No. 16-1466

In The Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31

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QUESTION PRESENTED

Whether *Abood v. Det. Bd. of Educ.*, 431 U.S. 209 (1977), which this Court has repeatedly reaffirmed and relied upon and which forms the basis for public-sector "agency shop" arrangements in States and localities across the United States, should be overruled.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Fraternal Order of Police ("FOP") has grown to the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel in every aspect of public safety and crime prevention.

The FOP's various local lodges act as the designated collective bargaining agent in states that allow for "agency-shop"[2] provisions, representing law enforcement personnel throughout the country at all levels of government. The FOP also broadly supports such collective bargaining activities even when other

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[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. In addition, Petitioner and Respondent have consented in writing to the filing of this Brief and have notified the Clerk that they consent to the filing of amicus briefs in support of either or neither party.

[2] Under an "agency shop" agreement, a labor organization that acts as exclusive bargaining representative may charge non-union members, who don't have to join the union or pay dues, a fee for acting as their bargaining representative. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 n.10 (1986). An agency shop agreement is also often referred to as a "fair-share" dues provision.

entities are acting as the designated bargaining agent for law enforcement personnel. Police officers die every year serving their communities. *See* Officer Down Memorial Page, Inc., https://www.odmp.org/search (last visited Jan. 18, 2018) (reporting that since 2016, there have been approximately 272 officer line-of-duty deaths). Through robust collective bargaining efforts, officers can bargain for better equipment, training, and community outreach impacting officer and public safety.

Resolution of the issue before this Court today would strike a serious blow to all these hard-fought collective bargaining efforts, undertaken throughout the country. It is with this backdrop in mind that the FOP respectfully seeks to be heard in this matter.

SUMMARY OF ARGUMENT

At the heart of Petitioner's challenge to *Abood* is an ideological attack on public-sector unions. Petitioner advances this attack under the guise of a First Amendment challenge, asking this Court to disrupt decades of prior Supreme Court precedent by declaring agency shop provisions unconstitutional. In so doing, Petitioner seeks a rigid rule that would have vast consequences on law enforcement and public safety.

1. Law enforcement and public safety personnel are uniquely positioned in how they must interact with their employers and serve the public. Most public safety employees, unlike virtually all other professions,

are legally forbidden from striking. This gives law enforcement limited input when attempting to bargain for employment conditions that meet the needs of officers and the communities they serve.

If Petitioner's viewpoint is adopted, such collective bargaining efforts would be significantly frustrated because unions would be starved of the funds needed to provide services to their members. This depredation of union bargaining efforts would have ancillary consequences that harm its members, law enforcement employers, and the public.

2. Petitioner characterizes all public-sector union activity as inherently political, offering cherry-picked examples of public-sector unions engaging in conduct resembling political advocacy. This characterization conveniently ignores the many bargaining activities public safety unions engage in to promote officer safety and public safety. Officer, citizen, and community safety are not partisan issues. Moreover, without unions to provide these nonpolitical services, local governments would forego such services altogether.

3. Nothing in *Abood* prohibits Petitioner from expressing his dissatisfaction with a union's course of action. Petitioner, like all citizens, is free to speak his mind. Even giving some credence to Petitioner's complaints, however, the current state of this Court's precedent wisely declines to advocate a one-size-fits-all approach to agency shop provisions. Instead, states and localities may freely decide what system is best for

the idiosyncratic needs of its citizenry. State and local law is the appropriate forum for determining the legality of agency shop provisions and this Court need not interfere with this longstanding dynamic.

ARGUMENT

I. PROPERLY FRAMING THE PURPOSE OF AGENCY SHOP PROVISIONS IN THE CONTEXT OF PUBLIC SAFETY UNIONS.

Agency shop provisions are not the nefarious speech-infringing mechanism Petitioner claims. Instead, agency shop provisions are a pragmatic tool for balancing a collective bargaining agent's legal duty to represent all members of a bargaining unit while eliminating individuals' incentive to "free ride" on the backs of their union member counterparts.

A. PURPOSE OF AND RATIONALE FOR AGENCY SHOP PROVISIONS.

Collective bargaining is the process by which members of a labor union and management negotiate over wages, benefits, working conditions, staffing levels, equipment purchases, training allotments, and other issues. *See* Symposium, Public-sector Labor Policy: A Human Rights Approach, 14 Nev. L.J. 509, 514 (2014). The collective bargaining process is authorized at the state or municipal level and can take essentially two forms with regard to law enforcement personnel. Some states such as Arizona, Arkansas, and Louisiana

either do not allow for, or do not require, employers to engage in collective bargaining with police officers. *See* William Aitchison, *The Rights of Law Enforcement Officers* 10-11 Labor Relations Information System (2015). Other states such as New York, Nebraska, and Ohio allow collective bargaining for law enforcement. *Id*.

In states that allow public-sector collective bargaining, state and local law typically dictates the legality of agency shop provisions.[3] Agency shop provisions require all employees to either be members of the labor organization or to pay to the labor organization their "fair share" of the costs incurred when negotiating and administering the collective bargaining agreement on their behalf. *See* Aitchison, *The Rights of Law Enforcement Officers* at 73. The "fair share" due is calculated on an annual basis and represents the percentage of normal union dues expended on costs germane to the collective bargaining process. *Id*. at 83.

The rationale for agency shop provisions is straightforward. Because labor organizations have a legal obligation to represent all eligible employees of a bargaining unit – whether they are actual union members or not – it is appropriate for those employees who are not members to pay for their share of the cost of

[3] Ohio, for example, permits but does not require agency shop provisions in collective bargaining activities. *See* Ohio Rev. Code Ann. § 4117.09(C). The decision of whether to include such a provision is thus left up to the collective bargaining participants and local political subdivisions.

collective bargaining undertaken on their behalf. Justice Kagan states it best:

> The law compels unions to represent – and represent fairly – every worker in a bargaining unit, regardless whether they join or contribute to the union. . . . In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty – as against financial self-interest – can explain their support. Hence arises the legal rule countenancing fair-share agreements: It ensures that a union will receive adequate funding, notwithstanding its legally imposed disability – and so that a government wishing to bargain with an exclusive representative will have a viable counterpart.

Harris v. Quinn, 134 S. Ct. 2618, 2656 (2014) (Kagan, J., dissenting); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) (noting that "[w]here the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. . . .").

B. WHY ELIMINATING AGENCY SHOP PROVISIONS WOULD BE DETRIMENTAL TO PUBLIC-SECTOR UNIONS.

The fees collected via the agency shop provisions help a public-sector union serving as a collective bargaining agent to defray the costs incurred when zealously undertaking bargaining efforts for a given bargaining unit. Without agency shop provisions, however, the unions would still be legally required to represent an entire bargaining unit, but would not be able to charge nonunion individuals for their fair share of the negotiating costs.

Left with less money to serve the same number of people, unions would have to make up the difference. To do so, unions would presumably turn to their primary source of revenue: membership dues. Unions would be forced to increase their membership dues to offset the loss of funds they had once received from nonunion members' fair share dues. Alternatively, the union could choose to reduce the sophistication and quality of the services offered to its members and nonmembers.

If the union increases dues for members, the individual union members are faced with a simple economic choice: they could agree to pay higher dues to receive the same or less services from the union, or they could drop out of the union and receive the benefit of the union's negotiating efforts without paying a dime. This is what is known as the free-rider problem, where individuals may receive the benefit of union

services on the backs of other individuals that pay for such services. Rational economic actors, when given such a choice, would elect to forego paying union membership dues.

When individuals begin to forgo their union memberships, this problem continues to compound itself. Less members means the union must continue to make up the difference by imposing higher dues and providing reduced services. These ever-rising dues for reduced services drives even the most altruistic individuals to forego union membership. This problem is often referred to as a "death spiral." Once union membership enters this tailspin, unions themselves may begin to fold with no membership or funding to sustain them.

Evidence supports this concern. The Economic Policy Institute conducted a study analyzing union membership in so called "open shop" or "right-to-work"[4] states – which forbid agency shop provisions – and compared the results with states that authorize payment of fair share dues. *See* Jeffrey Keefe, Economic Policy Institute, *Eliminating fair share fees and making public employment "right-to-work" would increase the pay penalty for working in state and local*

[4] In open shop or right-to-work states, an individual, by law, cannot be compelled, as a condition of their employment, to contribute funds to any labor organization. *See* Aitchison, *The Rights of Law Enforcement Officers* at 72-73. No fair share dues can be imposed on those individuals who chose not to join the labor organization. But the labor organization still has a legal obligation to represent all eligible employees whether that individual has joined the organization or not.

government (Oct. 13, 2015), http://bit.ly/1GPE2Ts. The study found that union membership for public-sector employees in right-to-work states was 17.4%, while in states allowing agency shop provisions it was 49.6% – a nearly threefold gap in union participation. *Id*. at 2.

Recognizing this free-rider problem, this Court has consistently held that agency shop requirements do not violate the constitutional rights of nonunion public-sector employees so long as the exclusive collective bargaining agent only assesses to the nonunion members charges that are "germane" to the collective bargaining process. Justice Scalia framed the issue best:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry – indeed, requires the union to go out of its way

> to benefit, even at the expense of its other interests. In the context of bargaining, a union must seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. ***Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.***

See Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J.) (concurring in part and dissenting in part) (emphasis added); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977).

C. UNIQUE ASPECTS OF LAW ENFORCEMENT AND PUBLIC SAFETY EMPLOYMENT FURTHER JUSTIFY AGENCY SHOP PROVISIONS TO FUND SOPHISTICATED COLLECTIVE BARGAINING EFFORTS.

Law enforcement and public safety employees operate in a unique employment environment in which they are largely forbidden by law from striking. These prohibitions are generally enumerated in state statutes, general common law, or even a law enforcement agency's local rules. *See* Aitchenson, *The Rights of Law Enforcement Officers* at 72. The consequences of a law enforcement labor strike in contravention of the foregoing sources can be steep and include: liability for civil damages, automatic discharge from employment,

or even authorized causes of action for employers to sue the striking officers for damages. *See*, *e.g.*, Fla. Stat. Ann. §§ 447.505 and 447.507 (providing that public employees engaging in a strike, or even supporting such a strike, shall be subject to penalties including liability for damages to the employer); Ind. Code Ann. § 4-15-17-8 (same); Wis. Stat. Ann. § 111.89(2) (West) (same).

Collective bargaining is a sensible counterbalance to the above problem. With the ability to bargain effectively, law enforcement unions can create pressure to hold management accountable and act as a zealous counterparty that ensures officers, and in turn, the public, are getting what they need. Put simply, a union or other designated bargaining agent's ability to engage in robust collective bargaining activities directly enhances the effectiveness of their members in the workplace and makes up for the legal handicap preventing public safety personnel from striking.

If Petitioner's viewpoint is adopted, however, law enforcement employees' ability to bargain effectively will be severely strained. *See* Section I.B., *supra* (demonstrating that eliminating agency shops will detrimentally impact public-sector unions' participation, and consequently, unions' ability to fund collective bargaining activities). This leaves employers with no incentive to respond to law enforcement personnel's concerns about issues such as public safety, community outreach, adequate officer training, officer response times, and adequate officer equipment.

II. EFFECTIVE COLLECTIVE BARGAINING ACTIVITIES UNDERTAKEN ON BEHALF OF PUBLC SAFETY EMPLOYEES BENEFITS THE PUBLIC.

In urging this Court to strike down *Abood*, Petitioner argues that public-sector collective bargaining activity equates to "quintessential lobbying" no different than meeting with public officials to "influence public policies." Pet. Br. 11. Underpinning this argument is Petitioner's belief that all public-sector union bargaining activity is inherently political. Pet. Br. 10-11. In support, Petitioner offers handpicked examples of instances in which union activity was arguably political in nature and paints these activities as business as usual for all public-sector unions. *See*, *e.g.*, Pet. Br. 13-15.

Public safety and law enforcement unions, however, debunk Petitioner's theory. Organizations such as the FOP frequently engage in bargaining activity not for political influence or political gain, but to promote officer safety and public safety.

A. LAW ENFORCEMENT UNIONS, AND SIMILARLY-SITUATED PUBLIC SAFETY UNIONS, ENGAGE IN BARGAINING ACTIVITY THAT IS NOT POLITICAL SPEECH OR LOBBYING.

Law enforcement unions such as the FOP engage in a variety of collective bargaining activities aimed at officer and public safety. These bargaining activities

cannot be brushed aside as inherently political speech as Petitioner claims – officer and public safety is not a partisan issue.

Moreover, public-sector unions expend their own resources to benefit their designated bargaining unit. Using these resources, these public-sector unions can support local governments and communities that would otherwise lack the financial ability, informational sophistication, or independent willpower to provide similar services.

Public safety unions' collective bargaining efforts have brought well documented benefits to the general public. For example, Policy Matters Ohio commissioned a report in 2011 noting that public worker negotiations benefit Ohio communities. *See generally* Policy Matters Ohio, *Benefits of Bargaining: How Public Worker Negotiations Improve Ohio Communities* 17-18 (2011), http://bit.ly/2FqoAUv. The report went on to list how public safety personnel, and in turn, the general public, benefit from public sector bargaining activities:

> We want so many hours of continuing education in our contract. The reasons for this are straightforward: firefighters [and police officers] must have medical skills to treat victims. The skills need to be kept current and updated as new medicines and techniques are employed. . . . Their ability to limit disasters and save lives depends on their ability to properly utilize all of the resources at their disposal. This requires constant practice and a certain level of expert training so that

> firefighters [and police officers] can execute rescue operations. . . . Police unions and almost all other public employee unions use these committees and collaborative efforts with management between contracts to solve problems in a flexible, timely manner.

Id. at 17-18.

1. Police officers have dealt with faulty, deficient, or inadequate bulletproof vests resulting in officer injuries and fatalities. Organizations such as the FOP have applied pressure and litigation to protect officers from faulty equipment. For example, in 2005, the FOP notified the Department of Justice that Michigan-based Second Chance Body Armor and manufacturer Toyobo Company had intentionally concealed critical defects in the body armor it sold to law enforcement. *See* Fraternal Order of Police, *FOP request for investigation of Second Chance leads to Federal lawsuit*, July 7, 2005, http://bit.ly/2Frdij9.

The FOP's request for an investigation led to a federal lawsuit brought by the Department of Justice, which alleged that Second Chance and Toyobo provided defective Zylon bulletproof vests to federal, state, and local law enforcement agencies despite having knowledge that the strength and bullet stopping capacity of the vests were substantially weaker than represented. *See United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 685 F. Supp. 2d 129 (D.D.C. 2010). According to the allegations, the vests also rapidly degraded when exposed to natural light, heat, and

moisture causing the vests to become dangerously ineffective. *Id*. at 132.

This issue has seen a recent revival. Currently pending in the Southern District of Florida is a suit filed by, among others, the Ohio State Troopers Association. *See generally* Complaint-Class Action, *Ohio State Troopers Association, Inc. et al. v. Point Blank Enterprises, Inc.*, Case No. 0:17-cv-62051 (S.D. Fla. 2017). The Ohio State Troopers Association – which represents all troopers, sergeants, dispatchers, communication technicians, and electronic technicians in the State of Ohio – alleges that the defendant, Point Blank Enterprises, Inc., manufactured and sold defective bulletproof vests to Ohio public safety personnel. *Id*. at ¶ 2. According to the complaint, the allegedly defective vests "pose a life-threatening safety issue and cannot be reasonably relied upon for their intended use." *Id*.

Public safety and law enforcement unions such as the FOP expend their own resources to oversee and monitor these pressing officer safety issues. Such oversight functions are driven by a desire to support officer and public safety, rather than political ideology.

2. Police vehicles have similarly experienced defects causing fatalities. The most infamous example of this is the Ford Crown Victoria police interceptors, which suffered from a design flaw putting the fuel tank behind the rear axle of the vehicle. Consequently, these vehicles, which were used by police throughout the country for decades, would explode when impacted at moderate speed from behind. *See generally Jablonski*

v. Ford Motor Co., No. 5-05-0723 (Ill. App. Ct. 5th Dist. Feb. 1, 2010). This was a significant problem considering such vehicles were used in police pursuits, and several lawsuits were filed against Ford as a result of numerous officer fatalities. *See* Ted Zwayer, LexisNexis Legal Newsroom, *Ford is Still Haunted by exploding Gas Tanks as a Multi-Million Dollar Award of Punitive Damages is Affirmed* (Mar. 3, 2010); *see also* Pat Beall, Palm Beach Post, Popular Police cars Crown Victorias prone to explode, tied to deaths, June 5, 2011, http://pbpo.st/2FnCd6W.

As early as 2003, the FOP began urging Ford to install fire-suppression systems on its Crown Victoria Police Interceptor, to make the vehicles safer. *See* Fraternal Order of Police, *Crown Victoria police cars still draw worries about fires*, Oct. 29, 2007, http://bit.ly/2FotGAF. The FOP also moved to publicize the issue, warning officers of the problems and offering potential solutions. *Id*.

3. Police radio equipment has historically failed precisely when first responders need to communicate most. This was true during the September 11th terrorist attacks when radio equipment failed, preventing key personnel from communicating with police and firefighters in the towers. *See*, *e.g.*, Brendan Sasso, The Atlantic, *Why Police and Firefighters Struggle to Communicate in Crises*, Sept. 18, 2005, http://theatln.tc/2mfhpWL. Police and first responder radios also failed during the Hurricane Katrina disaster response, *see id*., and during the Washington Navy Yard attack in September of 2013. *See* Kevin Bogardus, The Hill,

Radios failed during Navy Yard attack, emergency responders say, Sept. 19, 2013, http://bit.ly/2D07U8X (noting officers had to use cellphones to call for back up because their radios wouldn't work in the Navy Yard buildings).

There are at least two fundamental problems that give rise to breakdowns in radio equipment during these times of high need. First, radios across neighboring police departments are not always compatible, making it impossible for officers from different police stations to communicate effectively. *See* Sasso, http://theatln.tc/2mfhpWL. Second, some radio equipment fails due to a design flaw. Cameron Knight, *Black: City will 'aggressively' work to fix police radios*, Oct. 9, 2016, http://cin.ci/2qrxzRU.

Organizations such as the FOP and other collective bargaining agents help combat these critical problems in a variety of ways. The FOP uses its expertise and perspective to offer critiques and advice for police departments to follow when in future crisis situations. *See*, *e.g.*, Patrick Yoes, Fraternal Order of Police, Report on Communications Infrastructure Challenges Faced by First Responders During Hurricane Katrina (2015), http://bit.ly/2mDomBc. Additionally, when the FOP is able to act as a collective bargaining agent for broader groups, it can negotiate for uniform radio equipment purchases across an entire bargaining unit. Intuitively, acting as a group resolves some of the compatibility issues, particularly when a small number of bargaining units can coordinate on making uniform radio

equipment purchases across many neighboring police departments.

The FOP also acts on a localized level by applying pressure on radio equipment manufactures to provide quality products. For example, the FOP has employed litigation as necessary to pressure equipment manufacturers to remedy defects in radio equipment. *See*, *e.g.*, Knight, http://cin.ci/2qrxzRU (last visited Jan. 18, 2018).

As a result, the FOP and other similarly situated law enforcement unions are able to improve officer and first responder communication, which in turn, serves both officer and public safety.

4. Law enforcement employers have recently dealt with a nationwide shortage of qualified candidates to fill jobs. *See*, *e.g.*, Oliver Yates Libaw, ABC News, *Police Face Severe Shortage of Recruits*, http://abcn.ws/2rUiWDP; Vinny Vella, Courant Community, *Hartford Officials: Lack Of Qualified Applicants Forced Delay In Adding Cops To City Force*, Feb. 21, 2017, http://cour.at/2lUsNam.

Effective collective bargaining allows law enforcement to counter this problem by negotiating well-rounded work conditions, which is crucial to recruiting a qualified workforce and maintaining prompt incident response times. The FOP aids in this regard by negotiating for officers' benefits, equipment, salary, work schedule, and other bargaining criteria. The FOP, and similarly situated organizations, also offer added protection to officers by representing them in cases of

alleged misconduct. *See*, *e.g.*, The Associated Press, The New York Times, *Ohio City's Police Union Fights U.S. in Brutality Case*, Nov. 26, 1999, http://nyti.ms/2CZVGx0. This gives officers added reassurance that they will be adequately defended in instances where it may be politically expedient for a law enforcement employer not to defend an officer in high-profile matters. *See*, *e.g.*, *id*.

Moreover, union negotiations also work to offset the public-sector pay penalty. The Economic Policy Institute has found that public employees already suffer from a "pay penalty" relative to their private sector counterparts. *See* Keefe, http://bit.ly/1GPE2Ts. If this Court were to strike down *Abood*, it would essentially convert all states to "right-to-work" states. Consequently, the public-sector pay penalty would increase, making recruiting law enforcement personnel more difficult. *Id*.

Without acceptable working conditions, law enforcement agencies may have trouble recruiting qualified officers to serve our communities. This would affect staffing levels and law enforcement response times. Each of these problems directly impacts public safety. *See*, *e.g.*, Ryan Knutson, Wall Street Journal, *Why Uber Can Find You but 911 Can't* (Jan. 7, 2018) (noting that "U.S. Regulators estimate as many as 10,000 lives could be saved each year if the 911 emergency dispatching system were able to get to callers one minute faster").

5. Organizations like the FOP help protect the public by policing online sales of officer equipment, such as badges, which have been used to impersonate officers and commit crimes. *See*, *e.g.*, Don Van Natta, Jr., The New York Times, *In Florida, Criminals Pose as Police More Frequently and for More Violent Ends*, May 28, 2011, http://nyti.ms/2COCAFT. The FOP actively monitors websites like eBay, Amazon, and others, expending its own resources to do so. *See*, *e.g.*, Fraternal Order of Police, *FOP unanimously endorses Resolution calling for boycott of eBay*, Aug. 15, 2007, http://bit.ly/2FIQJMr. Without any such oversight, individuals could purchase police gear, with limited or lower risk of detection, and use that equipment to impersonate officers or commit crimes.

6. The FOP is able to draw on the experience of its over 325,000 members located throughout the country to provide all kinds of services, none of which are political in nature. *See generally*, Section II.A., *supra*. The FOP is also able to aggregate financing from this network to provide sophisticated and coordinated services across larger groups that law enforcement employers would likely forego altogether.

For example, the FOP offers frequent training seminars on a wide range of topics, including: crisis management; compliance with federal laws such as the

Hatch Act (5 U.S.C. §§ 7321 et seq.)[5], *Miranda*[6] rights, and *Garrity*[7] rights; and police encounters with the medically or mentally ill. *See*, *e.g.*, Fraternal Order of Police, *Legal Counselors Seminar February 26-27, 2016 Las Vegas, Nevada*, Jan. 3, 2015, http://bit.ly/2D0QDeQ; *see also* Fraternal Order of Police, *2018 NFOP Legal Counselors Seminar*, http://bit.ly/2FncifR. These training seminars are nonpolitical in nature; indeed, the FOP tailors such activities to improve officer effectiveness, and in turn, public safety.

7. Finally, organizations such as the FOP are well-positioned to facilitate valuable information flow that wouldn't otherwise be available. For example, the FOP offers informative studies on salaries for adjacent or nearby jurisdictions. *See*, *e.g.*, Fraternal Order of Police, *Labor Services*, http://bit.ly/2DoxbH2 (last visited Jan. 18, 2018); Fraternal Order of Police, *Research*, http://bit.ly/2FuOdDJ (last visited Jan. 18, 2018). The FOP also offers training for emerging high-profile issues such as the opioid crisis. *See*, *e.g.*, The Heritage Foundation, *Policing in America: Lesson from the Past, Opportunities for the Future*, Sept. 18, 2017, at 24, http://bit.ly/2mxPYbz (noting the challenges presented

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[5] The Hatch Act governs the political activity of public employees to protect the government workforce from partisan political influences.

[6] Referring to the rights officers must read to suspects upon arrest as enumerated in *Miranda v. Arizona*, 384 U.S. 436 (1966).

[7] As enumerated in *Garrity v. New Jersey*, 385 U.S. 493 (1967), which applies protection against self-incrimination to officers in the workplace.

by the heroin epidemic and advising that officer-administered naloxone can be an essential tool used to save lives). Surely, Petitioner would *not* contend that the FOP's time spent devising strategies and reports to deal with challenging issues such as the heroin epidemic are "inherently political."

This expertise extends further to vetting implementation of cutting edge equipment intended to aid officers and support public safety. For example, the FOP has aided efforts to incorporate police body cameras on its officers. *See*, *e.g.*, Fraternal Order of Police, *Legal Counselors Seminar February 26-27, 2016 Las Vegas*, Nevada, Jan. 3, 2015, http://bit.ly/2D0QDeQ. The FOP has also investigated the efficacy of virtual reality training to enhance officers' ability to handle challenging situations in the line of duty. *See*, *e.g.*, Megan Cassidy, The Republic, *Arizona police to get virtual-reality training on use of force; Tempe company VirTra gets contract*, Dec. 19, 2016, http://bit.ly/2mbWCmE. Through this work, the FOP has been able to advise various state and municipal jurisdictions on best practices for purchasing and implementing viable virtual reality training systems. *Id*. The FOP expends its own resources to produce sophisticated cost-benefit analyses, which individual municipalities lack independent resources or willpower to replicate.

For example, the FOP cautioned Arizona police departments against full-scale rollout of virtual reality technology after the FOP discovered a number of glitches in the system that would have cost the departments millions of dollars for unproven technology. *Id*.

B. DECISIONS ABOUT WHETHER TO ALLOW AGENCY SHOP AGREEMENTS ARE PROPERLY LEFT TO THE STATES.

Even if Petitioner's First Amendment concerns are given some credence, this Court should not universally strike down agency shop provisions. Instead, the decision on whether to authorize agency shop provisions should remain with the states.

As Justice Scalia recognized:

> [I]t is utterly impossible to erect, and enforce through litigation, a system in which *no* citizen is intentionally disadvantaged by the government because of his political beliefs. . . . These laws and regulations have brought to the field a degree of discrimination, discernment, and predictability that cannot be achieved by the blunt instrument of a constitutional prohibition.

See Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 694-95 (1996) (Scalia, J., dissenting) (emphasis in original).

State legislatures and local municipalities are in the best position to evaluate the collective bargaining climate in their localities and set laws to address those issues as they relate to public employment. The Supreme Court should not disturb this long-standing dynamic grounded in principles of federalism.

For example, not all states authorize an agency shop regime. *See* Aitchison, *The Rights of Law Enforcement Officers* at 10-11. Many states, like Ohio, permit

but do not require agency shop provisions. The issue is consequently one left to the bargaining process in each locality of Ohio. In these arrangements, every employer has the right to say "no" if it does not believe an agency shop system will help it manage its workforce, taking into account what is best given the unique context in which it operates.

CONCLUSION

Today's law enforcement personnel are fighting an onslaught of difficult issues. An opioid epidemic inflicts damage across our communities nationwide. Racial and cultural tensions are high. Mass shootings have dominated the national headlines. The FOP has sought to help law enforcement personnel confront these challenges head-on by promoting and collectively negotiating for comprehensive training initiatives, community outreach programs, better equipment purchases, and reacting efficiently in a manner that best serves the idiosyncratic needs of each jurisdiction our officers serve in. These initiatives are made possible, in large part, through fair share dues which the FOP and similarly situated unions use to advocate for officer and public safety rather than political gain.

The Petitioner asks this Court to overturn 40 years of precedent and, as a direct consequence, make the job that much harder for our Nation's law enforcement officers. This Court should decline the invitation

to do so. This Court should hold that agency shop provisions remain lawful.

For the foregoing reasons, the FOP respectfully requests this Court reaffirm *Abood*.

Respectfully submitted,

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