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Brief of Amici Curiae Labor Law & Labor Relations Professors in Support of Respondents

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No. 14-915

IN THE
Supreme Court of the United States

REBECCA FRIEDRICHS, *ET AL.*,
Petitioners,
v.
CALIFORNIA TEACHERS ASSOCIATION, *ET AL.*,
Respondents.

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

BRIEF OF AMICI CURIAE LABOR LAW & LABOR RELATIONS PROFESSORS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief addresses the following question:

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled, and public sector agency shop arrangements invalidated, under the First Amendment.

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are the professors listed in Appendix A, each of whom has expertise relevant to the issues before the Court in this case. *Amici* are interested in the outcome of this case because it raises important questions about the extent of this Court's traditional deference to states acting as employers; specifically, whether one time-tested method of public workforce management—collective bargaining with an elected union that represents members and non-members alike and is in turn supported by an agency fee—will be held unconstitutional.

A list of signatories can be found at Appendix A, with institutional affiliations provided for identification purposes only.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters evidencing the parties' consent to the filing of *amicus* briefs are on file with the clerk.

SUMMARY OF ARGUMENT

As employers that must manage large and diverse workforces and deliver critical public services, states and municipalities require substantial deference to their managerial choices. In addition, federalism principles weigh in favor of federal courts' deference to state employers. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is simply one manifestation of these longstanding principles.

I. Most public employers manage at least some of their employees by allowing them to elect a union representative to bargain collectively over terms and conditions of employment. Many of these employers also permit elected unions to charge a representation or "agency" fee from each worker to whom the union owes a duty of fair representation. The agency fee ensures that the union has the resources necessary to perform core tasks related to representation; without it, workers may engage in economically rational "free riding," which can increase fractiousness among employees, damage morale, and leave unions unable to perform key functions.

Collective bargaining has proven benefits for public employers—including preventing strikes and other labor disruptions, and improving the delivery of public services—because it provides a productive channel for workers to be heard and to resolve their differences with management. Thus, it is not surprising that a few public employers began bargaining with their employees' chosen union

representatives even before they were required to by law. Later, public sector labor relations law caught up with practice as states sought to prevent public employee strikes, and to recruit and retain high-quality employees. Indeed, empirical evidence shows fewer strikes where public employers have a duty to bargain with employees' elected union representatives. In addition, collective bargaining is linked to a host of related workplace benefits, including reduced employee turnover, increased job satisfaction, and improved worker productivity. These benefits run to both employers and employees, and they explain how collective bargaining can raise worker pay without contributing significantly to increased public budgets.

Many states have also concluded that unions are better able to perform their roles where they have adequate funds, and are funded in a fair way. A mandatory agency fee achieves both of these goals by requiring each represented worker to contribute to the costs of core union representational activities.

Basic economics predicts that free riding is inevitable where workers receive the benefits of union representation whether or not they contribute toward its costs. And research shows both that free riding is common where workers are not required to pay an agency fee, and that it has a deleterious effect on unions' abilities to represent workers. These negative effects will redound to public employers, as under-resourced unions are less likely to achieve the stability- and productivity-enhancing benefits described above.

II. This Court's First Amendment case law has consistently afforded public employers the flexibility to manage their employees to best deliver public services. In particular, this Court has long permitted governments acting in their managerial capacities (rather than as sovereign) significant leeway to limit employees' speech in the interest of workplace efficiency. Moreover, that is true even when the employee speech at issue is on a matter of public concern, and even when it takes place outside of working hours. *Harris v. Quinn*, 134 S. Ct. 2618 (2014), is not to the contrary, because that case did not involve public employees; by definition, the government could not have been acting in its public employer capacity.

In light of that longstanding principle, the key inquiry in this case should be whether governments adopt agency fee policies in their employer capacities. Given the workforce management benefits of collective bargaining described above, it is plain that they do. Accordingly, *Abood* is consistent with this Court's general approach to public employees' First Amendment rights and should not be overturned.

ARGUMENT

States and localities bear responsibility for providing critical government services, including law enforcement, education, sanitation, and fire and disaster protection. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 575 (1985) (Powell, J., dissenting) (those services "epitomize the concerns of local, democratic self-

government"); *Brown v. Board of Education,* 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."). These duties are carried out by public workers and managed by public officials.

Control over how to manage this critical relationship is at the heart of this case. Petitioners ask this Court to remove from public employers one proven method of managing their workforces: collective bargaining with an elected union, whose core functions are funded through mandatory agency fees. Their argument is inconsistent with this Court's longstanding practice of deferring to public employers when they act in their managerial capacity to ensure the efficient delivery of public services, including limiting public employees' speech and association.

I. Many States Improve Their Delivery of Public Services Through Collective Bargaining With Elected Unions That Are In Turn Supported By Agency Fees.

Most states have chosen to manage their public employees in part by allowing them to bargain collectively over terms and conditions of employment. These states and municipalities have reasonably concluded that collective bargaining is a sensible and fair way to respond to employees' concerns and desires, and this conclusion is supported by research showing that public sector bargaining tends to reduce strikes and improve the delivery of public services.

In addition, states may decide whether or not to permit unions to charge represented workers an agency fee, and many states have concluded that the benefits of collective bargaining are best achieved when each represented employee contributes to his or her union's core representation expenses. In short, agency fees are an equitable way of ensuring that elected union representatives have the funding they need to represent every member of the bargaining unit. The alternative risks a situation in which too many employees make the economically rational decision to "free ride" while still receiving the benefits of union representation, leaving the union unable to effectively represent the workers who elected it. This outcome could lead to labor unrest and the loss of the public benefits that employers can achieve through collective bargaining.

This Section first explains the benefits to states of public sector collective bargaining, and then addresses the role that agency fees play in achieving those goals.

A. Collective Bargaining is a Time-Tested Method of Managing Public Workforces, Avoiding Workplace Disruption, and Improving Delivery of Public Services.

In addition to making substantive human resources decisions about whom to hire or fire or how much to pay, state and local governments must decide how to manage the large numbers of workers they employ. Unlike private employers, however, our federalist structure also allows states to dictate the laws that govern their internal labor-

management relationships. States frequently exercise this freedom in light of their evolving views of how to achieve the best outcomes, with most states allowing at least some public employees to bargain collectively. Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512-13 (2013) (noting that as of 2007, all but seven states had some provision for public sector bargaining). Accordingly, states' public sector labor relations regimes reflect a range of decisions on issues such as which employees (if any) may elect a bargaining representative, how to resolve bargaining impasses, whether (and which) public employees may strike, how to process employee grievances, and which working conditions are subject to bargaining. *See id.* at 512-13; Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 Cornell J.L. & Pub. Pol'y 735 (2009) (comparing Virginia, which has outlawed public sector collective bargaining, with Illinois, which has adopted robust collective bargaining).

Whereas some of petitioners' *amici* suggest that public sector collective bargaining is harmful to the public interest, and attribute its existence to misaligned political incentives,[2] both history and empirical research demonstrate important employer and public benefits of public sector collective

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[2] *E.g.*, Br. Amicus Curiae of Pac. Legal Found., et al., at 9-13. In contrast to the picture painted by some of petitioners' *amici*, employee organizations (and later unions) have served as an "important wedge between political party machines and public employees." William Herbert, *Card Check Labor Certification: Lessons From New York*, 74 Alb. L. Rev. 93, 101 (2010-11).

bargaining. First, states' experiences over the last several decades show the value of collective bargaining in delivering public services; indeed, many public employers began bargaining with employee unions in order to ensure efficient and uninterrupted service even before they adopted state laws to facilitate bargaining. Second, research confirms that collective bargaining effectively resolves differences between employees and management, helping minimize potential discord and disruption, and decreasing the likelihood of strikes. Third, collective bargaining improves workers' longevity and productivity, and yields other positive employment and service-delivery outcomes. Fourth, collective bargaining does not drain the public fisc; while workers represented by public sector unions tend to receive higher pay than their non-union counterparts, those pay increases are offset by other efficiencies.

1. The utility of public sector bargaining for public employers is illustrated by its use long before the first state public-sector bargaining statute was passed in 1959. Joseph Slater, *Public Workers: Government Employee Unions, the Law, and The State, 1900-62* 158 (2004). Beginning in the early 1900s, postal clerks, teachers, firefighters, and other public sector workers began to unionize, such that the number of unionized public sector workers nearly doubled from 1915 to 1921, and overall union density in the public sector increased from 4.8 percent to 7.2 percent. *Id.* at 18.

Some public employers responded by bargaining with labor unions, and the resulting

agreements took various forms—some were written, others were oral, and still others were written policies that were officially unilateral statements by the employer but in fact were forged with union input. For example, in 1934, Operating Engineers Local 142 negotiated a written agreement with the Chicago Board of Education that the Board followed. *Id.* at 124. The next year, the New York Emergency Relief Bureau "negotiated a grievance procedure with its unionized employees." The result was signed by both sides, but later "changed to a unilateral announcement" after city officials "questioned the legality of a bilateral agreement." *Id.* Federal entities negotiated with employees as well, notably in the Tennessee Valley Authority (written agreements that were formally unilateral but were produced through negotiation) and the U.S. Post Office (oral agreements that the Post Office followed). *Id.*

By the late 1950s, increasing acceptance of public sector unions, and the growing disparity between law and practice, led states and the federal government to begin to authorize public-sector bargaining. *Id.* at 158-59, 190. By 1966, sixteen states had enacted laws granting at least some organizing and bargaining right to public employees, and by the end of the 1970s, a majority of states had adopted such laws. *Id.* at 191; Seth Harris, Joseph Slater, Anne Lofaso & David Gregory, *Modern Labor Law in the Private and Public Sectors: Cases and Materials* 63 (2013).

Legislative materials associated with many early public sector collective bargaining laws reveal

that these laws were aimed at achieving multiple public goals, including stemming a tide of public employee strikes in the 1960s and 1970s,[3] and recruiting and retaining high-quality employees who would efficiently deliver public services. *See, e.g.*, *Michigan Panel Report on Public Employee Bargaining* (Feb. 28, 1967) (describing "basic objective[]" of "protecting the general public against interruptions or impairment of essential government services"); *Pennsylvania Governor's Commission to Revise the Public Employment Law* 7 (1968) (absence of collective bargaining rights "reduces the value of [government employment] to that employe [sic]"); *Rhode Island's Commission to Study Mediation and Arbitration* 2 (1966) ("To achieve high quality education, good relations between teaching personnel and school boards are indispensable."); Ohio Legislative Service Commission, *Public Employee Labor Relations* 2 (1969) ("the employee's efficiency and contribution to the service generally increases if he participates in the decisions"); New York, *Governor's Committee on Public Employee Relations Final Report* 9 (1966) ("protection of the public from strikes in public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment").

2. Consistent with these states' early findings, research shows that collective bargaining provides a productive channel for employees to resolve

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[3] US Dep't of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1979* 4 (1981), *available at* http://bit.ly/1laOKzG.

differences with their public employers without resorting to strikes or other disruptive conflict. By facilitating employees' input into the terms and conditions of their work, union representation—including contract negotiation, grievance processes, and impasse procedures—prevents or mitigates employee dissatisfaction before it reaches a disruptive level. Moreover, the creation of structured channels for communication can help management and employees to understand each other's perspectives and enable ongoing, low-level problem solving.

Accordingly, one study of state and local government workers over a fifteen-year period found that "[s]trike incidence is highest when the parties have neither a duty to bargain nor dispute-resolution procedures." 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, 532 (1994). Numerous other researchers confirm this conclusion.[4] The Currie & McConnell study also concluded that "[s]trike incidence can be

[4] *E.g.*, James L. Stern & Craig Olson, *The Propensity to Strike of Public Employees*, 11 J. Collective Negotiations 201 (1982); David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 2, 13–14 (2011), *available at* http://ssrn.com/abstract=1792942; Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. Mich. J.L. Ref. 313, 361-65 (1993) (finding significantly fewer public sector strikes occurred in Ohio and Illinois after those states passed collective bargaining statutes); Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 247-48 (5th ed. 2014) (reviewing studies).

reduced by switching to a regime in which employers are required to bargain in good faith and strikes are illegal." *Id*. at 544.

Given its effectiveness in reducing conflict, it is unsurprising that most states and localities have adopted collective bargaining for at least some employees. Even states that generally eschew public sector bargaining sometimes permit union representation and collective bargaining for public safety employees, where service interruptions due to strikes would be singularly costly or dangerous. Thus, nearly all states permit bargaining by professional firefighters, including some that authorize no or nearly no other bargaining. Richard Kearney, *Labor Relations in the Public Sector* 62-64 (4th ed. 2009); *see also* Malin, *Public Employees' Right to Strike*, at 316 n.13 (listing states that permit collective bargaining only within certain employee units, including first responders). More starkly, when Wisconsin's legislature significantly curtailed collective bargaining for most public sector workers, it left intact bargaining rights (including permitting agency fees) for public safety workers, citing the dangers of strikes by those workers.[5] *Wisc. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 865 (W.D. Wisc. 2012), *rev'd in part*, 705 F.3d 640 (7th Cir. 2013); *see also* Casey Ichniowski, *Collective Bargaining & Compulsory Arbitration: Prescriptions for the Blue Flu*, 21 Indus. Rel. 149 (1982) (finding that "municipalities in states that provide for

[5] Subsequently, Wisconsin barred agency fees in the private sector, Wis. Stat., § 111.04(3) (2015), but that legislation did not affect the legality of agency fees for public safety unions.

collective bargaining in any form experience significantly fewer police strikes than do municipalities in environments where there is no law or where police bargaining is specifically outlawed").

3. In addition to averting workplace disruption, collective bargaining yields affirmative benefits for public employers, including improved workplace efficiency and reduced employee turnover. A large body of evidence shows that collective bargaining benefits employers in two key ways. First, the chance to have a voice at work through collective bargaining is itself highly valued by employees, who report that they view bargaining both as a way to improve their own lives and to make their employers more successful. Richard B. Freeman & Joel Rogers, *What Workers Want* 4-5 (1999). Second, workers who have a say in workplace decisions are "more likely to buy into the firm's processes and objectives," yielding higher "job satisfaction, loyalty, and job tenure" and "reduc[ing] the costs associated with the hiring and training of new employees and provides an incentive for investment in enterprise-specific skills." Stephen F. Befort, *A New Voice for the Workplace: A Proposal For An American Works Councils Act*, 69 Mo. L. Rev. 607, 611-12 (2004); *see also* Samuel Estreicher, "*Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 Minn. L. Rev. 1615, 1620 (2014) ("collective bargaining provides a means for workers to collectively express their preference for [a particular workplace policy] and for parties to determine whether the collective benefits outweigh the collective costs of its provision"); Kenneth G.

Dau-Schmidt & Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, in *Labor and Employment Law and Economics* 96, 109 (Kenneth G. Dau-Schmidt et al. eds., 2009) (collective bargaining helps employees to feel more useful and engaged, and has been linked to productivity gains, including lower turnover, search, and retraining costs).

Empirical studies find that where mature collective bargaining relationships develop, "unions can increase firm productivity in certain industries, particularly if management constructively embraces, rather than fights, union contributions." Dau-Schmidt & Traynor at 109-10; *see also* Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 19 (1985) ("unions are associated with greater efficiency in most settings"). Other research suggests that this finding also holds in the public sector. For example, one study linked teachers unions to stronger statewide performance on standardized college entrance exams. Robert Carini, Brian Powell & Lala Carr Steelman, *Do Teacher Unions Hinder Educational Performance? Lessons Learned From State SAT & ACT Scores*, 70 Harv. Educ. Rev. 437 (2000). Other studies have reached similar findings.[6]

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[6] F. Howard Nelson, Michael Rosen & Brian Powell, *Are Teachers' Unions Hurting American Education? A State-By-State Analysis Of The Impact Of Collective Bargaining Among Teachers on Student Performance* 4 (1996) ("The results of this study demonstrate clearly that student performance on [SAT College Entrance exams and the National Assessment of Educational Progress fourth grade reading test] is significantly better in states with high levels of unionization with all other variables held constant."); Morris M. Kleiner & Daniel L.

The explanation for these productivity gains in unionized school districts likely has many causes, but one is straightforward:

> [I]t would be silly to try to plan school policies or curricula without consulting with the teachers who have been trained to educate children and who are actually involved in the day-to-day

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Petree, *Unionism and Licensing of Public School Teachers: Impact on Wages & Educational Output*, in *When Public Sector Workers Unionize* 306 (Richard B. Freeman & Casey Ichniowski eds., 1988) ("collective bargaining coverage is associated with . . . higher educational performance as measured by student test scores and high graduation rates"); Randall W. Eberts & Joe A. Stone, *Teacher Unions & the Productivity of Public Schools*, 40 Indus. & Lab. Rel. Rev. 354, 354 (1987) ("[h]olding resources constant and using achievement gains on standardized tests as the measure of output, . . . union [school] districts are seven percent more productive for average students," and three percent more productive across all students). To be sure, there is variation in the literature on the effect of teachers unions on school district productivity, which may be in part a function of which states are investigated. *Compare* Michael F. Lovenheim, Stanford Institute for Economic Policy Research, *The Effect of Teachers' Unions on Education Production: Evidence From Union Election Certifications in Three Midwestern States* (March 2009), http://bit.ly/1WVvGBn ("teachers' unions have no impact on teacher pay or per-student district expenditures . . . class sizes. . . . [or] high school dropout rates") *with* Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence From a New Mexico Natural Experiment*, 120 Yale L.J. 1130, 1169 (2011) (study of effect of teachers unions in New Mexico, finding that "mandatory collective bargaining laws in the public school context lead to an increase in SAT scores and a decrease in graduation rates"). This variation underscores the importance of permitting state experimentation with a range of workplace-relations models.

> running of the schools. Discussions with collective representatives in a union setting are more likely to be productive than individual discussions because employees will have less fear of retaliation for reporting administrative failures.

Kenneth G. Dau-Schmidt & Mohammad Khan, *Undermining or Promoting Democratic Government?: An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Labor Law*, 14 Nev. L.J. 414, 429 (2014) (productivity gains can be attributed to facts that "unions help promote the negotiation of efficient contract terms," ensure that those terms are enforced, and facilitate worker voice, which lowers costly employee turnover).

In addition to workforce management benefits, some states and municipalities have worked to achieve other public policy goals through collaborative labor-management relationships. For example, some school districts (including in California) have been remarkably successful in partnering with their employees' collective bargaining representatives to improve student performance and teacher quality. Ken Futernick et al., *Labor-Management Collaboration in Education: The Process, The Impact, & The Prospects For Change* 25 (Janice L. Agee ed., 2013) ("[t]he most common practice in high-[labor-management cooperation] districts was a consistent, shared focus on the quality of education provided to the district's students[,]" and citing examples including Green Dot

Public Schools in Los Angeles, where "administrators and union representatives explicitly prioritize student interests as they negotiate contracts"); Saul A. Rubinstein & John E. McCarthy, *Collaborating on School Reform: Creating Union-Management Partnerships to Improve Public School Systems* 8-12 (2010) (describing case studies, including union-management collaboration within California's ABC School District on topics including peer mentoring and evaluation, new teacher orientation, and use of data-based decision making on student performance); Bobbi C. Houtchens et al., *Local Labor Management Relationships as a Vehicle to Advance Reform: Findings From the U.S. Department of Education Labor Management Conference*, 4 (2011) (describing case studies in which labor-management partnerships have contributed to improved student outcomes in a range of areas by facilitating "teacher leadership," which is "essential to dynamic decision-making").

Among these success stories are school districts such as Toledo, OH, where teachers unions have worked with districts to develop rigorous yet fair teacher evaluation and development systems, thereby improving teacher buy-in to what is often a tremendously divisive issue. U.S. Dep't of Educ., *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* 11-12 (2012) (describing union-management Board of Review in Ohio, which has "provide[d] more rigorous evaluations than those conducted by principals in the past"). Similarly, in Massachusetts, "interest based" rather than adversarial collective bargaining resulted in both

school and union leadership becoming more likely to view collective bargaining as a "vehicle[] for improving student performance," and also facilitated a collaborative process that resulted in improved teacher leadership, dual language immersion education, improved professional development, and other improvements at districts serving large numbers of low-income, minority, and special education students. Thomas A. Kochan et al., *Massachusetts Education Partnership: Results & Research From the First Two Years* (2015).

Similar examples abound, and are not limited to education. In Ohio, labor-management cooperation led to "millions of dollars in savings" across state government, with former Governor George Voinovich observing that "[m]y feeling is that labor is key" to successful quality management efforts. U.S. Dep't of Labor, *Report of the U.S. Secretary of Labor's Task Force on Excellence in State & Local Government Through Labor-Management Cooperation* (1996), *available at* http://1.usa.gov/1klt2bG. In Massachusetts, a joint venture between labor unions and MassHighway resulted in a sixty percent reduction in workers compensation claims, significant reductions in overtime and sick time, and millions in savings. *Id.*, *available at* http://1.usa.gov/1ix3J5e. Significantly, in each of these examples, as in the public education examples described in the previous paragraph, the collective representative played a key role in marshaling employee support for the joint initiative, on one hand, and channeling employee feedback, on the other. Given the importance of employee buy-in to the success of these new initiatives, each would

have been more difficult in an employment setting that lacked employee representation.

4. Finally, public sector bargaining has been shown to have little effect on overall budgets; even within program budgets, the effects of bargaining on allocation are generally modest and offset by efficiency gains. "The research on public expenditures . . . confirms that there are few if any public shifts in expenditures attributable to collective bargaining." Jeffrey H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington's & Winter's,* The Unions And the Cities, 34 Comp. Lab. L. & Pol'y J. 251, 272-73 (2013) (citing studies). Further, while public sector collective bargaining "has resulted in higher public employee wages in the range of 5% to 8%" over wages in states without bargaining, *id.* at 272, several caveats apply. First, bargaining can help offset employer monopsony power in the public sector, mitigating the wage penalty many public sector employees experience relative to comparable private sector employees. *Id.* [7] Second, wage increases may be offset by productivity gains, as described above. Third, the lowest-skilled (and lowest paid) public sector workers tend to receive the

[7] Public employer monopsony power can depress public sector workers' wages, especially for highly skilled or professional employees. Joseph Slater & Elijah Welenc, *Are Public-Sector Employees "Overpaid" Relative to Private-Sector Employees? An Overview of the Studies*, 52 Washburn L.J. 533, 534 (2013) (stating that "a majority of studies have found that public workers overall are paid somewhat less than comparable private-sector employees," though workers at the bottom of the pay scale are somewhat better off in the public sector, and workers at the top of the pay scale are worse off).

greatest wage increases associated with unionization; as many states turn their attention to the problem of income inequality, raising the wages of these workers may reflect public policy choices as much as union pressure. Lewin, *Getting it Right* at 6 ("[m]ore highly educated employees . . . enjoy less of a union premium than their less educated counterparts, which also contributes to lower [] income inequality and helps to keep the overall costs of collective bargaining to employers in check").

In the public sector, labor relations are not simply a matter of employee choice. Rather, states have shaped their collective bargaining laws and policies to facilitate effective employee relations.

B. Mandatory Agency Fees Are a Fair Way to Ensure Unions Have the Resources Necessary Carry Out Their Statutory Mandates and to Achieve the Public Benefits of Collective Bargaining.

There are two primary (and related) reasons that states that have adopted collective bargaining as a method of workforce management may choose to require or permit agency fees. First, agency fees distribute the costs of representation equally among all who are represented by an elected union; and second, agency fees ensure unions have sufficient resources for states to achieve the benefits of collective bargaining.

1. Virtually all states and municipalities that bargain collectively with their employees do so only with elected unions that represent all of the employees in a bargaining unit, and agency fees are

a fair way of distributing the costs of that representation. As in the private sector, public sector employers nearly always operate on the "exclusive representation" model, which is substantially more straightforward than alternatives such as bargaining with multiple employee representatives. Only three states have even experimented with proportional union representation, and two of them—including California [8] —rapidly abandoned that initiative.[9] Martin H. Malin, Ann C. Hodges & Joseph E. Slater, *Public Sector Employment: Cases and Materials* 340 (2d ed. 2011).

Moreover, when acting as an exclusive representative, a labor union has a duty to represent all employees within the bargaining unit fairly. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) ("It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be

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[8] Cal. Gov't Code § 3540 (1976) (known as the Educational Employment Relations Act). Petitioners argue that California education unions can "choose between being a 'members only' union that advances only members' interests, or an exclusive representative that represents all employees." Pet. Br. 38 (citing Cal. Gov't Code § 3543.1(a)). That is incorrect, because California law imposes a bargaining obligation "only with representatives of employee organizations selected as exclusive representatives" of bargaining units. Cal. Gov't Code § 3543.3 (1976).

[9] The third, Tennessee, adopted a system in 2011 that permits any representative chosen by at least fifteen percent of teachers to participate in "collaborative conferencing" with school districts. Tenn. Code Ann. § 49-5-605 (2011).

deemed to dispense with all duty toward those for whom it is exercised unless so expressed."); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring) ("Our First Amendment jurisprudence therefore recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other.").

Given the union's responsibilities, the economic consequences of eliminating the agency fee—the free rider problem—are easy to predict. In short, even an employee who desires union representation would rationally decide not to pay a voluntary representation fee when the benefits of union representation—including individualized benefits like grievance representation—cannot be withheld from non-payers. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 88, 124 (1971) ("A rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union."); Richard A. Posner, *Economic Analysis of Law* 430 (8th ed. 2011) ("The representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that would otherwise plague the union . . . ."). This Court has previously acknowledged this economic reality. *See Harris*, 134 S.Ct. at 2638 ("[T]he best argument that can be mounted in support of *Abood* is based on the fact that a union, in serving as the exclusive

representative of all the employees in a bargaining unit, 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."); *Abood,* 431 U.S. at 221-22 (the "union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become free-riders") (internal quotation marks, citations, and footnote omitted).

Research confirms the intuitive proposition that when services are available with or without payment, many will choose not to pay.[10] Keefe, *A Reconsideration & Empirical Evaluation*, 34 Comp. Lab. L. & Pol'y J. at 258 ("[p]ublic sector open shop laws reduced average employee departmental unionization by 4.0% for fire services, 10% for highways, 12% for sanitation, and 15% for police" and describing research finding "union density is almost double where unions are allowed to negotiate agency shop union security provisions, using CPS data from 1983 to 2004."); *see also* Jeffrey H. Keefe, *On Friedrichs v. California Teachers Association: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation* (2015), *available at*

[10] Petitioners' "solution" that unions should "simply redirect the massive amounts they . . . spend on express political advocacy" in order to fulfill their statutory mandate to represent nonmembers, Pet. Br. 31-32, raises its own First Amendment concerns, "[f]or the majority also has an interest in stating its views without being silenced by the dissenters." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 773 (1961).

http://www.epi.org/files/pdf/94942.pdf; Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, 56 Indus. & Labor Relations Rev. 349, 349–54 (2003). Likewise, when Michigan recently eliminated agency fees for union-represented public sector workers, union membership fell in the state even as the state's public sector workforce grew. *See* U.S. Dep't of Labor, *Union Affiliation of Employed Wage & Salary Workers By State*, *available at* http://www.bls.gov/news.release/union2.t05.htm; *see also* Keefe, *Inextricable Links* at 2-3. Perhaps some of these employees objected to union representation altogether; others surely decided not to subsidize their co-workers' union representation—and instead to be subsidized by others. But these losses undermine states' interests in equitable workforce policies and risk sowing dissent in the workplace. *Abood,* 431 U.S. at 221-22 (recognizing the state interest in fairly distributing collective bargaining costs); *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (discussing need for public employers to maintain workplace discipline, morale, workplace harmony, and efficiency). This is not to say that states may choose only bargaining supported by agency fees—of course that is not the case—but rather that states may now adopt or reject agency fees (or serially experiment with both models). Petitioners would remove that choice from states.

2. Closely related, the representation with which elected unions are tasked is expensive; an under-resourced union will be less able to provide the benefits of public sector bargaining and may also

be unable to carry out its statutory duties. The employer-side benefits of public sector collective bargaining—such as providing a productive channel for employee voice by both negotiating and enforcing contracts via grievance proceedings, and working collaboratively with management to solve workplace problems—require trained union staff and other resources. For example, competent bargaining over even relatively straightforward wages and benefits for a group of public employees at various stages of their careers requires the services of compensation consultants, actuaries, and lawyers. Even processing a single grievance typically involves not just the costs of paying the union/employee representative who appears before the arbitrator, but also half of the arbitrator's fee and expenses. William B. Gould IV, *Kissing Cousins? The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 675 (2006).

As this Court has recognized, labor unrest may result if dissatisfaction with an under-resourced union leads employees to seek out a representative that is better able to perform its duties. *See Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 52 (1983) (the "exclusion of the rival union may reasonably be considered a means of insuring labor-peace" by preventing the employer from "becoming a battlefield for inter-union squabbles"); *Abood*, 431 U.S. at 224 (discussing the "confusion and conflict that could arise if rival . . . unions, holding quite different views as to [terms and conditions of employment], each sought to obtain the employer's agreement"). Moreover, when unions are at risk of losing funding from any employee

dissatisfied with any aspect of the representation, they may respond by concluding that they "must process every grievance, placate every member, fight for every little cause, in order to hold its membership. The secure union, on the other hand, can tell off a member just as well and sometimes better than management can." Md. Dep't of Labor, Licensing and Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 19 (1996). This dynamic may (or may not) be preferable to represented workers, but it would undoubtedly make it more difficult for states to achieve the benefits of collective bargaining described above.

Thus, eliminating states' choice to permit or require an agency fee would not only leave states vulnerable to intra-workforce conflict and resentment as some workers free-ride on others, but would also leave states less able to compete with the private sector for the best workers and respond to employee dissatisfaction through collective bargaining. Of course, the prospect of workplace disruption poses special concerns for public employers and administrators. It also presents a certain irony—as discussed above, the avoidance of labor disruption is one significant reason to allow public employees to bargain collectively. Yet if states lack the freedom to manage their employees by bargaining with an elected union with the financial means to robustly represent its members, they may lose the very benefits that led them to authorize collective bargaining in the first place.

II. This Court's Cases Concerning the Managerial Rights of Public Employers Have Repeatedly Affirmed That *Abood* Struck the Appropriate First Amendment Balance.

This Court has recognized in countless cases that governments acting in their managerial capacity have significantly more power to control workers' speech than governments acting in their sovereign capacities have over non-employee citizens. That principle is especially forceful in the context of state and local governments, where federalism also weighs in favor of states' managerial authority. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (states' managerial choices are entitled to "the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power"). The outcome in this case should be no different; indeed, it is the petitioners in this case who seek an anomalous departure from settled law.

Given their responsibilities over core governmental functions, states and localities require significant autonomy in workforce management. For that reason, this Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 599 (2008); *see also Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011) ("The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by

employees when the workplace or the government employer's responsibilities may be affected."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("The government as employer indeed has far broader powers than does the government as sovereign."); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947) ("For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."). Accordingly, this Court has permitted public sector employers much of the same discretion over human resources management as enjoyed by the private sector. *See NASA v. Nelson*, 562 U.S. 134, 152 (2011) ("Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties." (internal quotations omitted)); *Connick v. Myers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter."); *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564 (1973) (holding Congress may bar public employees from engaging in certain political activity).

Managing public sector labor relations by bargaining with an elected exclusive representative that is financially supported by agency fees is no different than the numerous other restrictions or requirements that government employees must accept. The balance struck in *Abood* recognized as much in holding public employees could be required to pay their share of union expenses related to

collective bargaining—that is, expenses attributable to the union's dealing with the state in its capacity as employer—but not other activities, including those related to the union's dealing with the state in its capacity as sovereign. 431 U.S. at 235-36. Subsequent cases, including *Harris v. Quinn*, have only reinforced that principle. 134 S. Ct. at 2642 ("with respect to the [workers at issue], the State is not acting in a traditional employer role").

A. *Abood* is Consistent With This Court's Longstanding Principle That Public Employers May Restrict Public Employees' Speech to Promote the Efficiency of Government Operations.

The distinction between government-as-employer and government-as-sovereign is critical in the First Amendment context. "If an employee does not speak as a citizen, or does not address a matter of public concern, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision . . . . Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged." *Guarnieri*, 131 S. Ct. at 2493 (internal quotations omitted). "Restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest." *Id.* at 2493.

Accordingly, this Court has permitted significant limits on public employees' speech and association, provided they are reasonably linked to the government employer's managerial interests.

That principle explains why government may prohibit public employees' core political speech even when they are off-duty. *Mitchell*, 330 U.S. at 99-100 ("If . . . efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."); *see also Nat'l Ass'n of Letter Carriers*, 413 U.S. at 565 (holding that Hatch Act limits on public employees' participation in political campaigns are constitutional because they "will reduce the hazards to fair and effective government"). *Mitchell* and its progeny also illustrate that this Court typically defers to government employers' determinations about what employment policies will promote the efficient provision of public services. 330 U.S. at 100 (government employer need not prove that political neutrality is "indispensible"); *see also Kelley*, 425 U.S. at 247 (regulation of law enforcement personnel is entitled to deference, unless "there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property"); *Broadrick v. Okla.*, 413 U.S. 601, 697 n.5 (1973) (stating that "the legislature must have some leeway" in implementing restrictions on employees' partisan political activities).[11]

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[11] The dispositive significance of the government-as-employer's interests in maintaining organizational efficiency is further illustrated by this Court's decisions concerning the role of political considerations in employment decisions. On one hand, this Court has rejected political patronage systems for most employees because the interests that support political patronage for non-policymaking employees "are not interests

This Court has applied the same principle in countless other cases involving limits on public employee speech, upholding limits that are reasonably connected to the public employer's interests in managing its workforce, and rejecting those that are not. *E.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1988) (public school teacher could not be punished for speaking as a citizen where speech did not "impede[] the teacher's performance of his daily duties" . . . or "interfere[] with the regular operation of the schools generally"); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995) (prohibition on compensation for public employees' outside speeches or writing is unconstitutional where employees' speech occurred in "their capacity as citizens," and "does not even arguably have any adverse impact on the efficiency of the offices in which they work"); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("[T]he state interest element of the [*Pickering*] test focuses on the effective functioning

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that the government has in its capacity as an employer." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 n.4 & 75 (1990). However, the Court also noted that patronage may be permissible where "'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Id.* at 71 n.5 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). It is the presence of legitimate managerial concerns that makes the difference to the First Amendment outcome.

of the public employer's enterprise."). *Harris v. Quinn* is simply the latest iteration of this principle; there, this Court's holding rested largely on its conclusion that Illinois did not employ the personal assistants who opposed payment of a mandatory agency fee, 134 S.Ct. at 2638, and therefore by definition was not entitled to the deference usually afforded to public employers.

Thus, a key inquiry in this case is whether California's adoption of collective bargaining supported by an agency fee is reasonably related to its interest in managing its workforce. And, as the previous section illustrates, states adopt systems of collective bargaining with elected unions that may charge agency fees for the management-related goals of improving operational efficiency and minimizing workforce conflict and disruption. Likewise, when an elected union sits across the bargaining table from a public employer or pursues a grievance, it acts as an agent for one or more public employees regarding their terms and conditions of employment in a manner that quintessentially involves government-as-employer rather than government-as-sovereign. This is perhaps most readily apparent in the context of grievance proceedings where a union argues on behalf of a single employee that a single contract term has been misapplied. *See Guarnieri*, 131 S. Ct. at 2496 (allowing close First Amendment scrutiny of "grievances on a variety of employment matters" . . . "would raise serious federalism and separation-of-powers concerns"). But negotiation over terms and conditions of employment for a bargaining unit as a whole is no different. As Justice Scalia pointed out during oral argument in *Harris v. Quinn*, there is no

meaningful difference between an individual public employee asking for a raise on behalf of all public employees (perhaps because the employee is aware that civil service protections limit the authority of the employer to give a single employee a raise) and a union seeking a raise on behalf of all employees in a bargaining unit. Transcript of Oral Argument at 8 (No. 11-681) ("it's the same grievance if the union had presented it . . . the grievance is the salaries for policemen are not high enough."). Moreover, many collectively bargained terms and conditions of employment concern prosaic issues that may be of significant importance to public employees, but are of little public importance. For example, petitioners cite "seniority preferences" as a "hotly debated" policy issue about which some unions bargain, Pet. Br. at 26, but this Court has already held that internal decisions about when or how to transfer public employees are generally not a matter of public concern. *Connick*, 461 U.S. at 148.[12] In all of those

[12] Likewise, the application of contract terms in individual cases in which unions represent an employee in a grievance proceeding would be exceedingly unlikely to raise an issue of public concern. *Guarnieri*, 131 S. Ct. at 2501 (public employees may not "transform everyday employment disputes into matters for constitutional litigation in the federal courts"); *see also* William B. Gould IV, *Organized Labor, The Supreme Court, &* Harris v. Quinn*: Déjà vu All Over Again?*, 2014 Sup. Ct. Rev. 133, 158-59. And even as to wages and benefits, the effect of collective bargaining on the size of public budgets is often small, *supra* Part I.A.4, and therefore should not implicate the *Harris* majority's concern about the effects of collective bargaining on overall program budgets. *Cf. Harris*, 134 S. Ct. at 2642-43 (reasoning that collective bargaining over Medicaid-funded home healthcare providers would qualify as a

examples, the government acts as an employer managing its employees; accordingly, deference to states' managerial choices about when—and under what terms—collective bargaining supported by an agency fee should be permitted is appropriate under this Court's case law.

Finally, the distinction between government's roles as public employer and as sovereign (and the mirror-image distinction between individuals' roles as employees and citizens) also explains why this Court should reject petitioners' argument that collective bargaining is essentially the same as lobbying, Pet. Br. at 12. The key difference is that bargaining takes place with a government in its employer capacity, but lobbying involves a government in its capacity as sovereign. *Compare Minn. St. Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) (public employer may bargain with exclusive representative only, and exclude all others, because bargaining did not take place in public forum and "[n]othing in the First Amendment . . . require[s] government policymakers to listen or respond to individuals' communications on public issues"), *with City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Empl. Rel. Comm'n*, 429 U.S. 167 (1976) (public employer may not prohibit union-represented teachers from engaging in speech contrary to union position in public forum).[13] This distinction also

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matter of public concern because it "would almost certainly mean increased expenditures under the Medicaid program").

[13] As *City of Madison* illustrates, represented workers remain free to oppose their bargaining representative by any available means and in any forum to which they can gain access; indeed, the average union wage premium leaves represented workers

explains why states may prohibit public sector collective bargaining altogether without facing First Amendment scrutiny. *Smith v. Ark. State Highway Emp.*, 441 U.S. 463, 465 (1979) ("the First Amendment is not a substitute for the national labor relations laws"). In contrast, it goes nearly without saying that the same could not be said of a statute that banned lobbying. *See U.S. v. Harriss*, 347 U.S. 612 (1954); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010) ("Congress has no power to ban lobbying itself.").

B. Overruling *Abood* Would Call Into Question the Legality of Many Other Common Public Human Resources Practices.

If this Court holds that public employees have a right not to fund union activities related to collective bargaining, many other common workplace arrangements will also be called into question. For example, many state pension funds are managed by and invested in private companies; the corporations in which public pension plans invest may engage in political speech, raising *Abood*-type issues. *See* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 867-68 (2012). Similar claims

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with more resources with which to oppose union positions in public fora or lobby for revocation of public sector bargaining statutes. Thus, the restriction on public employees in this case is much less than *Mitchell*'s complete ban on certain political activity, or the party affiliation requirements that the Court suggested in *Rutan* and *Branti* would be permissible for policy-making employees.

could be made regarding state payments to human resources consultants, employment lawyers, and dispute resolution experts who are paid by the state to manage the workplace. *See* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 171 (2015) (describing "a larger category of private entities with public regulatory functions"). These routine public workplace policies should not become subject to First Amendment challenges.

This Court should not overrule *Abood*, but should instead reaffirm that states are free to manage their workforces by adopting a policy of public sector bargaining supported by an agency fee.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be *affirmed*.

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