of their job duties. *See* 547 U.S. at 421-22 (“controlling factor” was that prosecutor engaged in speech “pursuant to [his] official duties”).

2. Political Patronage

Like *Pickering* and its progeny, the Court’s political-patronage cases do not apply exacting scrutiny. Rather, as *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), explained, “the inquiry is whether the [political] affiliation requirement is a *reasonable* one.” *Id.* at 719 (emphasis added). The Court recognized that the case-by-case analysis this inquiry entails would “allow the courts to consider the necessity of according to the government the discretion it requires in . . . the delivery of governmental services.” *Id.* at 719-20; *see also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 98 (1990) (Scalia, J., dissenting) (“Although our decisions establish that government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when the governmental function operating is not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage its internal operations.”) (alterations omitted).

Rutan did not apply strict scrutiny to a case involving the government acting as employer. The Court there applied strict scrutiny – over the objections of the dissent – only after it determined that the interests the government relied upon – stabilizing political parties and fostering the political system – were “interests the government might have in the structure

and functioning of society as a whole” and “not interests that the government has in its capacity as an employer.” *Id.* at 70 n.4; *see also id.* at 98-100, 115 (Scalia, J., dissenting) (arguing that strict scrutiny “finds no support in our cases”). The case thus turned critically on the Court’s determination that the government was regulating its employees’ speech as a sovereign regulator and *not* as a proprietor or employer. *Id.* at 70 n.4 (majority). Similarly, the three-Justice plurality in *Elrod v. Burns*, 427 U.S. 347 (1976), applied exacting scrutiny only after it rejected the premise that patronage practices relate to the State’s legitimate interests in achieving operational efficiencies. *See id.* at 365 (“it is doubtful that the mere difference of political persuasion motivates poor performance”).⁶

The Court’s political-patronage cases thus further indicate that strict scrutiny does not apply when the government is acting as an employer and exercising its discretion to organize its internal operations.

⁶ Moreover, the political-affiliation requirements challenged in the political-patronage cases involved employees’ “private beliefs,” *Branti v. Finkel*, 445 U.S. 507, 516 (1980), and not just speech made in the employment context. *See also Elrod*, 427 U.S. at 355-56 (concluding that “[a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job” and, therefore, “the individual’s ability to act according to his beliefs and to associate with others of his political persuasion is constrained”); *Rutan*, 497 U.S. at 73 (observing government employees would feel pressure “to engage in whatever political activity is necessary” and “to refrain from acting on the political views they actually hold”). The same cannot be said of the agency shop, which does not infringe on employees’ private beliefs and leaves employees “free to participate in the full range of political activities open to other citizens.” *Abood*, 431 U.S. at 230.

3. Forum Analysis

Abood also comports with this Court’s public- and non-public-fora cases, which track the distinction between speech as a citizen and speech as an employee. Government employees’ speech is protected in a “forum” designed “for direct citizen involvement,” but not similarly protected in fora specially designated by the government for workplace speech – for example, “true contract negotiations,” which reflect the government’s selected personnel-management process. *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 174-75 (1976).

That distinction undergirded *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which upheld exclusive union representation under the First Amendment and concluded that the “‘meet and confer’ session” at issue was “obviously not a public forum.” *Id.* at 280. The same is true of collective bargaining and grievance procedures in Illinois. See 5 ILCS 315/24 (collective bargaining not subject to State’s “Open Meetings Act”). The Court does not apply strict scrutiny in those circumstances in part because the employee remains free to speak as a private citizen. See *Knight*, 465 U.S. at 280, 288 (observing that exclusive representation “in no way restrained . . . freedom to speak”).

4. Compelled Speech and Association

Petitioner argues (at 19-21) for exacting scrutiny by comparing *Abood* to this Court’s “compelled association,” “compelled speech,” and “expenditures for speech” cases. But those cases are not inconsistent with *Abood* or the employee-speech cases’ deference to the government acting in its capacity *as a manager of*

employees because they concern conduct far beyond the workplace.⁷

Petitioner also contends (at 23-24) that, even if government *restriction* on employee speech receives First Amendment deference, the same rationale cannot justify regulation of employee speech that *compels* employee speech. But the doctrinal bases of the protection against “compelled” speech are no different from those underlying the protection of free expression. Both stem from the recognition that the constitutional “right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Wooley*, 430 U.S. at 714 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); *see also Riley*, 487 U.S. at 796 (distinction between compelled speech and compelled silence is “without constitutional significance”).

Moreover, in arguing (at 24) that Illinois has no “interest” in compelling expression, petitioner confuses the *interest* with the regulation adopted to *further* that interest. Whether the government adopts regulations preventing or compelling “expressive activities,” *id.*, the government interest is in “the efficient and effective operation of government.” *Guarnieri*, 564 U.S. at 389. Petitioner offers no principled reason why that

⁷ *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010) (limitations on “corporate independent expenditures” on political speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-57 (2000) (expressive-association claim of private organization); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572-73 (1995) (right of “private organizers” to exclude groups from parade); *Riley v. National Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795-96 (1988) (compelled speech during fundraising communications to private donors); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (compelling citizens to display message on their “private property”).

interest cannot justify requiring payment of fair-share fees.

B. *Knox* And *Harris* Do Not Justify Strict Or Exacting Scrutiny When The Government Acts As Employer

Petitioner relies (at 18-19) on the comment in *Knox v. SEIC*, 567 U.S. 298 (2012), repeated in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that compelled subsidization is subject to “exacting” scrutiny. 567 U.S. at 310; *see also Harris*, 134 S. Ct. at 2639 (citing *Knox*). But *Knox*’s only cited authority was an inaccurate reference to *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), which did not involve the government’s regulation of its own workforce in its capacity as “proprietor.”⁸ *United Foods* applied a standard for “regulatory” fees. *Knox*, 567 U.S. at 310 (quoting *United Foods*, 533 U.S. at 414). It said nothing about the appropriate standard for compelled subsidies when the government acts as an employer. Indeed, even in the regulatory context, *United Foods* adopted *Abood*’s “germane[ness]” standard in judging the fees challenged by objectors. 533 U.S. at 415.

⁸ Unlike agricultural-marketing disbursements, fair-share fees reimburse unions’ statutorily mandated activities of obtaining, administering, and enforcing agreements on employment terms and conditions in the public-employment setting, which is entitled to greater deference. That these activities sometimes involve speech on many matters related to personnel management “hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Requiring employees to pay unions for the services they perform as exclusive representative “is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die.’” *Id.*

Likewise, *Knox* and *Harris* did not implicate the government’s interests as proprietor. *Knox* concerned the union’s notice obligations to maintain *Abood*’s line between chargeable and non-chargeable activities. See 567 U.S. at 314 (addressing “special assessment billed for use in electoral campaigns” that was collected without providing new opt-out opportunity). The union’s special assessment for non-chargeable political expenditures did not implicate the State’s internal operational interests in any way. The State was not a party and did not defend the assessment, even as *amicus*. *Harris* involved a personal-assistant program in which the “employer-employee relationship [was] between the person receiving the care and the person providing it” and “the State’s role [wa]s comparatively small.” 134 S. Ct. at 2624. The Court thus held that Illinois was “not acting in a traditional employer role” or “as a ‘proprietor in managing its internal operations.’” *Id.* at 2642 & n.27 (quoting *Nelson*, 562 U.S. at 138, 150).

* * * *

Petitioner’s pleas for strict or “exacting” scrutiny simply cannot be squared with the Court’s repeated holdings that employee-speech restrictions are subject to “*deferential* weighing of the government’s legitimate interests” against its employees’ “First Amendment rights.” *Umbehr*, 518 U.S. at 677-78 (emphasis added). See generally *Rutan*, 497 U.S. at 97-102 (Scalia, J., dissenting). Overturning precedent based on *Knox*’s inaccurate citation disserves the rule of law.⁹

⁹ Even if “exacting scrutiny” accurately described the First Amendment standard when the State acts as employer, it would not warrant overruling *Abood*. *Abood*’s careful line between

C. This Court’s Longstanding Fair-Share Jurisprudence Appropriately Balances Employees’ Workplace Speech Rights Against The Government’s Legitimate Interests As Employer

1. Fair-Share Fees Implicate Speech by Government Employees as Employees

The free-speech interests asserted by petitioner implicate speech not as a citizen but as an employee. Nothing in the IPLRA precludes petitioner from publicly criticizing the CBA. The payment of an agency fee to compensate a union for representing every member of a bargaining unit unquestionably “owes its existence” to the way States and localities have decided to manage their workforce. *Garcetti*, 547 U.S. at 421. As petitioner observes (at 58), “the government *controls* its employment terms” and hires employees subject to those terms. Exercising that control, 24 States (and countless localities) have authorized collective bargaining and agency fees to set employment terms. Giving employees, through an elected exclusive representative, a seat at the bargaining table to shape employment terms – and, concomitantly, ensuring that representational costs are borne equitably by all who benefit – is a critical part of how those governments “manage their operations.” *Garcetti*, 547 U.S. at 422.

speech germane to collective bargaining and political speech unrelated to those activities is narrowly tailored to that vital government interest because without mandatory fees non-members would free-ride on the union’s collective-bargaining efforts. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part) (*Abood* found the “distinctive” “free-rider” problem a “‘*compelling state interest*’ that justifies this constitutional rule”) (emphasis added).

That system, by law, sets the topics for collective bargaining, 5 ILCS 315/4, 315/7, 315/7.5; prescribes bargaining procedures, 5 ILCS 315/7; and mandates the manner and content of grievance proceedings, 5 ILCS 315/8. It functionally conditions employment on the workers' acceptance of these terms, including that personnel administration be conducted through a collective-bargaining system and that employees pay fair-share fees to support that system. In that respect, the State's law affects employee speech no differently than requirements that employees abstain from writing books about top-secret matters or discussing confidential information with the press, or that employees give compelled answers to questions in a polygraph examination as a condition of employment.

Moreover, CBA negotiations concern "bread-and-butter" employment issues – such as "wages, benefits, working conditions," "job security," upward mobility, safety equipment, and grievance and dispute-resolution procedures that affect all similarly situated employees. Kearney & Mareschal at 6. *See, e.g.*, JA159-60 (holidays), 179 (meal periods), 186-90 (overtime procedures), 229-33 (job-assignment procedures), 269-70 (transfers). Speech concerning these sorts of prosaic "employment matters," *Guarnieri*, 554 U.S. at 391, does not warrant strict scrutiny. Indeed, the Court has warned that strict scrutiny "would occasion [judicial] review of a host of collateral matters typically left to the discretion of public officials," such as "[b]udget priorities" and "personnel decisions." *Id.*

That conclusion is all the more compelling when a union represents a unit employee in a grievance procedure. *See Connick*, 461 U.S. at 154 (First Amendment does not "constitutionalize the employee grievance"). Employees initiate grievance procedures "pursuant to"

explicit CBA terms, which necessarily are limited to terms of employment. *Garcetti*, 547 U.S. at 421; see JA124 (“Grievance Procedure”). In both grievance and collective-bargaining contexts, the agency-fee payment dedicated to funding those union activities is speech undertaken “as a government employee,” “pursuant” to the process state and local governments have selected for managing the workforce and setting the terms of employment. *Garcetti*, 547 U.S. at 421, 422.

Employees who object to fair-share fees fundamentally are complaining about the State’s internal processes for negotiating employment terms and resolving workplace disputes with employees, as well as the conditions of employment to which they knowingly assent when they accept public-sector jobs. Janus’s counsel has stated that Janus “would prefer to negotiate with the state on his own.” Ian Kullgren, *Politico Pro Q&A: Jacob Huebert, Mark Janus’ Attorney* (Dec. 27, 2017). Contrary to Janus’s – impractical – desire, the First Amendment does not require that the State negotiate 60,000 individual employment contracts. Nor does it require States to impose unilaterally all terms and conditions of employment on workers; if States choose to have more inclusive interactions with their workers, nothing in the Constitution precludes a requirement that all workers pay their fair share of services provided. The Constitution is indifferent to whether the government finances its access to worker input through lower salaries, a surtax on all workers, or fair-share fees. See Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 Harv. L. Rev. (forthcoming Feb. 2018) (manuscript at 5).

Importantly, *Abood*’s agency-fee holding preserves employees’ rights *as citizens* “to participate in the full

range of political activities open to other public citizens.” 431 U.S. at 230. They can express disagreement with the union in public meetings, newspaper editorials, or any other public forum. *See id.* (“every public employee is largely free to express his views, in public or private orally or in writing”). The limited First Amendment protection *Abood* identified in the agency-fee context is consistent with how this Court treats the government’s prerogatives as an employer to control its employees’ speech and thereby “ensur[e] that all of its operations are efficient and effective.” *Guarnieri*, 564 U.S. at 386.

2. The Government Has Legitimate Interests in Preventing Unfair Free-Riding by Non-Members

When a union serves as exclusive representative, the State’s interest in effectively managing its workforce justifies ensuring that the costs of union services are “fairly” allocated among all employees in the bargaining unit. *Abood*, 431 U.S. at 221-22. As *Abood* recognized, the union’s tasks “are continuing and difficult ones” and “often entail expenditure of much time and money” to pay “lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel.” *Id.* at 221. Because state law compels the union to expend those resources “equitably to represent all employees,” *id.*, exclusive representation creates a “distinctive” “free-rider” problem: the non-members are “free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests,” *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also id.* (calling State’s interest in avoiding free-riding “compelling”).

Free-riding is indeed *precisely* what economic theory predicts when members of a bargaining unit may choose independently whether to vote for *and* whether to pay for a bargaining agent. Even if a non-member believes she benefits from the union's representation, she may vote *for* the union as representative (and reap the benefits of bargaining representation and assistance in grievance proceedings) yet opt *not* to join the union to avoid paying dues.

Although a developed record would demonstrate the free-riding problem in this context, free-riding is a classic collective-action problem. When state law obligates a union elected by a bargaining unit to represent the entire unit, *see* 5 ILCS 315/6(d), the incentive of "[a] rational worker" – even one who supports every position taken by the union – is "not [to] voluntarily contribute" to the union, because the union's activities (and thus the worker's benefits) will not be affected by that individual action alone. Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 88 (1965); *see also* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133, 137-38 (1996) ("each [individual] actor finds it rational to cheat").

For decades, Congress and this Court have recognized that fundamental economic concern. Even as the Taft-Hartley Act prohibited the closed shop and authorized States to pass right-to-work laws, 29 U.S.C. §§ 141-187, Congress did not prohibit agency fees and thereby create the inevitable free-rider problem. Beyond the concerns about access to employment that led Congress to abolish the closed shop, "[t]he 1947 Congress was equally concerned" that, "without such [closed-shop] agreements, many employees

would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts.” *Beck*, 487 U.S. at 748. Senator Taft observed that, absent a legislative solution, “if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay his dues rides along freely without any expense to himself.” 93 Cong. Rec. 4887 (1947); *see also Beck*, 487 U.S. at 748 n.5 (noting “[t]his sentiment was repeated throughout the hearings”).

To address that concern, Congress preserved States’ rights to authorize union-security agreements. *See* 487 U.S. at 749; S. Rep. No. 80-105, pt. 1, at 6 (expressing concern that “many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost”). Thus, under Taft-Hartley, and under *Abood*’s recognition that the same policies could be utilized by public employers, union-security agreements may require new hires to join the union or pay fees soon after their hiring, as limited to expenses germane to the collective-bargaining process. *See* 431 U.S. at 235-36. Those requirements avoid the unfairness of free-riding.

3. The Government Also Has Legitimate Interests in a Well-Funded Exclusive Representative

a. *Abood* properly recognized the State’s interest in an effective bargaining partner based on the multi-decade experiences of private-sector employers, as well as Congress’s recognition that fair-share fees facilitate stable labor relations. *See International Ass’n of Machinists v. Street*, 367 U.S. 740, 772 (1961) (“The

complete shutoff of [fair-share fees as a] source of income . . . threatens the basic congressional policy of . . . self-adjustments between effective carrier organizations and *effective* labor organizations.”) (emphasis added); *Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting) (“Private employers, *Abood* noted, often established [fair-share provisions] to ensure adequate funding of an exclusive bargaining agent, and thus to promote labor stability.”). Petitioner provides no basis – particularly without a factual record – for questioning that assessment by Congress and private employers, States, and localities across the country.

Petitioner vaguely asserts (at 24) that management lacks an interest in collecting agency fees because non-members are simply trying “to do their jobs.” But the States and localities with agency-fee laws have determined legislatively that part of the employee’s job is to work within a labor-relations system that requires a well-funded exclusive representative to provide input on terms and conditions of employment. The United States also asserts without citation (at 24) that agency fees have “little to do with the government’s need to maintain an efficient workplace or assert managerial control.” But, again, that assertion reflects a policy judgment with which many States disagree. The Federal Government itself reimburses union members with paid leave to perform the same functions Illinois requires the unions (and fair-share-fee payers) to pay, such as participating in bargaining and representing non-members in disciplinary proceedings. *See* 5 U.S.C. § 7131. Involving the federal courts in factual disputes about this choice among different payment mechanisms “would raise serious federalism and separation-of-powers concerns.” *Guarneri*, 564 U.S. at 391.

Petitioner’s basic premise (at 36) is that agency fees are “[n]ot [n]ecessary for [e]xclusive [r]epresentation.” But necessity is not the standard. Public employers have latitude to prevent harm to their operational interests *before* they occur. See *Connick*, 461 U.S. at 146. The question is not whether the *union* would still agree to serve as the exclusive representative even without agency fees. The question is whether the *government* has an interest in ensuring stability by enabling the union to be compensated for its costs in representing members and non-members alike. See 5 ILCS 315/6(d). As Justice Scalia recognized in *Lehnert*, “[m]andatory dues allow the cost of ‘these activities’ – *i.e.*, the union’s statutory duties – to be fairly distributed; they compensate the union for benefits which ‘necessarily’ – that is, by law – accrue to the nonmembers.” 500 U.S. at 553 (Scalia, J., concurring in the judgment in part and dissenting in part). Such laws ensure a more fully funded, cohesive bargaining partner, and that in no way offends the Constitution.

Representing non-members in grievance proceedings generates additional costs to the union. *Contra* Pet. Br. 46; see also *Harris*, 134 S. Ct. at 2637 (“[The union] has the duty to provide equal and effective representation for nonmembers in grievance proceedings, an undertaking that can be very involved.”) (citation omitted). Petitioner falsely claims (at 45-46) that AFSCME and Illinois law “compel employees to have the union represent them.” Nothing in Illinois labor law “prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization.” 5 ILCS 315/6(b). AFSCME’s CBA similarly provides that employees are “entitled,” but not required, to use “Union representation.” JA125-26.

Some non-members *choose* to be represented by the Union. As a developed record would show, such service is encompassed within the fair-share fee (so the non-member does not have to pay extra for her own lawyer) and the Union has a record of securing favorable outcomes for non-members, such as reinstatement following termination, backpay for disputed time worked, or the expungement of unjustified disciplinary measures.

b. Petitioner further questions (at 48-52, 53-61) whether the First Amendment permits exclusive representation. Petitioner claims the governmental interest in labor peace does not justify an exclusive-bargaining representative. Petitioner asserts (at 51) that non-members do not “benefit” from union representation, but rather “suffer an associational injury.” That question is not presented here. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (“[W]e ordinarily do not consider questions outside those presented in the petition for certiorari.”). This Court resolved the constitutionality of exclusive representation more than 30 years ago. *See Knight*, 465 U.S. at 278-79, 282-83. Congress and 41 States, the District of Columbia, and Puerto Rico authorize exclusive representation for at least some employees.

Moreover, any “associational injury” is not cognizable under *Garcetti* because exclusive representation occurs as a condition and in the context of the non-members’ employment. *See* 547 U.S. at 421 (speech “owes its existence” to employee’s job); *supra* pp. 22-23. Nor is the assertion that employees suffer an associational injury factually correct. It long has been understood that the exclusive representative does not represent the view of every individual member of the bargaining unit, each of whom may express divergent

views in their capacities as citizens.¹⁰ *See Abood*, 431 U.S. at 230 (“[E]very public employee is largely free to express his views, in public or private orally or in writing.”); *cf. Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring in the judgment) (“[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.”).

Contrary to petitioner’s misunderstanding of the government’s interest in labor peace, this Court consistently has recognized the government’s interest in the “efficient provision of public services.” *Garcetti*, 547 U.S. at 418. States and localities across the country have long *chosen* to set employment terms in a collaborative process that weighs concerns about the public fisc with a professional and organized accounting of government employees’ interests. *See* 5 ILCS 315/7 (duty to bargain includes “an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment”). Petitioner’s suggestion (at 61) that a government employer could not rationally “want[] to deal with a powerful negotiating opponent” oversimplifies employee management. Like any private corporation, the government’s ability

¹⁰ There is no record here of non-member beliefs about the effect of union representation. Petitioner asserts only hypothetical harms. *See, e.g.*, Pet. Br. 49 (CBAs “may harm some employees’ interests”), 50 (exclusive representative’s advocacy “may” harm non-members’ interests), 51-52 (non-members “may find themselves on the short end of the deals their representative strikes”). Petitioner’s complaint alleges only vaguely that AFSCME engages in “one-sided politicking,” “does not appreciate the current fiscal crises in Illinois,” and “does not reflect his best interests or the interests of Illinois citizens.” JA87. But he identifies no concrete disagreements with AFSCME and has not availed himself of the fora AFSCME provides to request that the Union take different positions.

to hire and retain high-quality employees may turn on management’s responsiveness to employee concerns and the wages, benefits, and other employment conditions that are the subjects of collective bargaining. Petitioner’s disagreement with that policy choice – and his suggestion (at 48) that exclusive representation “[h]arms” employees’ interests – is an issue for the Illinois state legislature, not this Court.

D. Petitioner’s Contention That All Collective Bargaining, Contract Administration, And Grievance Procedures Are Equivalent To Political Lobbying Is False

1. The Long-Recognized Distinction Between Collective Bargaining and Political Lobbying Is Sound

a. Under this Court’s precedents, the subject matter of speech is not the only determinant of whether it is “political speech” receiving heightened First Amendment protection. *See Connick*, 461 U.S. at 147-48 (inquiry focuses on “the *content, form, and context* of a given statement, as revealed by the whole record”) (emphasis added). That is why a public-school student may, as a citizen, lobby for legalization of marijuana, but a school may nonetheless prohibit him from displaying a “BONG HITS 4 JESUS” sign at a school event. *Morse v. Frederick*, 551 U.S. 393, 397, 410 (2007); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-74 (1991) (noting restrictions on attorneys that do not apply to ordinary citizens); *Brown v. Glines*, 444 U.S. 348, 354-58 (1980) (soldier acting as a citizen may circulate petitions off base but not on base). Likewise, the government may regulate statements by employees in the workplace that it could not regulate if made in the public square. In *Garcetti* it-

self, for example, the Court held the government's prerogative as employer applicable because the speech was workplace speech, even though its subject matter had broader political import. *See* 547 U.S. at 414, 421. Had a private citizen levied the same criticism of the government in a legislative hearing, however, the government could not censor it. Petitioner's contention (at 10-18) that bargaining with the government is always "political speech" fails to appreciate this key distinction.

Besides, petitioner's premise that all collective bargaining raises matters of public concern contradicts reality. Petitioner's inaccurate description of AFSCME's collective-bargaining efforts in Illinois obscures the significant distinctions between collective bargaining and lobbying. The vast majority of collective bargaining involves reaching agreements on non-political issues. AFSCME represents those employees in negotiations over labor-management issues including salary, promotions, overtime qualifications and pay, vacation, safety equipment, and parking. *See generally* ALJ *CMS v. AFSCME* Decision at 18-97. The CBA contains agreements about when employees can take time off work, including vacation time (JA152-56), holidays (JA159-60), and sick leave (JA281-83). And it states when employees can submit their vacation requests and when the employer will notify them of upcoming vacation schedules (JA156) and employee leave balances (JA316). The parties have bargained over such details as grooming standards, lunch-break schedules, and eligibility for bereavement leave. *See* ALJ *CMS v. AFSCME* Decision at 22-24, 70. If employee speech about such personnel issues constitutes citizen speech on matters of public

concern, little will be left of the deference the law has accorded public managerial authority.

b. The suggestion that collective bargaining is no different from political lobbying cannot be squared with the fact that state law literally *requires* bargaining to set employment terms. See 5 ILCS 315/7. The government has the right to choose to whom it listens in a private forum. See *Knight*, 465 U.S. at 282. Illinois has chosen to mandate discussions over wages and benefits through collective bargaining between management and an exclusive representative. Those sessions thus reflect employee speech, not citizen speech. Unlike lobbying, which is a voluntary expression of citizens' views on policy questions, collective bargaining represents mandated speech on topics selected by the legislature to set terms and conditions of employment. The Union must formulate positions on those topics.

c. A third distinction between lobbying and collective bargaining is that bargaining occurs between a public employer and an entity granted official representative status through an internal government-administered system of employee designation.

Lobbying, by contrast, entails citizens meeting and speaking with public officials to influence public policies. Any individual or group – including non-union-member government employees – can publicly lobby the government. The First Amendment's petition clause precludes government from restricting the speaker in lobbying; collective bargaining, by contrast, *does* entail a lawful restriction on who may speak with management on terms and conditions of employment within the officially prescribed system. When a government employee representative asks the employer to agree to a condition of employment within the

collective-bargaining process, it is not lobbying; it is complying with a statutory process for resolving issues of importance to government management. When a union in a non-public, internal grievance proceeding represents an employee accused of violating a workplace rule, it is not lobbying; it is playing a prescribed role to resolve a dispute in the manner established by the government for that purpose.

d. Admittedly, some subjects of collective bargaining have fiscal consequences, but a factual record would show that negotiating the economic terms of CBAs represents a small share of the activities germane to collective bargaining and contract enforcement that are chargeable to fee payers. Paying salaries is a reality of the government acting as an employer. At bottom, it cannot be that all topics with fiscal effects necessarily raise matters “of legitimate public concern.” *Pickering*, 391 U.S. at 571; *cf.* Pet. Br. 14. Almost every personnel issue may affect the public fisc, particularly when aggregated across many public employees. A rule constitutionalizing every such interaction “would subject a wide range of government operations to invasive judicial superintendence.” *Guarnieri*, 564 U.S. at 390-91. The Framers could not have imagined the First Amendment as a regulatory sword wielded by unelected judges to preclude government from engaging in routine management decisions. Even Justice Powell’s separate *Abood* opinion recognized that the First Amendment likely permitted requiring employees to contribute to collective bargaining over “narrowly defined economic issues” such as “salaries and pension benefits.” 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment); *see* 5 ILCS 315/6(a).

Since *Abood*, the Court consistently has recognized the distinction between lobbying and collective bargaining. Although the principal dissent in *Lehnert* disagreed about precisely where to draw the line between chargeable and non-chargeable activities, it, like all nine Justices in *Abood*, recognized the existence of core workplace speech not subject to First Amendment protection. Petitioner seeks to overrule an almost unanimous conclusion of the Court based on the mere assertion – without any record support – that collective bargaining inherently is fraught with issues of political concern. That view is demonstrably false.

2. Contract Administration and Grievance Procedures Are Wholly Unlike Lobbying

Collective bargaining also produces highly specific discipline procedures, including deadlines for when the employer must begin disciplinary proceedings and union notification requirements.¹¹ JA146-51. Petitioner’s classification (at 14) of grievance proceedings as “political” is even more divorced from reality. Grievances are often handled privately, with the stated goal that low-level supervisors will “undertake meaningful discussions” and “settle . . . grievance[s], if appropriate.” JA124-25. Thus, grievances often are resolved without prejudice or precedential effect and are of no significance to other employees or, in many cases, to the general public. JA132, 134; *contra* Pet. Br. 15. That sort of low-level, bread-and-butter “employee grievance” is not political speech at the First Amendment’s core. *Connick*, 461 U.S. at 154. Indeed, Justice Powell’s separate *Abood* opinion recognized

¹¹ Because AFSCME and the Illinois CMS sign multi-year CBAs, most years the Union does not engage in collective bargaining, and the majority of its expenses are attributable to grievance proceedings and contract administration.

that “[t]he processing of individual grievances may be an important union service for which a fee could be extracted with minimal intrusion on First Amendment interests.” *Abood*, 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment). The costs of handling routine employee grievances, like those of managing a workforce generally, are costs government has to incur – and may decide how to fund – in the normal course of employing people.

3. In an Appropriate Case, This Court Can Reconsider the Line Drawn in *Lehnert*

Abood recognized that aspects of union expression do enter the sphere of political First Amendment speech. See App. 32a-33a (listing non-chargeable activities). It also supplied the doctrinal tools for isolating that expressive conduct and excusing non-members from supporting it financially if they object. *Abood* determined that only expenses “germane” to the collective-bargaining process constitutionally could be charged to non-members. 431 U.S. at 235-36. *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), *Hudson*, and *Lehnert* long ago refined that distinction.

Even if some chargeable union activity could be considered political, that would not justify overruling *Abood* or striking down the Illinois law on its face. Petitioner cannot demonstrate that *all* union representation and *all* agency-fee payments reflect core First Amendment-protected political speech and thus that the statute is invalid in all possible applications as is necessary to sustain a facial challenge. See *United States v. Salerno*, 481 U.S. 739, 745 (1987). Rather, petitioner’s arguments implicate the debate in *Lehnert* over the line between chargeable and non-chargeable activities. Thus, for example, to the extent

this Court disagrees with *Lehnert*'s holding that lobbying for ratification of a CBA should be chargeable to objecting non-members, the solution is to re-draw the *Lehnert* line to make such lobbying expenditures non-chargeable, not to upset the entire regime that has governed for four decades. *See generally* Fried & Post Br. 22-27. Reexamining the fact-sensitive line drawn in *Lehnert*, however, cannot reasonably be done without a developed factual record.

IV. OVERRULING *ABOOD* IS INCONSISTENT WITH *STARE DECISIS*

A. *Stare Decisis* Principles Support Affirmance

Because *Abood*'s core principle remains sound, the Court need not reach *stare decisis*. But, even if the Court would not agree with *Abood*'s "reasoning and its resulting rule, were [it] addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). *Stare decisis* "contributes to the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), by ensuring that this Court's decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Thus, the Court requires a "special justification" to overrule a precedent. *Dickerson*, 530 U.S. at 443. The agency-shop model has created strong reliance interests. And *stare decisis* "does not ordinarily bend" to petitioner's "'wrong on the merits'-type arguments." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015). In short, petitioner cannot supply the "special justification" necessary to displace such a well-entrenched precedent. *Dickerson*, 530 U.S. at 443.

1. *Abood's* Longevity and Repeated Reaffirmance Compel *Stare Decisis*

Although *stare decisis* is not an “inexorable command,” “[o]verruling precedent is never a small matter.” *Kimble*, 135 S. Ct. at 2409. And *Abood* is not just any precedent.

This Court has reaffirmed and applied *Abood's* core holding in five subsequent decisions over a 40-year period.¹² It repeatedly has reaffirmed that the State's interest in maintaining orderly relations with its employees outweighs non-member employees' diminished First Amendment interest in withholding fair-share fees. See *Ellis*, 466 U.S. at 455-56 (holding “the governmental interest in industrial peace” justifies requiring employees to pay fair-share fees); *Hudson*, 475 U.S. at 302-03 (“the government interest in labor peace is strong enough to support an ‘agency shop’ notwithstanding its limited infringement on nonunion employees' constitutional rights”) (footnote omitted).

Contrary to petitioner's erroneous claims (at 33), this Court has relied on *Abood* outside the union-dues context. It repeatedly has relied on *Abood* to conclude that, if the government constitutionally may require membership in a group, it also may require group members to pay dues or other fees to support the group's core activities.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court held unanimously that, just as the

¹² See *Ellis*, 466 U.S. 435 (unanimous except for a limited dissent by Justice Powell); *Hudson*, 475 U.S. 292 (unanimous); *Lehnert*, 500 U.S. 507 (unanimously reaffirming *Abood's* basic holding that employees may be required to pay their share of expenses of exclusive representative's collective-bargaining activities); *Davenport*, 551 U.S. 177 (same); *Locke v. Karass*, 555 U.S. 207 (2009) (unanimous).

State's interest in stable labor relations justifies exclusive representation, "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. Thus, the Court held, under *Abood* "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 14. *See also Board of Regents v. Southworth*, 529 U.S. 217, 231 (2000) (reaffirming "constitutional rule" of *Abood* and *Keller* as "limiting the required subsidy to speech germane to the purposes of the union or bar association").

The Court also adopted *Abood*'s standard in agricultural-marketing cases. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472-73 (1997) (reaffirming *Abood*'s holding that "assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group" as long as the funds are "'germane' to the purpose for which compelled association was justified"); *United Foods*, 533 U.S. at 415 (mushroom advertisements did not satisfy *Abood*'s "germane[ness]" test because "the compelled contributions for advertising [we]re not part of some broader regulatory scheme"); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (describing *Abood* and *Keller* as "controlling").

In all, 17 Justices have authored or joined opinions recognizing *Abood*'s key principle. As that consensus reflects, *Abood* correctly held that the "vital policy interest[s]" of public employers in fairly allocating the costs of the union's services outweigh the comparatively modest limitations on public employees' expressive freedom. *Lehnert*, 500 U.S. at 519.

2. Petitioner Does Not Seriously Dispute That Overruling *Abood* Would Upend Significant Reliance Interests

Strong reliance interests underlie *Abood* and its progeny.

First, petitioner does not dispute that overruling *Abood* would disrupt the laws of at least 24 States that have – based on this Court’s repeatedly reaffirmed decisions – adopted collective-bargaining systems with fair-share fees. *Stare decisis* counsels strongly in favor of restraint “when the legislature . . . ha[s] acted in reliance on a previous decision” and “overruling the decision would . . . require an extensive legislative response.” *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991).

Second, contrary to petitioner’s assertion (at 32) that overruling *Abood* will “not affect government [CBA]s,” overruling *Abood* would call into question thousands of public-sector union contracts governing millions of public employees and affecting scores of critical services, including police, fire, emergency response, hospitals, and, of course, education.¹³ Those contracts require unions to provide vital services to the State, which unions agreed to provide with the agreement of funding for the significant costs of those services. *See Abood*, 431 U.S. at 221-22.

In such a scenario, *stare decisis* concerns “are ‘at their acme.’” *Kimble*, 135 S. Ct. at 2410. “[R]eliance interests are important considerations in . . . contract cases” *and* are heightened “where parties may have acted in conformance with existing legal rules in order

¹³ See Robert Jesse Willhide, U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 9, tbl. 3 (Dec. 19, 2014), <http://www.census.gov/content/dam/Census/library/publications/2014/econ/g13-aspep.pdf>.

to conduct transactions.” *Citizens United*, 558 U.S. at 365.

3. *Abood* Has Proved Workable

This Court’s precedents belie petitioner’s argument (at 26-32) that *Abood* is unworkable. *Abood* itself recognized that the line between collective-bargaining and ideological activities would be “somewhat hazier” in the public-employee context. 431 U.S. at 236. But line-drawing difficulties are insufficient reason to abandon sound constitutional principle. *See id.* at 235-37. Petitioner’s disagreement with that considered judgment does not provide special justification for overruling it, especially given that petitioner’s facial challenge presents a “lack of factual concreteness . . . to aid [the Court] in approaching the difficult line-drawing questions.” *Id.* at 236-37.

Nor, contrary to *Harris*’s suggestion, has this Court “struggled repeatedly with this issue.” 134 S. Ct. at 2633; *see* Pet. Br. 27. By *Harris*’s own count, the Court has decided four cases in 32 years placing particular types of expenditures on one side or the other of that line – hardly a torrent evidencing an unadministrable rule. It is wholly unsurprising that *Abood*, which was the first “in-depth examination” subjecting portions of agency-fee payments to constitutional scrutiny, failed to “clarify the entire field.” *Heller*, 554 U.S. at 635. Subsequent cases have refined the line between chargeable and non-chargeable activity, and those decisions have not been divisive. *See Ellis*, 466 U.S. at 457 (unanimous except for Justice Powell’s limited dissent); *Hudson*, 475 U.S. at 310-11 (establishing notice and opt-out procedures); *id.* at 311 (White, J., concurring); *Locke*, 555 U.S. at 221 (concluding litigation expenses were chargeable); *id.* at 221-22 (Alito, J.,

concurring). Only *Lehnert* generated significant dissension, as Justice Scalia advocated for a stricter line between chargeable and non-chargeable expenses. *Compare Lehnert*, 500 U.S. at 519, *with id.* at 556-57 (Scalia, J., concurring in the judgment in part and dissenting in part).

Petitioner also contends (at 27, 28-29) that the “amorphous” germaneness test unions apply “invite[s] abuse.” AFSCME’s test (App. 28a) is nearly verbatim from *Lehnert*. *See* 500 U.S. at 519. And its Fair Share Notice provides significant detail, listing activities “not include[d]” in the fair-share fee, App. 32a; itemizing the Union’s activity-by-activity costs to the single dollar, App. 34a-39a; and explaining the fair-share challenge process, which offers the challenger binding arbitration at the Union’s expense, App. 40a-41a. Moreover, the audit process protects against abuse, contrary to petitioner’s characterization (at 28-29). Far from taking the unions’ categorizations “for granted,” auditors must in fact “review those classifications . . . with professional skepticism” under the code that governs CPAs. CPAs Br. 11-12.

At most, petitioner’s workability concern counsels clarifying *Lehnert*’s rule, and not overruling *Abood*.

4. There Is No Exception to *Stare Decisis* Applicable Here

Contrary to petitioner’s attempt to require respondents to justify *keeping* established law on the books, *see* Pet. Br. 35, this Court has never held that *stare decisis* lacks force in constitutional cases. Indeed, it consistently has held that *stare decisis* demands “special justification” for “*any* departure” from precedent, *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (emphasis added), including “in constitutional cases,” *IBM*, 517 U.S. at 856.

Stare decisis would also further federalism values. Voters in different States have come to different conclusions on whether and how to recognize agency shops. Political debate on labor-relations policy continues. See, e.g., Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. Times (June 12, 2015). That “fair and honest debate . . . ‘is exactly how our system of government is supposed to work.’” *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (quoting *id.* at 2627 (Scalia, J., dissenting)). The variety of approaches reached through the States’ democratic processes counsels against finding a new First Amendment right to avoid paying any fair-share fees. As Justice Scalia noted: “It is profoundly disturbing that the varying political practices across this vast country, from coast to coast, can be transformed overnight by an institution whose conviction of what the Constitution means is so fickle.” *Umbehr*, 518 U.S. at 687 (Scalia, J., dissenting).

B. Petitioner’s Arguments Concerning *Abood*’s Vitality Depend On Assertions Of Contested (And Incorrect) Facts, And This Case Lacks A Factual Record

Petitioner asks this Court to overrule *Abood* and its progeny and hold that *any* fair-share fees collected without affirmative consent by *any* public-employee union in *any* State for *any* purpose are unconstitutional. Petitioner’s challenge exemplifies the kind of facial challenge “disfavored” by this Court. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). As even Justice Powell’s *Abood* opinion recognized, for *some* collective-bargaining topics an individual’s First Amendment in-

terests are “comparatively weak” and the State’s interests “strong.” 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment).

Moreover, petitioner raises his sweeping challenge without *any* evidentiary record and without having specified the issues on which he purportedly disagrees with the Union. Given the “fact-poor record[]” before this Court, *Sabri v. United States*, 541 U.S. 600, 609 (2004), it should be particularly unwilling to announce a sweeping new constitutional right. Instead, the Court should “proceed with caution and restraint,” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), and reject petitioner’s blanket challenge to all fair-share fees.

A more fulsome record, for example, would provide further evidence concerning the routine nature of grievance procedures. As the IPLRA requires, AFSCME pursues grievances on behalf of non-members – at those employees’ elections – literally hundreds of times per year, and it generates many positive outcomes, including reinstatement, backpay, and expungement of incorrect written reprimands. Such representation comes at a financial cost to the Union. And far from being precedential, *see* Pet. Br. 15, grievances are often resolved without “precedent” or “prejudice.” JA132, 134.

Petitioner also calls it “difficult” (at 29) for employees to determine whether a union has accurately described its expenditures in its *Hudson* notice and thus whether to challenge the calculation, and cites *Knox*’s assertion that union-funded arbitration in which the union bears the burden of proof is still a “painful burden.” 567 U.S. at 319 n.8. But “mounting a challenge is for all practical intents and purposes free,” as “to file a challenge costs only a postage stamp plus a small

amount of time to supply the tiny amount of information that the challenge must set forth.” *Gilpin v. AFSCME*, 875 F.2d 1310, 1315-16 (7th Cir. 1989) (Posner, J.). A record would allow the lower courts to test petitioner’s claim and the correctness of *Harris*’s footnote.

Finally, *nothing* in this lawsuit – no assertion in petitioner’s brief or allegation in his intervenor complaint – identifies a single view that petitioner takes in opposition to his union representative. A developed record would include evidence necessary to allow the lower courts to interrogate Janus’s claim, including the number of times Janus availed himself of the opportunity to provide the Union with his disagreements in the forum it provides (0), and the specific areas on which Janus disagrees with the position AFSCME takes (to assess whether they reflect speech “as a citizen” or “as an employee”). Typically, when this Court decides that a person’s constitutional rights have been violated, the alleged violation stems from something concrete. The vague and overblown nature of this lawsuit does not.

A record would also illuminate the prosaic nature of most employee disputes and the extent to which they reflect routine labor-management issues. Without facts proving the contrary, petitioner’s arguments for discarding *Abood* reflect the triumph of ideological fervor over empirical experience.

C. Overruling *Abood* Would Disrupt Other Long-Settled First Amendment Doctrines

1. *Abood*’s principle is consistent with First Amendment decisions in the employee-speech, compelled-subsidy, and public-forum contexts. *See supra* pp. 21-28. Not only was *Abood* correctly decided, but

overruling it would call those additional lines of precedent into question. See *Arizona v. Gant*, 556 U.S. 332, 358, 361 (2009) (Alito, J., dissenting) (citing reliance and “[c]onsistency with later cases” as weighing in favor of honoring *stare decisis*) (emphasis omitted). Because those cases rest on *Abood*’s foundation, it is not the sort of “doctrinal dinosaur or legal last-man-standing” justifying reduced adherence to *stare decisis*. *Kimble*, 135 S. Ct. at 2411.

2. “The United States previously defended *Abood* by relying primarily on the balancing test for public-employee speech claims established in *Pickering*.” U.S. Br. 9. That position was unsurprising and reflected the federal government’s vested interest, “[a]s the nation’s largest public employer,” *id.* at 1, in managing its workforce effectively. If the United States’ new position were adopted, *Pickering*’s force would be significantly reduced, and a far larger swath of public-employee speech would be subject to “exacting First Amendment scrutiny.” *Id.* at 8. This includes, potentially, speech by public-employee leakers of government secrets or employee disagreements with the government’s third-party contracts. Though leaks very frequently “implicate[] concerns of politics and public policy,” *id.* at 15, that conduct traditionally has been subject to the more permissive First Amendment standard allowing “reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment,” *Snepp*, 444 U.S. at 509 n.3. The United States’ reversal in position would leave that and other areas of First Amendment law in limbo in ways the government’s brief does not address.

3. Petitioner does not hide that the core of his challenge implicates the validity of exclusive union representation itself. See, e.g., Pet. Br. 50 (agency fees

“compound the First Amendment injury that [exclusive representation] already inflicts”). The logic of petitioner’s argument is thus directly at odds with *Knight*, adding yet more ripple effects counseling against overruling *Abood*.

* * * *

Stare decisis has additional force where a “decision’s close relation to a whole web of precedents means that reversing it could threaten others.” *Kimble*, 135 S. Ct. at 2411. As that concern applies here, the Court should decline “to unsettle stable law.” *Id.*

V. PETITIONER’S REQUEST FOR AN AFFIRMATIVE CONSENT REQUIREMENT SHOULD BE REJECTED

A. The Scope Of Required Consent Is Outside The Question Presented

Petitioner invites the Court (at 61-63) to decide whether the First Amendment requires employees to provide “affirmative consent” to non-chargeable fees, rather than an annual opt-out mechanism. The Court should decline the invitation.

The Court granted certiorari on one question: “should *Abood* be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment?” Pet. i. Unlike in *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (per curiam), it did not grant certiorari (nor was certiorari sought) on whether the First Amendment permits a system requiring employees to opt out of supporting non-germane activities. See Pet. i, *Friedrichs*, No. 14-915 (U.S. filed Jan. 26, 2015). It is apparent why. Under the CBA, AFSCME’s default rule is to charge non-members *only* for “their share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and

conditions of employment subject to the terms and provisions of the parties' fair share agreement." JA124; *see also* 5 ILCS 315/6(a). Full union dues are collected only from employees "who individually request it." JA122. Given the facts of the case, no "holding" (Pet. Br. 62) could address the consent question.

B. Any First Amendment Interest Against Compelled Subsidization Is Properly Protected By A Right To Opt Out

The Court repeatedly has recognized that an individual given the chance to object is not being compelled to engage in expressive activity. *See Davenport*, 551 U.S. at 181 ("Neither *Hudson* nor any of our other cases . . . has held that the First Amendment mandates that a public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*."); *Beck*, 487 U.S. at 745 (RLA prohibits political expenditures "over the objections of nonmembers").

This conclusion reflects holdings in other First Amendment cases. *See, e.g., Christian Legal Soc'y Chapter of Univ. of California v. Martinez*, 561 U.S. 661, 682 (2010) ("regulations that *compelled* a group to include unwanted members, with no choice to opt out," have been held unconstitutional, whereas less strict requirements have not). Moreover, the right to opt out adequately protects other constitutional rights. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'"). In court, individuals can forfeit constitutional rights by failing to object affirmatively to their violation. *See, e.g.,*

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313 n.3 (2009) (“[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence”).

Petitioner merely asserts (at 62) that affirmative consent is necessary to satisfy the First Amendment. But he makes no effort to distinguish (or even cite) the many contexts in which this Court has said otherwise. As the cases above demonstrate, it long has been the rule that individuals affirmatively must invoke their own constitutional rights.

CONCLUSION

The case should be dismissed for lack of subject-matter jurisdiction. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 12, 2018