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"The Janus Case and Public Sector Unions: Where Jurisprudence Meets Politics"

May 15, 2018

ALBANY LAW SCHOOL

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The *Janus* Case and Public Sector Unions: Where Jurisprudence Meets Politics

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SPEAKER BIOGRAPHIES

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EDMUND J. MCMAHON is founder and research director of the Empire Center for Public Policy. McMahon's writing and research focuses on improving New York's economic competitiveness and promoting greater transparency, accountability and fiscal responsibility in state and local government. He has authored or co-authored major studies on public pension reform, collective bargaining, population migration, budget trends and tax policy in New York. His influential "Blueprint for a Better Budget," published in January 2010, featured a number of recommendations subsequently implemented under Governors David Paterson and Andrew Cuomo. McMahon also was a leading advocate of an across-the-board cap on property taxes in New York before it was enacted at Governor Cuomo's initiative in 2011. McMahon has published numerous articles and essays in publications including the *Wall Street Journal*, *The New York Times*, *Barron's*, the *Public Interest*, the *New York Post*, the New York *Daily News*, *Newsday*, and the Manhattan Institute's *City Journal*. His frequent radio and TV

interviews have included appearances on CNBC, Fox News Channel and Bloomberg News, as well as on regional cable and broadcast outlets throughout New York State. McMahon's professional background includes nearly 30 years as an Albany-based analyst and close observer of New York State government. As chief fiscal advisor to the Assembly Republican Conference in the early 1990s, he drafted a personal income tax reform plan that would become the basis for historic tax cuts enacted under Governor George E. Pataki. Previously, as research director of the Public Policy Institute, he worked on the Institute's counter-budget proposals and developed the template for New York's school report cards. He also served as a deputy commissioner in the state Department of Taxation and Finance and as a vice chancellor of the State University of New York. McMahon is also an adjunct fellow with the Manhattan Institute for Policy Research, which he joined in June 2000. In January 2005, he opened the Institute's Albany-based Empire Center project, which became an independent non-profit think tank in 2013. He was the Empire Center's first president, and became research director in the fall of 2016. Earlier in his career, he was a staff writer and columnist for the Albany *Times Union* and *The Knickerbocker News*. McMahon is a graduate of Villanova University.

ROSEMARY QUEENAN, ESQ. is Associate Dean for Student Affairs and Professor of Law at Albany Law School. Prior to joining Albany Law School in 2007, Professor Queenan was Assistant General Counsel for the Patrolmen's Benevolent Association of the City of New York, Inc., where she represented the Union in various court actions and arbitrations, and advised the Board of Trustees on issues involving the Union's affiliated Health and Welfare Funds. She also served as an Assistant Attorney General in the Litigation and Civil Rights Bureaus of the New York Attorney General's Office, where she defended various state agencies in state and federal court actions and investigated potential claims of discrimination. Before that she was an associate in two private litigation firms, where she represented clients in commercial, products liability, and general negligence actions. Professor Queenan began teaching in 1999 as an adjunct faculty member at New York Law School, where she taught Legal Reasoning, Writing & Research, Written and Oral Advocacy and Drafting Contracts. Dean Queenan received her B.A. from the University of Maryland and her J.D. from New York Law School (magna cum laude).

In the

United States Court of Appeals

For the Seventh Circuit

No. 16-3638

MARK JANUS and BRIAN TRYGG,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

LISA MADIGAN, Attorney General of the State of Illinois,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 15 C 1235 — **Robert W. Gettleman**, *Judge.*

ARGUED MARCH 1, 2017 — DECIDED MARCH 21, 2017

Before POSNER, SYKES, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court upheld, against a challenge based on the First Amendment, a Michigan law

that allowed a public employer (in that case a municipal board of education), whose employees (public-school teachers) were represented by a union, to require those of its employees who did not join the union nevertheless to pay fees to it because they benefited from the union's collective bargaining agreement with the employer. The fees could only be great enough to cover the cost of the union's activities that benefited them; they could not be expanded to enable the union to use a portion of them "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235–36. For were that permitted, the workers who disagreed with the political views embraced by the union would be unwilling contributors to expenditures for promoting political views anathema to them, and the law requiring those contributions would thereby have infringed their constitutional right of free speech.

Illinois has a law, similar to the Michigan law, called the Illinois Public Relations Act, 5 ILCS 315 *et seq.*, under which a union representing public employees collects dues from its members, but only "fair share" fees (a proportionate share of the costs of collective bargaining and contract administration) from non-member employees on whose behalf the union also negotiates. See 5 ILCS 315/6. But in 2015 the governor of Illinois filed suit in federal district court to halt the unions' collecting these fees, his ground being that the statute violates the First Amendment by compelling employees who disapprove of the union to contribute money to it.

The district court dismissed the governor's complaint, however, on the ground that he had no standing to sue be-

cause he had nothing to gain from eliminating the compulsory fees, as he is not subject to them. But two public employees—Mark Janus and Brian Trygg—had already moved to intervene in the suit as plaintiffs seeking the overruling of *Abood*. Of course, only the Supreme Court has the power, if it so chooses, to overrule *Abood*. Janus and Trygg acknowledge that they therefore cannot prevail either in the district court or in our court—that their case must travel through both lower courts—district court and court of appeals—before they can seek review by the Supreme Court.

While dismissing the governor's complaint for lack of standing, the district court granted the employees' motion to intervene and declared that the complaint appended to their motion would be a valid substitute for Governor Rauner's dismissed complaint. Technically, of course, there was nothing for Janus and Trygg to intervene in, given the dismissal of the governor's complaint. But to reject intervention by Janus and Trygg on that ground would be a waste of time, for if forbidden to intervene the two of them would simply file their own complaint when Rauner's was dismissed. As there would be no material difference between intervening in Rauner's suit and bringing their own suit in the same court, the efficient approach was, as the district court ruled, to deem Rauner's suit superseded by a motion to intervene that was the equivalent of the filing of a new suit. See *Village of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007).

But we need to distinguish between the two plaintiffs, Janus and Trygg, because while Janus has never before challenged the requirement that he pay the union "fair share" fees, Trygg has. First before the Illinois Labor Relations

Board and then before the Illinois Appellate Court, Trygg complained that the union bargaining on his behalf (the Teamsters Local No. 916, one of the defendants in this case) was ignoring a provision of the Illinois law that allows a person who has religious objections to paying a fee to a union to instead pay the fee to a charity. 5 ILCS 315-6(g). The Illinois court agreed, and on remand to the Board Trygg obtained the relief he sought: instead of paying the fair-share fee to the union, he could pay the same amount to a charity of his choice. The defendants (the unions that bargain on behalf of Janus and Trygg, respectively—AFSCME for Janus, the Teamsters for Trygg—the Director of the Illinois Department of Central Management Services, which is the state agency that has collective bargaining agreements with both unions; and the Attorney General of Illinois intervening on the side of the defendants) argue that Trygg's claim in the present suit is precluded by his earlier litigation.

Claim preclusion is designed to prevent multiple lawsuits between the same parties where the facts and issues are the same in all of the suits, and 28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to a state court judgment that it would be given by the courts of the state in question. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). Trygg's First Amendment claim and his earlier Illinois statutory claim arise from the same fact: the existence of an Illinois law requiring that he pay fees to the Teamsters, the union required to bargain on his behalf. But the parties disagree as to whether Trygg could have raised his First Amendment claim in the earlier litigation. It's true that the Illinois Labor Relations Board could not have entertained a constitutional challenge to the statute, but Trygg could have included the claim in his appeal from the Board's decision to

the court, because it presented an issue relevant to the legality of the Board's action. See *Reich v. City of Freeport*, 527 F.2d 666, 671–72 (7th Cir. 1975). He did not do so; and because he had a "full and fair opportunity" to do so, he is precluded by Illinois law from litigating the claim in the present suit. See *Abner v. Illinois Department of Transportation*, 674 F.3d 716, 719 (7th Cir. 2012). He missed his chance.

Janus's claim was also 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.

The judgment of the district court dismissing the complaint is therefore

AFFIRMED.

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 *Abood 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.

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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.

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[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]

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[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

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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

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[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

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[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 Employes' 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*

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[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-*

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[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,

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[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:

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[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

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[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

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[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-

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[17] *Right to Work States*, Nat'l Right to Work Legal Def. Found., http://www.nrtw.org/rtws.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; s*ee 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]

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[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/Qt4R1c.

[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 Lif*e, 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, s*ee* 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

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[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 nonmembers . . . 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 nonmember 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

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[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

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[23] *See* Andrew Buttaro, *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-

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[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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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 RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31

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January 12, 2018

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.

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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.

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[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 unit[2] 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-

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[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* Decision[3] 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

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[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.

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[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 intervener 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.

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[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

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[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.

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[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]

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[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.

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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 nonmembers 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." *Guarnieri*, 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

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[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

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[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

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[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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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

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.

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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

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[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); *Commc'ns 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

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[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.

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[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

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[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*,

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[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]

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[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.

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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,

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[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 nonchargeable 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

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[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.

Respectfully submitted,

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