No. 14-915

In the Supreme Court of the United States

REBECCA FRIEDRICHS, et al.,
Petitioners,
v.
CALIFORNIA TEACHERS ASSOCIATION, et al.,
Respondents.

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

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

HARRY GREENBERG
GREENBERG BURZICHELLI GREENBERG P.C.
3000 MARCUS AVE.,
LAKE SUCCESS, NY 11042
NEW YORK, NY
(516) 570-4343
hgreenberg@gbglawoffice.com

ALAN M. KLINGER
Counsel of Record
DINA KOLKER
DAVID J. KAHNE
STROOCK & STROOCK & LAVAN LLP
180 MAIDEN LANE
NEW YORK, NY 10038
(212) 850-5400
aklinger@stroock.com

Counsel to Amicus Curiae
New York City Municipal Labor Committee

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INTEREST OF *AMICUS CURIAE*[1]

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

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

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

bargaining unit – members and non-members alike. The blanket invalidation of "fair share" fees, contrary to Petitioners' unsupported assertions, would materially impair the MLC member unions' abilities to represent New York City public sector workers in negotiations for better terms of employment and would threaten the carefully balanced and well-established labor relations framework that has developed in the nearly five decades since the MLC was established, a history that includes nearly 40 uninterrupted years of reliance on the "agency fee" option.

SUMMARY OF ARGUMENT

For the second consecutive term, a group of petitioners ask this Court to overrule *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). This renewed attempt reflects not a sudden "special justification" for overturning the well-entrenched precedent, as would be required to reverse it under rudimentary principles of *stare decisis*, but merely a persistent and fervent political desire to undermine and weaken public sector unions. As in last year's battle in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), this facial challenge to *Abood* finds itself notably devoid of actual record evidence demonstrating that Petitioners objected to the terms and conditions of employment negotiated by their union and accordingly should be rejected.

Despite recent attempts to erode *Abood* using factual iterations of various types of agency fees – partial-public employee fees in *Harris* and special assessment fees without a *Hudson* notice in *Knox v. SEIU,* 132 S. Ct. 2277 (2012) – the precedent has

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

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

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

The reliance continues today. As the Court recognized in *Harris*, "governments and unions have entered into thousands of contracts involving millions of employees in reliance on *Abood*." 134 S. Ct. at 2652. (Kagan, J. dissenting). Collective bargaining agreements, however, reflect only the starting point of the reliance interests. A union must serve all represented employees. This means hiring professional staff and investing in resources that

provide representation and services to all bargaining unit members, not just union members. A union may process thousands of grievances each year, requiring the work of union staff, attorneys and arbitrators. Agency fee payers, like union members, utilize these services. Nowhere is this more pronounced than New York City, where 97 public sector unions represent some 390,000 active City workers (and 120,000 retirees) working under 144 contracts that have fair share arrangements and rely upon such fees in funding collective bargaining and related non-political union activities (and have done so for decades).

The agency or "fair share" fee is justified, in large part, because New York, like many other states, compels its unions by statute to promote and protect the interests of its members *and non-members* alike in negotiating and administering collective bargaining agreements. While the duty of fair representation allows a spectrum of reasonable conduct, that duty does not permit treating agency fee payers differently than members with regard to contract negotiation and administration. For MLC member unions, a compulsory agency fee fairly distributes the cost of bargaining among those who benefit and counteracts the inescapable economic incentive that public sector employees (like most rational individuals) would otherwise have to "free-ride" on the union's efforts for all.

Importantly, even with this fair share fee, nothing precludes a public sector employee, like any other citizen, from expressing his or her political viewpoint or engaging in political activities with regard to the union or more broadly in the local,

state and federal political arenas. Nothing prevents an agency fee payer from seeking to influence union policies through organizing other agency fee payers and exerting political pressure or even seeking decertification. Indeed, a union would be prohibited from taking any retaliatory action against either a member or agency fee payer wishing to so act. The union's exclusive ability to speak is narrowly limited to direct negotiation with the employer on terms and conditions of employment. The union and the individual member are free to lobby the legislature as any other citizen. Moreover, unlike private organizations, unions are obliged to have internal democratic processes. Thus, any First Amendment infringement, if such infringement exists at all, is minimal.

In contrast to the minimal (if any) intrusion on supposed "political" speech, the governmental interest in maintaining a labor-management framework that, for decades, has produced general labor peace in New York City (and elsewhere throughout the State) cannot be exaggerated. Fair share fees allow exclusive bargaining agents to negotiate collectively without fear of free-riding non-members undermining their efforts. Petitioners' unsupported attempt to assume away the "free-rider" problem is belied by irrefutable principles of economics and human behavior, as well as our current national experience in "right-to-work" states.

Ultimately, Petitioners not only betray fidelity to this Court's decisions, which have long recognized the important role of public sector unions in fostering peaceful labor-management relations, they threaten to significantly undermine our unions' efforts within

New York City's legislatively created collective bargaining system to protect middle class workers.

Manifestly, this case presents wide-ranging implications for the future of labor relations, union funding and collective bargaining. Petitioners' stance would summarily and instantaneously eliminate the 40-year old distinction between union fees utilized for collective bargaining, contract administration and grievance adjustment, and those used for political or ideological activities established in *Abood* and refined in later cases.

Even more broadly, by arguing that traditionally chargeable activities constitute matters of "public concern" under *Pickering*, Petitioners threaten to upend the entire *Pickering* and *Garcetti* line of cases, which draw a distinction between political speech and speech on traditional employment-related matters. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For, if speech related to a union's collective bargaining negotiation – quintessentially "terms and conditions" of employment – is deemed protected because such negotiations may ultimately impact the public fisc, virtually all speech would consequently enjoy full constitutional protection in the public workplace. The lines specifically demarcating what constitutes political speech or speech of "public concern," as those terms have been understood in this Court's First Amendment parlance in the public employment context, would be obliterated. In short, Petitioners' position endangers not just ongoing labor-management relations in New York City and elsewhere, but the continuing

coherence of First Amendment jurisprudence in the government employer context as well.

ARGUMENT[2]

Consistent with the Railway Labor Act cases before it and, indeed, constitutional jurisprudence more generally, the *Abood* Court framed its analysis as balancing (1) the legitimate interests of government in securing labor peace and avoiding the free-rider problem with (2) the First Amendment free speech rights of individuals.

Here, Petitioners have attempted to rig the scale unfairly with conclusory political rhetoric in the absence of material record facts. Self-serving declarations that the free-rider problem, is not, in fact, a problem (Pet. Br. at 33), or unsubstantiated conjecture that a public sector union's obligation to treat members and non-members alike would not be impacted by the wholesale elimination of agency fees (Pet. Br. at 42), provide an insufficient basis on which to balance the governmental interests against the individual non-member interests under *Pickering and Garcetti* (or any other constitutional balancing test). Even those snippets of supposed statistical "facts" provided by *amici curiae* in support of

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[2] *Amicus Curiae* here addresses principally the first question presented by Petitioners, namely, "Whether *Abood v. Detroit Board of Education* should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment?" With respect to the second question, whether it violates the First Amendment to require that public employees opt-out of subsidizing non-chargeable political speech (versus affirmatively consenting), *amicus curiae* joins Respondents' arguments.

Petitioners prove unsatisfactory, first, because they are inherently misleading and, second, because the constitutionality of agency fees should not be reviewed as a facial challenge on a nationwide basis in the absence of a factual record. First Amendment constitutional analyses of agency fees, firmly established in *Abood* and reinforced in *Pickering* and *Garcetti* require a nuanced analysis of the actual speech at issue, the context in which raised and the countervailing governmental interest. Plainly, no record exists on which to consider whether agency fees, in widely varying circumstances, pass constitutional muster.

As explained herein, New York State, for instance, maintains a strong interest in its chosen statutory collective bargaining system for managing its public sector employees. New York City, for example, offers a very different process of negotiation than the process described by Petitioners. Negotiations are typically conducted confidentially, not at a public meeting (Pet. Br. at 5), with only the union and the employer at the bargaining table. Many issues regarding core management prerogatives that Petitioners deem of "public concern" are non-mandatory (*i.e.*, an employer or a union is not required to bargain on such topic), or, in some cases, prohibited subjects of bargaining (*i.e.*, barred from bargaining). In sum, Petitioners' challenge to the constitutionality of California's agency fee is not "one-size fits all," and finds no ready application to other states around the country.

I. Any Asserted Intrusion On Employee Constitutional Rights Is Justified By Governmental Interests That Are Real And Substantial

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

The Court in *Abood* correctly determined that any arguable interference that exists in requiring agency fees "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations." 431 U.S. at 222. Ultimately, Congress determined that in the private sector "it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs, and that legislative judgment was surely an allowable one." *Id.* at 219.

The National Labor Relations Act leaves regulation of state and local government labor relations to the States. *See* 29 U.S.C. § 152(2). In *Abood*, while not "judg[ing] the wisdom" of the decision, the Court recognized it was for Michigan to determine whether labor stability would be best served by a system of exclusive representation and the permissive use of an agency shop fee for public sector unions. *Id.* at 229; *see also Railway Employes' Dep't v. Hanson,* 351 U.S. 225, 234 (1956) (the "ingredients of industrial peace and stabilized labor-management relations are numerous and complex" and the decision of whether the "union shop [is] a stabilizing force…rests with the policy makers, not with the judiciary").

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

Labor unrest continued in the early years of the Taylor Law as government employers and unions adjusted to their new roles and the law was refined, first in 1969 (generally adding unfair labor practices and additional strike deterrents) and again in 1977 (authorizing agency fee arrangements). Donavan, *supra* at 104-31. New York City, operating under a

state-permitted local analogue to the Taylor Law (the New York City Collective Bargaining Law ("NYCCBL")), suffered some of the most crippling continuing labor strife. *Id.* at 204. Indeed, in 1969, as part of a response to legislative inquiry regarding public sector labor relations in New York City, Mayor Lindsay urged, among other legislative changes, authorization of agency fee arrangements. *Id.* at 126. The State Public Employment Relations Board ("PERB") agreed and sought to have the authorization extended state-wide. *Id.* These views were in line with the recommendations of at least two other study committees in 1969 and again in 1973. *Id.* at 193. Ultimately, shortly after *Abood* was decided, New York amended the Taylor Law (with New York City following suit) to permit agency fee arrangements. *Id.*

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

inability of public employees to unionize and have "a greater voice" in determining the terms of their employment contributed to the use of strikes). The basic system has remained undisturbed for decades and New York has relied upon agency fees ever since.

Petitioners wish to disrupt New York's chosen system of managing labor relations. They wish to avoid paying a single cent for collective bargaining from which they gain substantial benefit because of unspecified objections to the positions taken by teachers' unions in California or perhaps unionization nationwide. They are certainly entitled to have that opinion.

However, California and New York, like many other states, have reasonably decided to manage their public sector workforce by allowing workers to select, on a majority basis, a union as their collective bargaining representative. *See* N.Y. Civ. Serv. L. § 204; *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) ("Central to the policy of fostering collective bargaining…is the principle of majority rule."). The selected union, by statute, receives the exclusive right to negotiate terms and conditions of employment for the covered titles of employees and becomes required to represent all members of the bargaining unit fairly. *See* N.Y. Civ. Serv. L. § 208(3)(a); Cal. Gov't Code § 3546(a). In turn, unit members who choose to not become union members must pay a service fee that is relevant only to the nonpolitical aspects of union representation. California and New York have determined through their legislative policies that the exclusive representation model best promotes sound

workforce management and productivity. The "fair share" fee acts as a crucial component of that model.

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

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

agency fee arrangements, sets disciplinary procedures by state agency rule, not collective bargaining. *See* N.M. Stat. Ann. § 10-9-13 (West) (requiring the State Personnel Office to promulgate rules for dismissal and demotion procedures for public employees). Likewise, in New York, public employee pensions, a "political" area specifically identified by Petitioners, fall into the category of prohibited subjects of bargaining the terms for which are set by statute. *See* N.Y. Civ. Serv. L. § 201-4. The wisdom of the inclusions and exclusions of bargaining is not the issue here, but the presence of these myriad formulations serves to underscore the vast differences among jurisdictions and thus the wholly deficient nature of this record for Petitioners' blanket attack.

Indeed, though Petitioners seek to eliminate agency fees everywhere, they appear to premise their attack purely on a few unsupported and anecdotally selected facts. Whether, as Petitioners assert, a small percentage of workers (Pet. Br. at 45) in a particular bargaining unit utilize the grievance process (certainly true of some unions) or thousands use them (equally true of some MLC unions), the union still needs to provide trained staff, maintain facilities, and pay for its share of any arbitrations that result.

Likewise, Petitioners' assertion that only unions may press grievances is factually inaccurate in New York. While some unions reserve that right, others permit individuals to press grievances at some or all stages of the process.

Moreover, despite these legislatively established labor relations frameworks, nothing prevents Petitioners or others from voting against or otherwise challenging the state governments that enacted the labor laws as well as their unions. Petitioners may lobby their state and local elected officials for change. They may also, like some agency fee payers and union members in New York City, speak directly to their employers both in opposition to a particular position taken by the union or in support of their personal policy views. The union's right of exclusivity applies to negotiating terms and conditions of employment; that right does not prohibit individuals from communicating with the employer or the employer from listening. Individuals may publicly oppose the unions as agency fee payers or, as members, work internally through the union's democratic processes to change the union's polices and strategies. Further, where objectors may feel they have a substantial like-minded group, they can also seek to initiate a decertification proceeding, by which a union may be recalled and removed from its role as exclusive bargaining representative. In much the same way, a taxpayer may vote against a particular local policy funded through taxes or fees and may take action by campaigning and lobbying to oppose it. But the taxpayer may *not* simply refuse to pay the fee and invoke the First Amendment as a defense. *See, e.g., United States v. Lee*, 455 U.S. 252, 260 (1982) (imposition of social security tax upheld against First Amendment claim that such tax violated challenger's free exercise rights).

Finally, Petitioners implicitly admit that unlike the contractual grievance context, union

representation in the disciplinary or termination context would be valuable even to agency fee payers. Pet. Br. at 46. However, they dismiss this benefit out of hand, asserting that such services are not provided by unions. *Id.* That is simply not the case in New York City. Many MLC member unions integrate disciplinary charges into their contractual grievance process; consequently, union processing of grievances necessarily includes the defense of disciplinary charges. Other MLC unions employ outside counsel to provide such services to employees as well as negotiate for and administer informal workplace procedures for minor infractions. Yet other MLC unions provide a team of attorneys through their affiliation with a state labor organization for the defense of disciplinary charges. And all of these services, and far more discussed *infra* at Point II.C., are available to and utilized by agency fee payers. All of these services cost substantial sums of money or make a claim on significant union resources to negotiate and administer.

These services count among the reasons a state adopts a union-based system for managing its workforces in the first instance. Imagine a public employer answering hundreds if not thousands of inquiries regarding the miscalculation of wages from individual workers rather than having the union organize, aggregate and review those payroll complaints and present a single issue for determination. Or, imagine New York City negotiating with the approximately 390,000 public employees separately with regard to terms and conditions of employment. Such approach would be

untenable and likely result in unilaterally imposed terms and conditions of employment, shutting public sector employees out of the process entirely and potentially reverting back to the labor strife that was typical prior to the advent of modern public sector labor relations under the Taylor Law. New York State, among others, opted for a different choice to harmonize the rights of individuals and public sector workers with the needs of government employers and the public welfare. The services a union provides and the role it plays benefit not only the workers but extend to the labor-management framework as a whole.

Petitioners attempt to subvert the clear governmental interest in New York's choice of labor relations structure by declaring that a state's concern is narrowly limited only to those matters that explicitly "imperil[] the union's existence." Pet. Br. at 12. But no such limitation on the legitimate interests and intentions of lawmakers exists. Petitioners' reasoning begs the question of how many unions need be "imperiled" for the state interest to prevail (and what constitutes "imperiled")? For, taken to its logical conclusion, so long as a single union is able to survive the elimination of agency fees, there would have been, in Petitioners' mind, no justification for allowing agency fees to continue. That is not, and should not, be the law.

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

Petitioners casually dismiss the precept that free-riding in the absence of agency fees poses a material threat to the financial viability of unions

and their ability to adequately represent workers. Pet. Br. at 12. The legitimacy of the free-rider problem, long recognized jurisprudentially and well-established in academic literature, should not be so cavalierly disregarded.

This Court has continuously recognized a primary purpose of the agency shop or fair share fee is to counteract free-riding. *See Abood,* 431 U.S. at 222; *Lehnert,* 500 U.S. 507, 537-38 (1991); *see also, Ellis v. Bhd. of Ry., Airline & S.S. Clerks,* 466 U.S. 435, 452 (1984) (allowing free-riding corrodes workplace harmony and cooperation by "stirring up resentment" because some employees can "enjoy[] benefits earned through other employees' time and money").

The rationale for the Court's acceptance is readily understandable: a rational economic individual will seek to enjoy the collective benefits a union provides without paying dues if he or she can avoid them.[3] If agency shop fees are rendered unenforceable for public sector employees, unassailable tenets of economics compel the conclusion that union membership will decline, since more employees will want to gain union services for free. *Harris*, 134 S. Ct. 2656 (Kagan, J., dissenting) (recognizing that the duty of fair representation "creates a collective action problem of far greater

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

magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers"). Indeed, in the absence of a "fair share" fee, union detractors *and union supporters* alike have an economic incentive to free-ride. The resulting decline in membership, as shown below, would weaken unions, place pressure on a union's ability to comply with the duty of fair representation, sow divisiveness, undermine the effectiveness of the collective bargaining process and push employee compensation below market levels. *See* Cooper, David and Lawrence Mishel, "The Erosion of Collective Bargaining Has Widened The Gap Between Productivity And Pay," *Economic Policy Institute Briefing Paper*, Jan. 6, 2015 (linking the widening income and wage disparity to the erosion of collective bargaining rights).

The statistics and studies in the field bear this out. Right-to-work legislation significantly increases the level of free-riding in public sector unions. In "right-to-work" states during the years 2000 to 2013, free-riders represented 20.3% of public employee bargaining units. *See* Keefe, J., "On *Friedrichs v. California Teachers Association*," *Economic Policy Institute Briefing Paper #411*, Nov. 2, 2015 ("Keefe 2015"). Public sector union density[4] in those areas registered at 17.4%. *Id.* By contrast, in states allowing agency shop agreements, only 6.8% of those in bargaining units chose not to join the union, with union density at a far more robust 49.6%. *Id.* Other data suggests that free-riders may actually represent

[4] Union "density" reflects the percentage of public sector employees represented by a union.

as much as 35-40% of employees covered by a collective bargaining agreement when agency fees are banned. *Id.* Thus, right-to-work laws significantly reduce the likelihood of union representation of public sector employees as a whole. *Id.*[5]

Wisconsin, a state repeatedly cited by *amicus curiae* supporting Petitioners, is illustrative. Contrary to *amicus'* assertions, Act 10, passed by the Wisconsin legislature in 2011, contained a right to work provision, among other restrictions on collective bargaining. (Keefe 2015, at 10). Once Act 10 became law, union membership in the Wisconsin Education Association Council, Wisconsin's largest teachers' union, immediately declined by 29%. *See* Brief of the Mackinac Center for Public Policy ("Mackinac Ctr. Br.") at 16. By early 2014, that union had lost a third of its members and by February 2015, it had lost more than half. *Id.* The AFSCME union in Wisconsin reported a similar experience, suffering a 70% decline in membership since Act 10 was enacted. (Keefe 2015, at 10).[6] Indeed, even *amicus'* own data shows that Wisconsin's public sector unions statewide contracted by a staggering 58,878 members from 2011 to 2014. Mackinac Ctr. Br. at 19. In sum, Act 10 and its elimination of most public

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

[6] *Citing* Samuels, Robert, "Walker's Anti-Union Law Has Labor Reeling In Wisconsin," *Washington Post*, February 22 (2015).

sector agency fees, despite Petitioners' and *amicus'* assertions to the contrary, have dealt a devastating blow to the membership levels (and resultant financial resources) of Wisconsin public sector unions.

Petitioners, aided by *amici curiae*, seek to downplay the free-rider impact. Yet, even a cursory glance at the carefully selected metrics, limited geographic locations, and time period of the data they present should give the Court skeptical pause.

In its principal anecdotal support in the public sector, *amicus* cite the experience of the Michigan Education Association ("MEA") after the Michigan legislature enacted right-to-work legislation in 2012, becoming effective March 28, 2013. Mackinac Ctr. Br. at 21. *Amicus* suggests that membership declined only by 8% between August 2012 and August 2014 (13% among teacher support staff), and its revenue declined by only 12% in fiscal year 2013. Mackinac Ctr. Br. at 25. Putting aside that these percentages loom fairly large for the less than two-year relevant period, the data misleads.

First, many MEA locals were in contracts that had not yet expired by August 2014 and, hence, would not have allowed members the option of free-riding, for even the right-to-work law allowed some grandfathering of contracts. (Keefe 2015, at 9). The decline of MEA membership and revenue thus were concentrated among a much smaller subset of MEA locals that had contracts expiring between March 28, 2013 and August 2014. *Id.* Even that smaller subset of the MEA reflected a growing amount of free-riding among Michigan's public sector unions. During this

short period, Michigan experienced employment growth of 6% but overall union membership declined by 7%. *Id.* Free-riding more than doubled when measured as the difference between the number of members and those covered by a collective agreement; similarly, overall union density in Michigan declined from 16.6% to 14.5%. *Id.*

Second, *amicus* rely upon *private* sector trends – surprising, since Petitioners repeatedly highlight the different incentives in the public and private spheres – to approximate the impact of this Court's decision. But even in the private sphere, right-to-work laws have contributed to the decline of unions in the states that adopt them. Oft-cited studies instruct that, in the first five years after the passage of a right-to-work law, union organizing success declines by 46%, and in the next five years it declines an additional 30%. (Keefe 2015, at 4).[7] Other studies show that union density almost doubles when unions are allowed to negotiate agency shop provisions. *Id.*[8]

An undeniable link thus emerges between states with statutory schemes allowing agency fees and higher union densities. Eighty percent of unionized public employees are located in states like New York and California that permit agency fees. (Keefe 2015, at 13). The remaining 20% are found

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[7] *Citing* Ellwood, David T., and Glenn Fine, "The Impact of Right-to-Work Laws on Union Organizing," *Journal of Political Economy*, 95, 250-73 (1987).

[8] *Citing* Farber, Henry S., "The Decline of Unionization in the United States: What Can Be Learned from Recent Experience?" *Journal of Labor Economics* 8, 1, Part 2 (2005).

dispersed among a variety of relatively smaller states with right-to-work laws. Even in those states, right-to-work legislation maintains a substantial impact. That negative impact would be amplified if forcibly applied to the remaining 80% of unionized public sector employees. *Id.* Thus, despite *amicus'* assertion that in eight states where union density averages 24% and free-ridership averages 22%, – Florida, Idaho, Iowa, Kansas, Nebraska, Nevada, North Dakota and South Dakota – unions have been able to perform their duty of fair representation, the statistic carries little probative value. Cumulatively, these states account for but 10% of public employees and 6.7% of all public sector employee union members in the United States. (Keefe 2015, at 12).

Amicus does, in fact, acknowledge that "union membership will drop" in states that have passed right-to-work legislation, takings pains to emphasize that any decrease in union membership will ultimately "stabilize" after the initial departures. Mackinac Ctr. Br. at 31. However, the level at which such membership "stabilizes" would impact the viability of many individual unions and the overall exclusive bargaining labor relations structure. There is a dramatic difference to a state-wide public sector labor relations scheme between having enough unions to represent the vast majority of eligible employees (as now in New York) and having union density hover at 12-14%, as with right-to-work states.

Moreover, if the Court were to overrule *Abood* there would be no adjustment period to "stabilize," as *amicus* imply. No grandfathering of existing agreements could occur, as in Michigan. Agency

shop fees would be immediately and irretrievably lost for all public sector unions, imperiling collective bargaining nationwide and throwing union finances instantaneously into question.

Two final points merit brief mention. First, aside from the dubious statistical data, Petitioners dismiss the free-rider problem, at least in part, because unions *voluntarily* seek to be exclusive representatives. The argument is neither compelling nor correct. The notion that "no law imposes a duty of fair representation," Pet. Br. at 37-38, is flatly untrue, at the very least in New York, where the Taylor Law explicitly provides for a compulsory duty of fair representation. N.Y. Civ. Serv. L. 209-a(2)(c). Further, to the extent Petitioners mean to assert that unions decide to organize knowing this duty exists, the same can be said of Petitioners choosing to become public sector employees in states such as California or New York, where compulsory agency fees have existed for decades.

Second, and relatedly, the elimination of agency fees would create a perverse incentive for unions to offer certain union services and benefits only to members.[9] It would not only reduce union

[9] The idea that a union would never negotiate different benefits for members and non-members directly conflicts with Petitioners' own assertion that California already attempts to create such inducements to membership. Pet. Br. at 42, n. 10. While the very heart of unionization is built on unity, where free riding threatens the viability of a union, a union could be compelled to find ways to attract dues-paying members. In states where such "members only" benefits are prohibited, unions would be severely hamstrung in their ability to perform their statutory function by the absence of agency fees.

funding, but it would force unions to shift resources away towards basic fee collection and away from core union duties. Put differently, allowing free-riding places a significant economic strain on a union's adherence to its long-established mandatory duty of fair representation for all bargaining unit members.

While much has been said here to link the duty of fair representation to agency fees, and certainly there is a relationship, the duty does not arise just because of agency fees. Rather, the duty is a necessary byproduct of the exclusive representation structure at the heart of virtually all union-based labor relations systems, including New York's. Petitioners do not challenge that exclusivity. However, by attempting to minimize the import of that duty or suggest it need not be a duty at all, Petitioners create a paradox.

As a threshold matter, at least in New York, the duty is established by state law and cannot be undone by this Court to facilitate Petitioners' challenge to agency fees. *See* N.Y. Civ. Serv. L. 209-a(2) Here, since the Taylor Law concerns state and local public employee unions, it is not subject to challenge by Petitioners or regulation by the federal government. Nonetheless, even if the duty were to somehow be removed, non-members would still be subject to union-management negotiated terms and conditions of employment, but with no recourse against the union or the employer with regard to those terms. The unit-wide application of negotiated terms and conditions arises from the union's role as exclusive bargaining representative, not the duty of fair representation itself. Thus, though collectively bargained terms would apply, there would be no

right to challenge union action as a breach of that duty and no entitlement to equal access to the grievance process.

Moreover, if a non-member sought to collaterally challenge a collective bargaining agreement, that challenge would necessarily pose a direct threat to exclusivity, vitiate the traditional grievance and arbitration provisions of a collective bargaining agreement, and risk making employers potentially liable on several fronts in court and otherwise. Such a challenge would subject the collective bargaining agreement to multiple competing interpretations and generally destabilize the entire labor relations structure. Exclusivity and the duty to bargain in good faith operate as the linchpins for the peaceful resolution of labor-management disputes and find common ground among competing interests. Eliminating the duty of fair representation to justify abandoning agency fees, would, in practice, either leave non-members with no remedy whatsoever, or, strike at the core of exclusivity and completely destabilize public sector labor relations in places that have relied upon a public sector union system for decades.

II. Overruling *Abood* Would Upend First Amendment Jurisprudence In the Government Employment Context

Perhaps in light of the clear and substantial governmental interests outlined above, Petitioners attempt to place great weight on the purported infringement of their First Amendment rights by the State of California. Here too, Petitioners try to sweep away practical reality with rhetoric, arguing

that one can only view the government as sovereign, not as employer, and that all speech related to union activity is of "public concern." But this simplistic view of the complexities of public employment stands in stark contrast to well-settled case law in both the First Amendment and other contexts.

A. The Abood Precedent Rightly Recognizes The Distinction Between Government As Sovereign And As Employer

When a public sector employee sues a government employer for violating his or her First Amendment speech rights, the employee must show that he or she spoke as a citizen on a matter of public concern and not as an employee on a matter of private, employment-related concern. *Connick v. Myers,* 461 U.S. 138, 147 (1983). While the public sector employee does not shed his or her constitutional protections when accepting public positions, the government may properly restrict employment-related speech necessary for efficient and effective operation as an employer. *Garcetti*, 547 U.S. at 418. A "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large," *Engquist v. Oregon Dep't of Agric.,* 553 U.S. 591, 600 (2008), and a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011) (Kennedy, J.,) (quoting *Garcetti,* 547 U.S. at 418).

Indeed, for over 150 years after adoption, the First Amendment was not understood to impose *any*

restrictions on the government when acting as employer. *Garcetti,* 547 U.S. at 410, 417; *see also McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (Holmes, J.) (a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

Typically, the determination of whether the coerced or prohibited speech at issue implicates the government acting as employer or as sovereign requires consideration of the actual speech and the context of that speech. Courts primarily look to whether the speech relates to "a matter of public concern." *Garcetti,* 547 U.S. at 418. If not, the employee has "no First Amendment cause of action." *Id.* If the speech addresses a matter of public concern, contrary to Petitioners' implication, the analysis does not stop there. The court then determines whether the government had adequate justification for its action by balancing the interests of the employee, "as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568.

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

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

Thus, even if arising from separate precedential antecedents, *Abood's* distinction between non-ideological and ideological speech functions as an overlay on *Pickering's* distinction between speech in the government workplace of "public concern" and "speech of its employees." *Pickering*, 391 U.S. at 568. Though the *Abood* Court did not extensively cite the *Pickering* balancing test, it surely understood this distinction between the government as an employer and as sovereign. The *Abood* Court correctly noted that the "uniqueness of employment is not in the employees nor in the work performance; the uniqueness is in the special character of the employer," the government which has a separate and independent constitutional

obligation to its citizens. 431 U.S. at 227. Thus, the Court recognized the distinct duties of the government both to its employees and to citizens broadly.

B. The Abood Precedent Rightly Recognizes The Distinction Between Matters of "Public Concern" And Those Related To Employment

The *Abood* Court drew a line between, on the one hand, lobbying and political activities directed at the government as sovereign, and on the other, collective bargaining or negotiating terms of employment, directed at the employer (which here happens to be the government). The union's exclusive representation of a workforce, inextricably intertwined with the right to collect agency fees, is limited to the bargaining table. Such exclusivity does not extend to street corners, voting booths or the steps of City Hall, where agency fee payers and union members alike may agree or disagree with particular positions taken by the union or government, including the adoption or repeal of right-to-work laws.

Applying the *Pickering* framework (though not conceding its relevance), Petitioners suggest that their objection to paying fair share fees reflects a matter of "public concern" because government spending *writ large* raises issues of public import. Petitioners even compare basic subjects of collective bargaining to speech in political campaigns. Pet. Br. at 30.

Yet for over 50 years, the Court has not only recognized but repeatedly emphasized the important, more nuanced distinction between a union's political expenditures, *i.e.*, those of a "public concern," and "those germane to collective bargaining" with only the latter properly chargeable to non-union members. *E.g., Lehnert,* 500 U.S. at 515. An employee's free speech rights "are not unconstitutionally burdened because the employee opposes a position taken by the union in its capacity as collective bargaining representative." *Id.* at 517. Basic speech by a union concerning quintessential employment matters – wages, benefits, discipline, promotions, leave, vacations and termination – do not suddenly transform into constitutionally protected First Amendment speech in every circumstance they are addressed by a union simply because such decisions may in some, unspecified manner impact the public. *Harris*, 134 S. Ct. at 671 (Kagan, J., dissenting) ("we have made clear that except in narrow circumstances we will not allow an employee to make a federal constitutional issue out of basic employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations") (internal citation omitted).

C. New York City's Public Sector Unions Provide Services (Funded By Agency Fees) That Are Undeniably Non-Political and Non-Ideological

As mentioned in Point I, *supra*, the bulk of the often voluminous collective bargaining agreements that our member unions sign with New York City and other City-affiliated public employers concern

employment matters far beyond anything that could fairly be considered of "public concern." Just because unions at times align themselves with a "wide range of social, political, and ideological viewpoints" and causes, *Lehnert,* 500 U.S. at 587-88, does not mean they always, or even often, so align.

In essence, Petitioners' argument that *all* union speech is of "public concern" hinges on tearing down the well-established doctrinal recognition that certain functions performed by a union are directed towards core issues of "terms and conditions of employment" that are universal in the public and private sector alike, while other forms of union activities are ideological or political in nature. This position attempts either to eviscerate the distinction altogether in all First Amendment contexts or adopt a double standard that provides an unprincipled exception solely in the case of public sector union speech. Much of the *Harris v. Quinn* dicta commenting on *Abood* focused on the supposed "anomalous" nature of agency fee decisions in constitutional jurisprudence. In truth, it is the carving out of public sector union speech from every other type of public employment First Amendment circumstance that would truly be anomalous.

Even if the line drawn between permissible assessments for collective bargaining activities and prohibited assessments for ideological activities appears "somewhat hazier" in the public sector, *Lehnert*, 500 U.S. at 521, in the vast majority of instances chargeable activities may be readily distinguished from non-chargeable ones. The many day-to-day services our unions regularly provide are

not only apolitical, but often mundane and ministerial, though no less critical for our members.

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

There are elsewhere myriad examples of such chargeable services being provided each day by MLC member unions that are valuable to members and agency fee payers alike, costly for the union to offer and, even by Petitioners' own measure (arguing that fiscal impact alone renders all bargaining "political" (Pet. Br. at 25)), not political in nature.[10] MLC unions, for example, provide group legal services for a variety of members' personal matters, including house closings, will preparation, and matrimonial

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[10] Petitioners specifically rely on a comment made in *Harris* that a union's position on spending may have a "profound" effect on the size of government. Pet. Br. at 25. That assertion neither legally determines the issue nor is it true. Citations to the total cost of providing a public service (Pet. Br. at 25) do not speak to the impact of union speech, but to the scale of the service provided. Studies have found that overall budgetary expenditures do not materially shift as a result of collective bargaining. (Keefe 2015, at 11).

disputes, without regard to whether the member pays dues or an agency fee.

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

Similarly, while Petitioners fixate on a union's role in negotiating for increases in compensation, that task occurs only periodically upon the expiration of a prior agreement. Even in the realm of compensation, a union spends the vast majority of its day-to-day work administering the agreement, including helping workers understand pay structures, evaluate possible payroll errors and navigate the payroll correction processes.[11] Viewed

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[11] Petitioners' rant (Pet. Br. at 26-28) regarding a variety of terms and conditions of teacher employment, including hours

honestly, these activities cannot be characterized as remotely political in nature or of a "public concern," yet are immensely important to an individual public sector employee.

These types of services, combined with matters of health and safety, handling grievances, and providing legal services mentioned above, comprise the bulk of the work of our unions, which are funded by dues and agency fees. To be clear, these services are not merely *available* to agency fee payers, they are *utilized* by them. One MLC member union, for instance, reported that between September 2010 and June 2015 some 338 agency fee payers brought grievances on a variety of topics through the union grievance and arbitration process, directly contradicting Petitioners' conclusory assumption that an agency fee payer does not utilize the grievance process and thus gets little value from it. Pet. Br. at 46.

Finally, public sector unions in New York City, like many around the country, understand the distinction drawn in *Abood* and its progeny between chargeable and non-chargeable activities, and have implemented workable administrative pay structures consistent with its teachings. As the *Abood* Court

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worked, workload, pay and seniority rights is misplaced. At bottom, Petitioners have not expressed any particular objection to a substantive position taken by the unions; rather, they object to the union's ability, far more fundamentally, to negotiate a variety of topics. That ability, however, is determined by state elected officials and the laws they have enacted. Thus, Petitioners' proper recourse rests with their local and state elected officials, not the First Amendment.

recognized, while there may be occasional "problems in drawing lines between collective bargaining…and ideological activities," 431 U.S. at 236, they are few and far between – certainly not occurring with sufficient frequency to issue a blanket invalidation of fair share fees altogether.

This Court should be under no illusion: the Petitioners and their *amici* supporters, in drawing their hypothetical lines without any record to support it, misunderstand the true realities of operating a union. Largely theoretical classification issues are not a reason to disrupt such an important and well-established precedent, particularly one that the public sector unions of New York have relied upon for decades.

CONCLUSION

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

Respectfully submitted,

Harry Greenberg
GREENBERG BURZICHELLI GREENBERG P.C.
3000 Marcus Ave.,
Lake Success, NY 11042
New York, NY
(516) 570-4343
hgreenberg@
gbglawoffice.com

Alan M. Klinger
Counsel of Record
Dina Kolker
David J. Kahne
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 850-5400
aklinger@stroock.com

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