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 PROFESSORS CYNTHIA L. ESTLUND, SAMUEL ESTREICHER, JULIUS G. GETMAN, WILLIAM B. GOULD IV, MICHAEL C. HARPER, STEWART J. SCHWAB AND THEODORE J. ST. ANTOINE, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are leading professors of labor and employment law who have written and lectured extensively about the role of labor organizations and collective bargaining, both in government offices and private companies, in the United States and abroad. A focus of their work has been the importance of independent employee organization to the positive contributions that unions and collective agreements can make to our democratic society. Short biographies of each of the *amici* follow:

Cynthia Estlund is the Catherine A. Rein Professor of Law at New York University School of Law. She has taught and lectured around the world and has authored and edited several books and scores of articles and book chapters in the fields of labor law and employment law.

Samuel Estreicher is the Dwight D. Opperman Professor of Law at New York University School of Law, director of its Center for Labor and Employment Law, and co-director of its Institute of Judicial Administration. He has taught and lectured widely on labor and employment law, and is the author of leading casebooks and articles in the field. He is a former secretary of the ABA Labor and Employment Law Section, served as Chief Reporter of the

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or submission of this brief, and no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioners' and respondents' letters consenting to the filing of all *amicus* briefs are on file with the Clerk's office.

Restatement of Employment, and was a clerk to Justice Lewis F. Powell, Jr.

Julius Getman is the Earl E. Sheffield Regents Chair in Law, Emeritus at the University of Texas School of Law. He is the author of seven books and over 50 articles on labor law and labor relations. He has served as president of the Association of American Law Schools and has also taught labor law at Yale, Stanford, and Chicago universities.

William B. Gould IV is the Charles A. Beardsley Professor of Law, Emeritus at Stanford University. A member of the National Academy of Arbitrators since 1970 and recipient of five honorary degrees, he is the author of ten books and numerous articles. He has served as Chairman of the National Labor Relations Board and presently serves as Chairman of the State of California's Agricultural Labor Relations Board.

Michael C. Harper is Professor of Law and Barreca Labor Relations Scholar at Boston University School of Law. He has published widely on labor law and employment law topics in law journals and is the author of leading casebooks in these fields. He served as a Reporter for the Restatement of Employment Law.

Stewart J. Schwab is the Jonathan & Ruby Zhu Professor of Law at Cornell University Law School and its former Dean. He has taught and written widely on labor and employment law, as well as the economic analysis of law and empirical legal studies. He was a Reporter for the Restatement of Employment Law, and is an editor of the Journal of Empirical Legal Studies. He received his J.D. and Ph.D. (economics) from the University of Michigan, and was a clerk to Justice Sandra Day O'Connor.

Theodore J. St. Antoine is the Degan Professor Emeritus of Law at the University of Michigan and former Dean of the Michigan Law School. He is a past president of the National Academy of Arbitrators and a former secretary of the ABA Labor and Employment Law Section. He has also taught at Cambridge, Duke, George Washington, Illinois, and Tokyo universities, as well as the Salzburg Seminar in American Studies. In addition to numerous articles and book chapters, he has co-edited a major casebook on labor law, now in its twelfth edition, and edited the NAA's textbook on arbitration.

SUMMARY OF ARGUMENT

I

The issues in this case reflect a fundamental dynamic as to how the government as employer will manage its workforce. The government employer here is not regulating what its employees—certificated teachers in California public-school districts—can say or do in a public arena, but rather is acting as manager of the district's teaching (and non-professional) staff. The challenge for the school-district employer is how to obtain the most dedicated, effective performance from its teachers consistent with budgetary and other constraints.

The public employer must establish fair policies with uniform criteria to accomplish that goal. Teachers working in the same school district will expect to be evaluated and compensated by a uniform system—not necessarily identical terms but a set common criteria that is uniformly applied. If the teachers are judged by different norms and expectations, or if ostensibly uniform rules are

applied in a disparate manner, this will sow dissension and undermine their ability to serve fully the school mission.

The public employer knows that it has to establish uniform criteria for setting wages, hours, health and welfare benefits, and other terms of employment and provide for uniform application of those criteria. There are essentially two tenable approaches open to the public employer for deriving those criteria and applying them in particular cases. One is by unilateral management action, with the assistance of its human resources personnel and perhaps in consultation with other employees or outside contractors. The other is by collective bargaining with the exclusive bargaining representative of its employees. The collective-bargaining route has the advantage of providing an independent employee voice likely to reveal employee preferences and concerns that management might not be able to elicit on its own and to ensure that those preferences and concerns are effectively heard during bargaining and in the grievance procedure.

The contribution to employee voice that collective bargaining with an exclusive bargaining representative affords also promotes First Amendment values in a government personnel-management context largely excluded from direct constitutional scrutiny under this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

If the collective-bargaining route is truly to provide an independent employee voice, the affected employees must fund their own representative. Otherwise, that representative, however well-intentioned he or she may be, will be reasonably viewed by the teachers as an agent of management

and, when teacher positions are at variance with management's, will not be able in most cases to advance the teachers' perspective. This is a limitation common, in the absence of collective bargaining, to most personnel and human resources departments in both government offices and private companies.

The self-funding critical to the exclusive bargaining representative's independence and effectiveness requires that all employees who benefit directly from that representation pay their fair share of its costs. Consistent with its role in the employer's process of setting common terms of employment for similarly-situated employees and its statutory duty to represent fairly all represented employees, whether they are union members or not, the exclusive bargaining representative cannot in most instances confine the benefits of its representation to those willing to assume its costs. If, then, employees can enjoy the benefits of representation without paying for it, there will over time be less effective representation provided by the exclusive representative or none at all.

Where the state permits employees to engage in collective bargaining through independent exclusive representatives of their choosing, it is consistent with good management practice and First Amendment values that such organizations be self-funded through dues or fees required of all employees in the bargaining unit as a condition of employment.

II

The First Amendment requires that any dues or fees obtained as a condition of employment from employees who have declined union membership may

only be used, *when objected to by those employees*, for purposes related to the exclusive representative's collective-negotiation and grievance-adjustment functions.

Petitioners' facial challenge to the California system does not allege any violation by California or the union respondents of this Court's requirements under *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986), and its progeny. Rather, petitioners claim, with respect to the second question presented, that respondents' opt-out procedure violates the First Amendment because it unduly burdens the exercise of their constitutional right to exclude themselves from the unions' use of their fees for non-chargeable expenditures. Each of the petitioners, however, has successfully utilized the opt-out procedure to exclude themselves from such use of their fees. Their motion for judgment on the pleadings on behalf of the respondents, *over the latter's objections*, precluded any fact development below. From all that appears, all that was required of non-member represented employees objecting to such use was the checking of a box contained in the *Hudson* notice, which petitioners successfully did.

Respondents had no reason to assume that all represented employees who did not join the union also objected to paying the full agency fee. There are many reasons why an employee might decline to join a union—they may dislike the local union leaders but support the union's work, they may wish to be free of internal union discipline, they may have a general aversion to being "joiners", or, perhaps, they simply failed to fill out the union-membership forms. The *Hudson* notice that was sent to petitioners provided the opportunity for non-members to indicate a

broader-based objection, which petitioners effectively utilized.

Although there may be circumstances where an opt-out requirement is problematic for the protection of constitutional rights, this Court recognized the constitutional sufficiency of an opt-out requirement for individuals wishing to exclude themselves from a state class action sitting as a multi-state forum in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 791 (1985). On the record in this case, the opt-out procedure was constitutionally sufficient for petitioners to register objections to union use of their agency fees for non-chargeable purposes.

ARGUMENT

I. THE GOVERNMENT AS EMPLOYER ACTS CONSISTENTLY WITH THE FIRST AMENDMENT WHEN, IN LIEU OF EXERCISING ITS RIGHT TO UNILATERALLY SET THE CONTRACTUAL TERMS OF EMPLOYMENT FOR ITS EMPLOYEES, IT PROVIDES THAT THE EMPLOYEES MAY FORM OR SELECT AN EXCLUSIVE BARGAINING REPRESENTATIVE TO ACT ON THEIR BEHALF IN NEGOTIATING WITH THE EMPLOYER AN ENFORCEABLE AGREEMENT SETTING THEIR EMPLOYMENT TERMS (AND ADMINISTERING SUCH AGREEMENT) AND REQUIRES ALL EMPLOYEES WHO DIRECTLY BENEFIT FROM SUCH REPRESENTATION TO PAY A FAIR SHARE OF THE COSTS.

A. An Employer of Any Size Must, as a Matter of Practical Necessity, Set Common Criteria, Schedules or Algorithms ("Common Terms") for the Wages and Health and Welfare Benefits to Be Paid to Its Similarly-Situated Employees, the Hours of Work, and the Workplace Rules (Including a Grievance Procedure) That Apply to Those Employees.

For employers of any size and for most of their employees, the terms and conditions of employment for similarly-situated employees are set through uniform criteria, schedules, or algorithms (hereafter, "common terms") that, in principle, are to be uniformly applied. This is because compensation and employment terms are important motivators of performance, especially when, as in the case of school

teachers, the quality of performance cannot be easily measured or monitored; and because employees care a great deal about whether they are being treated fairly in comparison with other employees with the same or similar qualifications doing the same or similar work. When employers violate employee expectations of horizontal equity (i.e., treating similarly-situated employees alike), they invite employee dissension and undermine overall performance.

In the public sector or the private sector, "[w]hen an employer is dealing with a large number of similarly situated employees, the employer is likely to [set and then] communicate the terms of the employment relationship through unilateral statements" of employer policy that "apply uniformly to [such] employees without further negotiation with individual employees." Amer. Law Instit., Restatement of Employment Law, Comment a to §2.05 (2015). Such employers rarely, if ever, negotiate individual contacts with any of their similarly-situated employees because terms agreed to with any individual employee would, as a practical matter, have to be extended to the rest of the employer's similarly-situated employees.[2]

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[2] This is also a widely-held premise of economists when evaluating whether employers have market power over terms and conditions of employment (technically referred to as employer "monopsony"): "When the employer cannot offer different wages to different workers depending upon their location, a firm that wishes to be hire more labor must not only offer higher wages to attract new employees, but also pay existing employees the same higher wage." V. Bhasjarm Alan Manning & Ted To, Oligopsony and Monopsonistic Competition in Labor Markets, 16 J. of Econ. Persp. 155, 162 (Spring 2002). One 2009 study of the labor market for school teachers in Missouri found that "employers enjoy a substantial amount of

When employees have selected an exclusive bargaining representative with whom the employer must negotiate, the terms of any resulting collective agreement are also likely to reflect this emphasis on uniform criteria and uniform application. "The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944). As with trade agreements, the terms of employment are uniform. Except as restricted by the collective agreement or external law, the [employees'] employment terms "already have been traded out. There is little left to individual agreement except the act of hiring." *Id.*

Public-school teachers in California are not the Rhode Island factory workers of *J.I. Case* but they, too, reasonably expect to be compensated and evaluated according to the same criteria as other teachers with the same experience and length of service in the public-school district.

There may be disagreements over such matters as how teacher effectiveness is to be measured and whether class size and student performance should affect compensation, but there is unlikely to be any significant disagreement among teachers (or their employers) on the need for common criteria and fair procedures for such evaluation.

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monopsony power in spite of the presence of many competitors." Michael R. Ransom & David P. Sims, Estimating the Firm's Labor Supply in a "New Monopsony" Framework: School Teachers in Missouri, IZA DP No. 4271, P. 24 (June 2009).

B. The Government as Employer Has Only Two Tenable Means for Setting Common Terms of Employment: Either Setting Those Terms Unilaterally Or, Instead, Setting Them, Within Statutory Limits, in Bargaining With the Exclusive Bargaining Representative of the Employees' Choosing.

School-district employers are certainly aware of the central importance of setting common terms of employment for similarly-situated employees. The questions for the school-district employer in carrying out that task include how much weight to give to experience and length of service in pay and promotion decisions, how to measure teacher performance, and how to develop evaluation procedures and instruments that teachers can have confidence in and that will help them to become more effective in the classroom. And once these rules and criteria are formulated, the further question is how to provide integrity to internal grievance and other complaint procedures so that employees are willing to come forward to reveal their needs and concerns without fear of reprisal (thus enabling school-district management to be proactive before disputes unravel out of control).

The government as employer has only two tenable means of setting common terms of employment for similarly-situated employees: (1) unilateral management action or (2) collective bargaining with an exclusive bargaining representative. Unilateral management can be quite sophisticated if the school district has the necessary resources. A good human resources department should be attentive to employee preferences (say, with respect to health and welfare benefits) and be viewed by most employees as receptive to certain complaints about supervisors so

that potentially serious supervisor abuse of authority can be "nipped in the bud". Such a school district can aid its human resources personnel by retaining outside consultants to poll the workforce on pay and benefits issues and advise management of the best practices used in other employment settings.

Not all school districts are so well-resourced but even if they were, there are limits to the benefits of most forms of unilateral management. Recognizing as much, some states, including California, experimented initially with public employee groups that would "meet and confer" with the public employer. These groups were members-only voluntary organizations. They did not have exclusive authority to represent all similarly-situated employees. The public employer, moreover, owed no duty to bargain with the organizations, and no binding employer-employee group agreement eventuated. The end result was perhaps a better informed but still unilateral employer determination of the terms and conditions of employment.

A good number of states that began with this "meet and confer" model changed their laws, as did California, to allow a public employee organization representing a majority of the employees in an "appropriate bargaining unit" to become the statutory exclusive bargaining representative for all of the employees in the unit. To some extent this was due to public-employee dissatisfaction with the limitations of a "meet and confer" model that, at the end of the day, did not alter the reality that common terms of employment would be set unilaterally by the public employer.

It was also due to a strong management preference that developed after the emergence of employee

interest in organization for "a single representative" to "avoid[] the confusion that would result from attempts to enforce two or more agreements specifying different terms and conditions of employment," to "prevent[] inter-union rivalries from creating dissension within the work-force," and to "free[] the employer from the possibility of facing conflicting demands from different unions…." *Abood v. Detroit Board of Education*, 431 U.S. 209, 220-21 (1977), citing, *inter alia*, *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (employees held not protected in using pressure tactics to compel employer to deal with them rather than the exclusive bargaining representative). See 74th Cong., 1st Sess., Sen. Rep. No. 573 (May 1, 1935), reprinted in National Labor Relations Board, 2 Leg. History of the National Labor Relations Act, 1935 (1985), pp. 2300, 2313 ("Since it is wellnigh universally recognized that is it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule…. Employers…, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority rather than numerous warring factions.").

Thus, the logic of the situation was that if there was to be a serious role for employee input in the setting of terms of employment, the public employer would recognize the organization supported by the majority of employees as the exclusive bargaining representative with authority to negotiate, within

statutory limits,[3] a single enforceable collective agreement for all similarly-situated employees.[4]

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[3] State law defines the scope of exclusive representation. Under the California statute challenged here, the "scope of representation" in public schools is limited to "matters relating to wage, hours of employment, and other terms and conditions of employment" as defined in Cal. Gov't Code § 3543.2(a)(1), J.A. 47-48. The public-school employer may consult, but not bargain, with the exclusive representative over curricular and textbook issues, and may consult with "any employees or employee organization on any matter outside the scope of representation." *Id.* § 3543.2(a)(3)-(a)(4), J.A. 48. The public school and exclusive representative also can bargain over "causes and procedures for disciplinary action, other than dismissal, including a suspension of pay for up to 15 days," *id.* § 3543.2(b), J.A. 48. Dismissals and longer-term suspensions of certificated public school teachers are governed by the state civil service system.

[4] Members-only agreements with "independent labor organizations" are lawful in private companies governed by the National Labor Relations Act (NLRA), 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 et seq., provided "there shall be no interference with an exclusive bargaining agency" that is established in accordance with the provisions of the NLRA. *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 235, 239 (1938). Despite some academic disagreement, it has been the consistent view of the National Labor Relations Board that the employer has no statutory duty to bargain with a members-only union. *See* Labor Law: Cases, Materials, and Problems 402-404 (Michael C. Harper, Samuel Estreicher & Kati Griffith eds. 2015). In countries like France where there are many unions and no legal duty to bargain with any of them but collective agreements can be extended by the government to the non-union sector, the rule of one-agreement-for-similarly-situated employees prevails. See Clyde W. Summers, Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle, 20 Comp. Lab. L. & Pol'y J. 47, 50 (1988) (although there are at least five competing labor organizations, "one and only one agreement applies in a single enterprise"; for example, "a collective agreement by a CFTC (Christian) union governs members of the ideologically hostile CGT (Communist)

C. Collective Bargaining with an Exclusive Bargaining Representative Presents Significant Advantages Over Its Alternatives by Providing the Opportunity for an Independent Employee Voice in an Employment-Terms Setting Process that Results in an Enforceable Agreement and is Consistent with First Amendment Values.

A distinct advantage of the collective-bargaining approach to setting wages, hours, and working conditions is that the employer gains the benefits of hearing an independent employee voice able to reveal employees' preferences and concerns that individual employees may be reluctant to share with the employer or its human resources personnel. In many nonunion employment dispute systems, employees are not likely to raise claims while employed because they fear employer reprisal. It is thus not surprising that nearly all law suits under federal and state antidiscrimination laws (with the exception of certain systemic hiring and promotion challenges) involve terminations from employment rather than complaints from incumbent employees. In the nonunion public-school context, teachers are more likely to exhibit dissatisfaction by "exit" rather than "voice"[5]—leaving the school system altogether rather

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union. Other unions can only 'accede' to the terms made by the contracting union.").

[5] The terminology is taken from Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States (1970).

than voicing disagreement while working for the school district.[6]

Where an exclusive employee bargaining representative is present, incumbent employees are more likely to utilize the mechanism of "voice" rather than "exit". Turnover is lower and utilization of complaint procedures higher when employees have the support of other employees through the exclusive bargaining representative.[7]

The presence of an independent employee voice in the public sector also has implications for civil liberties. Even if the First Amendment does not protect government employees in their professional, job-related speech, it is important that employees feel they can raise workplace concerns with their employer without fear of reprisal, can turn to an independent employee representative to escalate the grievance with higher levels of school-board management, and if necessary, take the matter to binding arbitration. As this Court noted in *Garcetti,* a good internal system can help resolve grievances without a potentially disruptive public airing of personnel disputes: "[a] public employer that wishes to encourage employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism." 547 U.S. at 424. Similarly, the disputes in *Connick v. Meyers*, 461 U.S. 138 (1983) and *Waters v. Churchill*,

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[6] On the relative indifference of school districts to teacher turnover, at least before the advent of teacher unionism, see Donald H. Wollett, The Coming Revolution in Public School Management, 67 Mich. L. Rev. 1017, 1024 (1969).

[7] This is a principal finding of Richard B. Freeman & James L. Medoff, What Do Unions Do? (1984), which has generated an extensive literature.

511 U.S. 661 (1994), might have been resolved without litigation if the employees had recourse to an effective internal procedure negotiated and administered by an exclusive bargaining representative.

D. Having Employees Themselves Finance the Exclusive Bargaining Representative Provides a Level of Independent Voice Valuable to Achieving the Ends of the Collective-Bargaining Process and is Consistent with First Amendment Values

For an exclusive bargaining representative to be able to fulfill its role as an independent employee voice able to enlighten the employer regarding the employees' preferences and concerns that otherwise they may be reluctant to express to the employer and its managers, the employee organization must be able to finance itself through employee dues and fees. If the representative were to be funded by the school board, it would in short order be reasonably viewed by the employees as an organ of management, a human resources department of the school board in all but name.[8]

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[8] This is illustrated by the history of employer-dominated labor organizations between the enactment of the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933), and the enactment of the NLRA in 1935, which in § 8(a)(2), 29 U.S.C. § 158(a)(2), effectively outlawed such organizations. *See generally* Samuel Estreicher, Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of § 8(a)(2) of the NLRA, 69 N.Y.U.L.Rev. 125 (1994).

E. The Government as Employer Acts Properly in Requiring All Employees Who Directly Benefit from the Exclusive Bargaining Representative's Performance of Its Collective-Negotiation and Grievance-Adjustment Functions to Pay Their "Fair Share" of the Costs of Such Representation.

It is the price of democratic government that citizens may have to allow their taxes to be used to finance activities and expression by the government that they personally do not favor or even oppose. Our system is based on majority rule, with constitutional limits to protect civil liberties. If citizens could readily opt of paying taxes for, say, police protection by local government because they prefer private provision of security services, the municipality would have considerable difficulty maintaining an effective local police force. Similarly, if citizens could opt out of paying taxes for public schools—perhaps because they are homeowners who no longer have children in the public schools or are ideologically opposed to public provision of education—public education would suffer because the level of funding would decline significantly. Depending on the varying objections of the citizenry, the funding base for public services would be undermined with inevitably negative effects on the provision of those services.[9]

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[9] As this Court stated in *United States v. Lee*, 455 U.S. 252, 260 (1982), overriding the religious objections of a farmer belonging to the Old Order Amish against payment of social security taxes, "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violated their religious beliefs."

This is a widely-shared understanding but it is not always applied with equal force in the context of collective bargaining. Certainly, there would be no First Amendment concern if the government funded employee organizations to do precisely what the union respondents have said or done in this case in connection with their collective-negotiation and grievance-adjustment activities. The constitutional issue does not change because the government as employer has chosen to capture the benefits of an independent employee voice in the setting of common terms for their similarly-situated employees.

What the exclusive bargaining representative does in collective bargaining involves the provision of collective goods available to all in the bargaining unit. Because of the functional necessity of setting common terms of employment for similarly-situated employees and because of the exclusive bargaining representative's statutory duty to "fairly represent each and every employee in the appropriate unit," Cal. Gov't Code § 3544.9, J.A. 55, the benefits the exclusive representative obtains in the collective agreement cannot be confined to employees willing to pay the costs of representation. This is certainly true of negotiated health and welfare benefits which, simply in order to take advantage of economies of scale, are available to all employees (sometimes with exceptions for certain probationary or temporary employees). The negotiated criteria and procedures for determining additional compensation, promotion, and teacher evaluation also cannot, as a practical and legal matter, be limited to those willing to pay.

The negotiated grievance procedure, too, is a collective good, even though individual employees have a statutory right to present their grievances directly to the employer (as long as the adjustment is

reached prior to arbitration, is not inconsistent with the collective agreement, and the exclusive bargaining representative is given prior notice and opportunity to comment). Cal. Gov't Code § 3543(b), J.A. 45-46. This Court has recognized the importance in private-sector companies of unions being able to control whether grievances are escalated to higher-level management and whether cases will be submitted to arbitration. Although unions cannot, consistent with their duty of fair representation, "arbitrarily ignore a meritorious grievance or process it in a perfunctory manner," *Vaca v. Sipes*, 386 U.S. 171, 191 (1967), there is no individual employee right to escalate a grievance or arbitrate a dispute under a collective agreement. The union and the employer typically have negotiated a procedure whereby "both sides are assured that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and resolved." *Id.* Both in the public sector as well as the private sector, the union is the employees' custodian of the collective agreement, acting as the "statutory agent and … coauthor of the bargaining agreement in the enforcement of that agreement." *Id.*[10]

In the end, "[c]ollective bargaining, war, and the basic government services are alike in that the 'benefits' of all three go to everyone in the relevant group, whether or not he has supported the union, served in the military, or paid the taxes. Compulsion is involved in all three, and has to be." Mancur Olson,

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[10] For similar reasons, when the represented employee invokes his or her rights under the collective bargaining agreement, or seeks the aid of the exclusive bargaining representative, the employee is necessarily engaged in protected "concerted" activity. *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The Logic of Collective Action: Public Goods and the Theory of Groups 90 (1977 ed.). The question is not one of "individual freedom" but whether "the results of the unions' activities justify the power [California] has given them." *Id.* at 88. Here, California has made the decision—that it is free to change at any time—that its public school districts as employer should engage in collective bargaining with the teachers' exclusive bargaining representative with respect to their wages, hours, and working conditions.[11]

It is, at bottom, a political decision for California and other states to make whether to elect or continue collective bargaining for their public employees or remain with or revert to some form of unilateral management. The merits of the decision should be considered in these terms and not in terms of an "individual freedom" to refuse to pay a fair share of the costs of the services of an exclusive bargaining representative while benefiting from those services.

Petitioners' request that this Court overrule *Abood* and its other decisions based on *Abood* should be denied.

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[11] Petitioners seemingly equate respondents with advocacy organizations (e.g., Br. for Petitioners 13), such as the AARP, the Association of American Educators, or the Christian Educators Association International (a co-petitioner here) that lobby for changes in legislation and public policy and may appear in court to advance causes that presumably benefit employees. The critical distinction is that these organizations, unlike respondents, are not engaged in the public employer's internal process of setting common terms of employment for similarly-situated employees. Petitioners' point can be likened to saying that lawyers should not be paid for representing public employees in court or an administrative agency because a number of advocacy groups are also working on the legislative and public-policy fronts to advance what they believe to be the interests of employees.

II. RESPONDENTS' USE OF AN OPT-OUT PROCEDURE IN THIS CASE DID NOT VIOLATE THE FIRST AMENDMENT

With respect to the second question presented, petitioners have leveled a purely facial challenge to the specific administrative procedure used in the collection of agency fees. Even though such a challenge by its nature raises highly fact-specific issues, petitioners moved for a judgment on the pleadings *on respondents' behalf*, rejecting respondents' position in the courts below that discovery and development of the record would be helpful to the court. Pls. Motion for Judgment on the Pleadings, J.A. 615-19. Petitioners do not allege any violation of employees' right to speak and assemble in a public forum under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny; nor do they allege any failure on respondents' part to comply with the agency-fee objection notice and procedures required in *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 2912 (1986), and its progeny. Other than their flat-out challenge to any agency-fee requirement for public employees (in their words, to prevent 'payment of *any* fees to any union as a condition of public employment," Complaint, J.A.102 (emphasis supplied), their claim respecting the second question in this case is that the union respondents used an "opt-out" procedure rather than an "opt-in" procedure which would treat all nonunion members, no matter what their reasons for not joining the union, as objecting-fee-payers on First Amendment grounds as a matter of law. Most constitutional claims require an objection to be cognizable. See Union Respondents Br. 55-56. For example, opt-out procedures used in class action practice, to enable individuals to exclude themselves

from class actions they do not wish to be a part of, have been held by this Court to be constitutionally sufficient against due process challenge in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 791 (1985).

Although an opt-out may be problematic in some settings, respondents were not constitutionally required to follow an opt-in procedure in this case. From all that appears in the record, respondents had no reason to assume that simply because petitioners did not wish to become union members they also wished to assert a First Amendment right not to subsidize certain union activities. The decision not to become a union member can be due to many other reasons, including dislike of local union leaders but support of the union's work, a desire to be free of the prospect of internal union discipline, *see, e.g.*, *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95 (1985) (statutory right to resign union membership at any time, even in the midst of an active strike), a general aversion to being "joiners," or simply a failure to fill out union-membership forms.

We do not know what reasons the nonunion member employees had in this case. Petitioners precluded the creation of a record (that would likely have included their depositions). Certainly, there is no basis to require respondents to assume the assertion of a constitutional right and objection absent the employee's indication that he or she has such an objection.

An employee who actually intends to raise such as an objection needs only to check off a box in the *Hudson* notice, see J.A. 663-64. In fact that is precisely what petitioners did in this case, *id.* 74-79, successfully preventing the objected-to use of their fees.

In sum, petitioners have presented no grounds for a facial First Amendment challenge to the opt-out objection procedure followed in this case.

CONCLUSION

The court of appeals judgment should be affirmed.

Respectfully submitted,

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