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 INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

The International Brotherhood of Teamsters (IBT) is a labor organization with more than 1.3 million members across the United States and Canada, including more than 200,000 workers employed by states, cities, counties, school districts and other public entities. The IBT's local affiliates serve as collective bargaining representatives for working men and women in a huge variety of occupations. In addition to representing employees in traditional Teamster crafts in the private sector, affiliates of the IBT represent, among many other public employees, support staff at Pennsylvania State University, the University of Minnesota, and the University of California system; public defenders in Minnesota; sanitation workers and other employees of various public agencies in New York City; health care workers in public medical facilities across the country; law enforcement officers in 26 states; correctional and other employees of Cook County, Illinois; and public school principals in Philadelphia.[1]

The Teamsters' members would be adversely affected by a decision that invalidates longstanding arrangements, set up in reliance on this Court's precedents, by which the costs of collective bargaining representation are spread among all bargaining unit workers who benefit from it.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief responds to claims by Petitioner and his *amici* that the States lack an important interest in preserving agreements that fairly allocate the costs of collective bargaining representation because collective bargaining purportedly works just as well without a fair-share requirement. As demonstrated below, long experience with collective bargaining in the United States shows the opposite.

As an initial matter, Petitioner fights a straw man by attacking *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for "wrongly assum[ing]" that fair-share fees are a necessary component of every exclusive representative system. Pet. Br. at 3; *see also id.* at 37. *Abood* was not predicated on such an assumption. At the time of *Abood*, as today, some states banned fair-share arrangements for private sector workers covered by the National Labor Relations Act (NLRA), and some public sector collective bargaining systems did not use fair-share arrangements. Moreover, strict necessity has never been the test for the constitutional validity of accommodations agreed to by public employers. *See* Resp. AFSCME Council 31 Br. at 20-29.

What *Abood* actually said is that a state that chooses a democratic system of exclusive representative collective bargaining to fix employment terms and resolve grievances for public employees may also conclude that "important government interests" are best served by having all unit workers share the costs of employee representation. 431 U.S. at 225. *Abood* recognized that assessing all employees for their proportionate share of representational expenses

"distribute[s] fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' who refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222. *Abood*'s observations about fairness and free riding were correct at the time, and experience has demonstrated that they remain correct today.

A system that legally requires an exclusive representative to bargain and process grievances for all unit workers while, at the same time, relying solely on voluntary contributions to pay the costs of those activities, will lead to free riding, unfairness, and the underfunding of the collective bargaining system. *See* Mancur Olson, Jr., *The Logic of Collective Action* 85-87 (2d ed. 1971). In such a system, free riding is economically rational for all workers – including workers who want effective representation. *Id.* at 88. Moreover, that rational free riding forces workers who choose to pay union dues to bear more than their proportionate share of the cost of representation of the entire unit, which further discourages voluntary payments. As a result, absent a mechanism to spread the costs of collective bargaining representation, some collective bargaining units will not be viable at all, while others will lack the funding necessary for effective representation. *Id.* at 87.

In challenging *Abood*, Petitioner and his *amici* urge that the existence of collective bargaining systems for federal employees and employees in so-called right-to-work environments demonstrate that *Abood*'s underpinnings in basic economic logic are wrong. Pet. Br. at 37-38; *see also* U.S. Br. at 20-21 (arguing that federal employee unions demonstrate

that there is no meaningful relationship between fair-share arrangements and exclusive representation). But Petitioner did not develop a factual record about the real-world impact of fair-share arrangements on the stability and effectiveness of employee representatives, and the Court should not overturn decades of precedents, relied upon in thousands of contracts, based on untested and counterintuitive suppositions. Moreover, an analysis of the *actual experience* of federal employee unions and unions in so-called right-to-work jurisdictions demonstrates that Mancur Olson's economic logic was right.

To begin with, the federal system does not permit bargaining over wages or benefits, so it is not even an apt comparison to robust public employee bargaining systems that permit fair-share arrangements. In any event, the federal system is plagued by free riding. About two-thirds of federal employees in bargaining units that democratically chose union representation do not pay any dues to support collective bargaining costs. The rampant free ridership means that the federal government has to finance core employee representation activities in other ways, and it means that some federal employees bear more than their fair share of the costs of their employer's system of fixing and enforcing employment terms and resolving employee grievances.

Likewise, in other environments that use exclusive representative bargaining without a fair-share requirement, union membership rates are much lower, free riding is rampant, and employee representation is less effective. Petitioner's *amici* understand that, absent a fair-share requirement, all workers have an economic incentive to free ride. One *amicus*'s campaigns even use the slogan "Keep Your Money.

Lose nothing." to encourage union members in units without fair-share requirements to resign.[2] That is, the campaign tells workers there is no logical reason to voluntarily pay for services that must, by law, be provided to the entire bargaining unit for free.

Petitioner also urges that, even if *Abood* was right about the underlying economic logic, public employers have no legitimate interest in dealing with adequately funded collective bargaining representatives. Pet. Br. at 60-61. This simply ignores the role that collective bargaining plays in workforce management. States that choose to use collective bargaining systems as a mechanism to determine public employment terms and fairly resolve grievances have an important interest in the effective operation of those systems, which depend on the existence of effective employee representatives. The Court should not deprive those states of the ability to negotiate agreements which fairly distribute the costs of employee representation.

ARGUMENT

I. The Example of Federal Employee Unions Does Not Show that Illinois Lacks an Important Interest in Fair-Share Arrangements.

Contrary to the assertions of Petitioner and his *amici*, the experience of federal employee unions does not demonstrate that state and local collective bargaining systems would function just as well without fair-share fees. As a threshold matter, federal employee collective bargaining is not an apt comparison because employees cannot bargain over wages or benefits and because the system involves very large units that provide economies of scale. That dispositive

[2] See Appendix (reproducing flyer from anti-union group).

point aside, federal employee collective bargaining also suffers from very serious free riding problems, and the federal government consequently supports necessary employee representation in other ways.

A. Federal employee collective bargaining is not analogous to typical state and local bargaining.

The scope of collective bargaining in the federal sector is very limited, most notably in that bargaining over wages and benefits is *prohibited*.[3] *See Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 649 (1990) ("The wages and fringe benefits of the overwhelming majority of Executive Branch employees are fixed by law . . . and are therefore eliminated from the definition of 'conditions of employment'" over which federal employees may collectively bargain.). By contrast, the vast majority of the 41 states that authorize at least some public sector employees to bargain collectively allow those employees to bargain over wages and benefits. *See* Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States* at 7, Ctr. for Econ. and Pol'y Res. (2014).[4]

The much narrower scope of federal sector bargaining directly affects unions' operating expenses. Negotiations are much simpler, given the limited subset of bargainable issues. Because wages

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[3] This brief refers to "federal employees" to mean employees covered by the Federal Service Labor-Management Relations Statute (FSLMRS). 5 U.S.C. § 7103. Postal service employees are covered by the National Labor Relations Act "to the extent not inconsistent with" certain provisions specific to the Postal Service. 39 U.S.C. § 1209(a).

[4] http://cepr.net/documents/state-public-cb-2014-03.pdf

and fringe benefits are set by statute, federal employee unions also do not require the services of accountants, economists, and benefits actuaries, who typically participate in more comprehensive collective bargaining negotiations. *See Abood*, 431 U.S. at 221 (Collective bargaining may require "lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel.").

The federal sector also uses large, often national, bargaining units that provide economies of scale for the federal unions. Agency-wide bargaining units are permitted, and the Federal Labor Relations Authority (FLRA) may consolidate, without an election, two or more bargaining units at the same agency that are represented by the same labor organization. 5 U.S.C. § 7112(a), (d). The FLRA applies a pro-consolidation standard. The consolidated unit need not "be *more* appropriate than the non-consolidated units." *U.S. Dep't of Interior, Nat'l Park Serv. & AFGE, AFL-CIO*, 69 F.L.R.A. 89, 95 (2015). Instead, consolidation requires only that the consolidated unit satisfy the general criteria for an appropriate bargaining unit. *Id.* at 94-95 (citing § 7112(a), which directs the FLRA to consider whether a proposed unit shares a "community of interest," promotes "effective dealings" with management, and allows for "efficien[t]" agency operations); *see also* Sam Estreicher, *The Paradox of Federal-Sector Labor Relations: Voluntary Unionism without Collective Bargaining over Wages and Employee Benefits*, 19 Emp. Rts. & Emp't Pol'y J. 283, 288 & n. 14 (2015) (describing FLRA pro-consolidation practice).

The FLRA has certified many national, agency-wide bargaining units. For example, the American Federation of Government Employees represent more

than 200,000 employees in a single bargaining unit at the Veterans Affairs Department, and the union represents 42,000 Transportation Security Administration officers under another contract. *See* Press Release, AFGE, *AFGE, VA Sign New Collective Bargaining Agreement* (Mar. 28, 2011)[5]; Press Release, AFGE, *TSA Officers Agree to New Contract* (Dec. 19, 2016)[6]. By contrast, many state and local collective bargaining systems involve far smaller bargaining units. For example, Local 1932, an IBT affiliate in California, has *nineteen* different contracts for the fewer than 2,000 employees of the City of San Bernardino.

In the federal sector, the parties' bargaining obligations extend only to bargaining between "the certified exclusive representative and agency, respectively." *U.S. F.D.A. & AFGE AFL-CIO Council No. 242*, 53 F.L.R.A. 1269, 1274 (1998). For the many nationwide bargaining units, bargaining occurs only at the national level unless the parties "authorize local components to bargain supplemental and other agreements over particular subjects or in particular circumstances." *Id*. At these nationwide units, a single bargaining team represents tens (or even hundreds) of thousands of employees. Federal employee unions therefore harness significant economies of scale to lower the per-member cost of collective bargaining, and those economies are unavailable to small state and local government employee bargaining units like those represented by Local 1932. *See* Estreicher,

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[5] https://www.afge.org/publication/afge-va-sign-new-collective-bargaining-agreement/

[6] https://www.afge.org/article/tsa-officers-agree-to-new-contract/

supra, at 297 n. 62 (noting the economies of scale in federal employee labor-management relations).

B. Most federal employees free ride even though a majority of covered employees support union representation.

Because of rampant fee riding, only a small minority of federal employees belong to a labor union. *See* Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the CPS* (noting that only 19% of federal employees are members of a union).[7] Two thirds of federal employees in bargaining units represented by unions are not dues-paying members. Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 26 (5th ed. 2014) ("[O]ut of the approximately 1.9 million full-time [federal employees] who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues."); *see also id*. ("Free riders pose a serious problem for federal unions."). In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court hypothesized that a "high percentage" of employees who want union representation will "willingly pay[] union dues." *Id.* at 2641. But the example of federal employee unions demonstrates that the desire for employee representation does not equate with a willingness to pay for that representation if, by law, it must be provided to all unit workers for free.

Federal employee unions cannot form unless a majority of the employees in the bargaining unit chooses union representation. 5 U.S.C § 7111(a). Once represented, federal employees can decertify the

[7] http://www.unionstats.com

union if a majority of the unit's employees no longer want representation. *See id.* § 7111(b)(1)(B). So federal employee bargaining units do not form, or continue to exist, unless the union has majority support. Yet far from a "high percentage" of those covered employees pay dues. *Harris*, 134 S. Ct. at 2641. Instead, only about a third do. Kearney & Mareschal, *supra*, at 26. Many federal employees who want representation make the economically rational decision not to pay for that representation because, by law, it must be provided anyway for free and because, if they do pay for it, they would be subsidizing the free riders. These employees reason, consistent with basic economic theory, that each employee "alone would not perceptibly strengthen the union . . . [but] . . . would get the benefits of any union achievements whether or not he supported the union." Olson, *supra*, at 88.

C. The federal government must directly support core collective bargaining activities.

To provide federal employees with meaningful (albeit limited) collective bargaining representation in a free-rider environment, the federal government must use other methods to support "core" representational activities, i.e. "collective bargaining, contract administration, and grievance adjustment." *See Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)).

Federal employees who serve as employee representatives for collective bargaining negotiations, grievance processing, contract administration, and other representational activities are entitled to "official time for such purposes," meaning that the

federal government pays the employee's salary while he or she works on behalf of the bargaining unit. 5 U.S.C. § 7131. By covering the employee's salary, official time enables the federal government to directly support some of the costs of the employee representative, thereby partly making up for the consequences of not having a fair-share requirement.[8]

The federal government also pays directly for a grievance resolution system, in contrast to typical state and local collective bargaining systems. In Illinois, public sector collective bargaining agreements must contain a grievance and arbitration procedure requiring the union and employer to share the cost of arbitration. 5 Ill. Comp. Stat. 315/8. Thus, the union must pay for half the cost of hiring a private arbitrator. Federal employees, by contrast, have the option to challenge a discharge or other serious disciplinary action before the Merit Systems Protection Board (MSPB).[9] *See* 5 U.S.C. §§ 7512, 7513(b), (d). Claims before the MSPB are heard by administrative law judges, who are salaried federal employees. *Id.* § 1204(b). So disputes before the agency do not require the union to share in the cost of arbitration.

Whether the federal employee grieves the discipline before the MSPB or an arbitrator, moreover, the employee, when successful, may be entitled to

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[8] State collective bargaining systems set up in reliance on *Abood* typically depend far less on "official time" and similar arrangements.

[9] A represented federal employee may also choose, in the alternative, to challenge disciplinary action before an arbitrator, pursuant to the terms of the employee's collective bargaining agreement. 5 U.S.C. § 7121(e)(1).

recoup reasonable attorneys' fees from the government. 5 U.S.C. § 5596(b). The statute allows for fee awards to outside counsel as well as in-house, staff counsel of federal employee labor unions. *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 932 (Fed. Cir. 2000). When the employee chooses the MSPB option and is awarded fees, then, the federal government covers the entire cost of the dispute resolution process by paying for the decision-maker who hears the employee's claims and reimbursing the cost of the employee's representation. *See, e.g.*, *Wells v. Harris*, 2 M.S.P.B. 572 (2010) (example of MSBP awarding attorneys' fees to union counsel).

Federal employee collective bargaining agreements also often provide union locals with rent-free office space in federal buildings. *See U.S. Dep't of Veterans Aff. & AFGE Local 31*, 60 F.L.R.A. 479, 482 (2005) ("[U]nion office space is a substantively negotiable condition of employment."). The union locals with collective bargaining agreements that have these provisions operate from a location that is both rent-free and in close proximity to management. This lowers union operating expenses by freeing up resources that would otherwise need to go toward office space and transportation.

* * *

In sum, the example of federal employee unions does not demonstrate that basic economic theory is inapplicable to employee exclusive representation. Rather, to the extent the federal experience is relevant at all in light of the limited scope of bargaining and federal government financial support of employee representation, it confirms that *Abood* correctly understood the underlying economic incentives.

II. The Example of Collective Bargaining in Other Environments Without Fair-Share Arrangements Does Not Support Petitioner's Arguments.

Petitioner and his *amici* also point to collective bargaining systems in those states that do not permit fair-share arrangements as purportedly showing that Illinois lacks an important interest in preserving its fair-share agreements. Again, however, the actual empirical evidence shows otherwise. Union membership is much lower, and free riding much higher, without fair share arrangements. As a result, many potential bargaining units never form, and some existing bargaining units collapse, because employee representatives cannot represent unit workers with such low membership. Because there is no method to fairly allocate the cost of representation, the units that do exist have fewer resources and therefore are less effective representatives.

A. Unionization rates are much lower and free riding is often rampant without fair-share arrangements.

Union representation is much less prevalent in states that bar fair-share arrangements. Across all sectors, public and private, the percentage of employees who are represented by a union is nearly 60% lower in states that prohibit fair-share arrangements. Elise Gould & Will Kimball, *"Right-to-Work" States Still Have Lower Wages*, *Econ. Pol'y Inst. Briefing Paper No. 395* at 5 (April 22, 2015).[10]

In the public sector, of the 20 states with the *highest* percentage of employees who are union

[10] http://www.epi.org/files/pdf/82934.pdf

members, only one prohibits fair-share arrangements (Michigan), and in that state the prohibition went into effect too recently to have a full impact.[11] *See* Hirsch & Macpherson, *Union Membership and Coverage Database from the CPS*; 2012 Mich. Pub. Act No. 349. By contrast, 19 of the 20 states with the *lowest* union membership percentages prohibit fair-share arrangements.

Comparing data from before and after the adoption of fair-share prohibitions also demonstrates the effect of such prohibitions. Between 1964 and 2011, three states shifted from allowing to prohibiting fair-share arrangements: Louisiana (1976), Idaho (1986), and Oklahoma (2001). In each state, union membership dramatically decreased.

Louisiana. In the twelve years before Louisiana adopted a law barring fair-share arrangements, the overall percentage of Louisiana employees who were union members stayed relatively constant, fluctuating between 16% and 19.2% (and the rate was 17.3% in 1976, when the law passed). In the next twelve years, however, the unionization rate fell by nearly half, to 9.8%. The state's rate fell significantly faster than the overall U.S. average, which dropped only 30% during

[11] Petitioner's *amici* cite data from Indiana and Michigan to argue that prohibitions on fair-share arrangements do not have an adverse effect on public employee union membership rates. *See* Buckeye Inst. for Pub. Policy et al. Br. at 7-9. But those states' bans went into effect in 2012 and 2013, respectively. 2012 Ind. Acts 7-11; 2012 Mich. Pub. Act No. 349. And the bans apply only to collective bargaining agreements that take effect after the laws' adoption. Ind. Code § 22-6-6-13; Mich. Comp. Laws § 423.210(b). So it is too soon for data from Indiana and Michigan to reflect the impact of the new laws.

the same period. *See* Hirsch & Macpherson, *Union Membership and Coverage Database from the CPS*.

Idaho. The percentage of Idaho private sector employees who belonged to a union declined "significantly faster" than neighboring states after Idaho prohibited fair share arrangements in 1986. Emin M. Dinlersoz & Rubén Hernández-Murillo, *Did "Right-to-Work" Work for Idaho?*, 84 Fed. Reserve Bank of St. Louis Rev. 29, 30 (2002).

Oklahoma. Oklahoma's adoption of a 2001 law barring fair share arrangements led to a 20.6% drop in the number of private sector workers who were union members. Ozkan Eren & Serkan Ozbeklik, *What Do Right-to-Work Laws Do? Evidence from a Synthetic Control Method Analysis*, 35 J. of Pol'y Analysis and Mgmt. 173, 182 (2016).[12]

The free rider problem is so pronounced in states that bar fair-share arrangements that in some

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[12] *Amici* Buckeye Institute et al. argue that prohibiting employers from fairly distributing the cost of representation would have only a "limited" effect on union membership. Buckeye Inst. for Pub. Policy et al. Br. at 12. But the statistics that *amici* cite are nonsensical. For instance, *amici* claim that free ridership is 2.4 times higher in states that allow fair-share arrangements – that is, that free ridership is *higher* in states that permit agreements that make it impossible to free ride. *Id.* at 10-11. To the extent *amici's* argument can be deciphered, the gist appears to be that, if the Court overrules *Abood*, some workers who are currently fair-share payors would become union members rather than free ride. Maybe so. But the statistics that *amici* cite indicate that, at most, only a minority (30%) will do so. The remaining 70%, according to *amici*'s argument, will free ride. And *amici* does not account for the union members who would resign rather than pay additional dues for all the free riders. So, even at face value, the data do not support *amici*'s contention that the effect of overruling *Abood* would be "limited."

bargaining units only a minority of covered employees actually pay dues. This is so even though a majority of covered workers *want* collective bargaining representation (or they would not have voted for representation in the first place, or would vote to decertify the representative).

The example of AFSCME Iowa Council 61 is illustrative. Public sector workers in Iowa recently voted overwhelmingly to recertify their unions (i.e. reaffirm that they want union representation), with 86% of eligible voters (and 97% of voters who cast a ballot) voting for recertification.[13] Yet only about 34% of the workers Iowa Council 31 represents pay dues.[14] So even though the vast majority of unit workers support representation for collective bargaining and grievance resolution, only about a third of the unit workers will pay for that representation if it is otherwise available, by law, to all unit workers for free. The circumstances of Local 238, an IBT affiliate in Iowa, are similar. Across Local 238's bargaining units, 97% of votes cast were in favor of recertification, meaning that there were many more votes in favor of recertification than there are members of the union.

The experience of public employee representatives in Iowa is far from unique, as Petitioner's own *amicus* admits. *See* Mackinac Ctr. for Pub. Policy Br. at 27-29 (stating that the two largest public employee unions

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[13] Retention and Recertification UNOFFICIAL Results: Election October 10-24, 2017, Iowa Public Employee Relations Board, *available at* https://iowaperb.iowa.gov/sites/default/files/OctoberResults_Final2.pdf

[14] *Compare* AFSCME Iowa Council 61, 2016 Form LM-2 Report, *with* About AFSCME, AFSCME Iowa Council 61, *available at* http://www.afscmeiowa.org/

in Florida have only 27% and 25% membership, respectively). Petitioner and his *amici* portray low membership rates as showing that workers do not want collective bargaining representation, but without majority support these units would not have chosen, and continue to have, collective bargaining representation. The low membership rates show that economic theory about free riding behavior is correct in practice.

This circumstance is not limited to public sector unions. For example, Local 370 of the International Union of Operating Engineers (IUOE) represents 400 private sector employees at MotivePower, a locomotive manufacturer in Idaho, which does not allow fair-share requirements. Only 32% of employees in the MotivePower bargaining unit pay dues, meaning that the other 68% free rides, requiring their fellow workers to pay higher dues to cover their representational costs, including handling their individual grievance cases. *See Int'l Union of Operating Eng'rs Local 370 v. Wasden*, 217 F. Supp.3d 1209, 1211-12 (D. Idaho 2016). The "unfairness" of this rampant free riding has produced "friction" at MotivePower because "members resent having their dues and fees used to underwrite work that benefits nonmembers who pay nothing." Decl. of Curt Koegen, ¶ 4, Dkt No. 21-1, *Int'l Union of Operating Eng'rs Local 370 v. Wasden*, 217 F. Supp.3d 1209 (D. Idaho 2016) (No. 4:15-cv-00500). Free riding this extensive is not unique to Local 370. In another Idaho bargaining unit with minority membership, IUOE has been forced to nearly double membership dues, which have consequently become a "financial burden" for many of the workers who have remained as members. *Id.* ¶ 31.

As the majority of the workforce, the non-members could decertify the Idaho bargaining units if they wished to do so. *See* 29 U.S.C. § 159(c). Yet they have not done so. This example, and those discussed above, further discredit the mistaken assumption that a "high percentage" of employees who support union representation will pay for it if they would otherwise receive it for free. *Harris*, 134 S. Ct. at 2641.

B. Some bargaining units are not viable without a requirement that all employees share in the cost of representation.

Basic economic theory predicts that some bargaining units will never form in environments that use exclusive representation bargaining without fair-share arrangements because it will not be financially viable to represent the workers, even if most prefer representation. *See* Olson, *supra*, at 2 (Large groups will not "form organizations to further their common goals in the absence of . . . coercion" or some other "separate incentive, distinct from the achievement of the common or group interest."). Empirical data confirms this.

In the first five years following passage of a ban on fair-share arrangements, new private sector bargaining unit "organizing is reduced by 50%. In the next five years, it is reduced by roughly 25%." David T. Ellwood & Glenn A. Fine, *The Impact of Right-to-Work Laws on Union Organizing* at 23, Nat'l Bureau of Econ. Res. (May 1983).[15] This reduction in organizing is consistent with the theory that new bargaining units have more difficulty forming in states that prohibit fair-share arrangements. There are also many

[15] http://www.nber.org/papers/w1116.pdf

bargaining units where the elimination of a fair-share arrangement forced the representative to abandon the unit, even though workers had not decertified the union, because representation was no longer financially viable.[16] *See, e.g.*, *American Sunroof Corp.-West Coast, Inc.*, 243 NLRB 1128 (1979); *North Mem'l Med. Ctr.*, 224 NLRB 218 (1976); *Brewery Drivers and Helpers Local Union 133*, 1995 WL 1918089 (N.L.R.B. Div. of Judges, Sept. 14, 1995).

Petitioner argues that exclusive representation alone suffices to create and sustain effective union representation, and relies on an imaginary comparison between unionization rates in states that, according to Petitioner, either allow or ban exclusive representation. Pet. Br. at 41 & n. 20. But Petitioner's comparison is inapt.

Petitioner actually compares union membership rates in states that have exclusive representation systems with union membership rates in states that have no collective bargaining system for public employees at all – and where therefore it is obvious that unions are not viable representatives regardless of employee preferences regarding union representation.[17] The correct comparison to assess the

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[16] The NLRA permits represented employees to deauthorize a fair-share arrangement contained in their collective bargaining agreement. 29 U.S.C. § 159(e)(1). Deauthorization does not terminate the collective bargaining agreement or the employees' relationship with the union, as with decertification, but instead annuls only the fair-share arrangement.

[17] Three of the states that Petitioner cites – North and South Carolina, and Virginia – ban all public sector collective bargaining. N.C. Gen. Stat. § 95-98; Va. Code § 40.1-57.2; *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000). The fourth state, Georgia, bans collective bargaining for all public

relationship between exclusive representation and union viability would be to compare exclusive representative collective bargaining and an alternative that actually involves some form of bargaining, the most obvious of which is members-only collective bargaining, a system where unions bargain only for their members. Under a members-only system, a union could bargain for increased wages and benefits that would be available only to the members of the union, meaning that an employee would need to join the union to earn the higher wages or receive the increased benefits. None of the states that Petitioner cites have such a collective bargaining system, nor does any other state.

It is no accident that the States do not use members-only bargaining. As this Court has recognized, such a system would not advance employers' interests because it would be burdensome (and smack of unfairness) for employers to implement different wage, benefits, and grievance resolution systems for employees performing the same job. *See Abood*, 431 U.S. at 220 ("The designation of a single representtative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment.").[18]

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employees save firefighters. Ga. Code Ann. §§ 20-2-989.10; 25-5-4. In the remaining state, Mississippi, no statute authorizes public sector collective bargaining, which "traditionally has been construed as a prohibition" on such bargaining. James C. May, *The Law and Politics of Paying Teachers Salary Step Increases upon Expiration of a Collective Bargaining Agreement*, 20 Vt. L. Rev. 753, 776 & n. 157 (1996).

[18] *See also* Sen. Rep. No. 573 (1935), *reprinted in* 2 Leg. Hist. of the National Labor Relations Act 2313 (1935) ("Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at

Petitioner and his *amici* also would likely claim that a system in which public employers grant higher wages and benefits to union members violates the Equal Protection Clause. So the data Petitioner cites says nothing about the effect of exclusive representation itself on union viability.[19]

C. Employee representatives are less effective in systems that do not fairly distribute the cost of representation.

The unions that do form in states that bar fair-share arrangements are less effective advocates for the workers they represent. For example, in the private sector, construction fatalities are 40% higher in states that bar fair-share arrangements. Roland

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the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule."); H.R. Rep. No. 1147 (1935), *reprinted in* 2 Leg. Hist. of the NLRA 3070 ("There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides.").

[19] Petitioner points out that exclusive representation regimes still exist for "partial" public employees like homecare and childcare providers, even after *Harris* held that fair-share arrangements could not be used. Pet. Br. at 37-38. In fact, the adverse effect of *Harris* on those units is already clear. *Amicus* Freedom Foundation boasts that more than 65 percent of the membership of one Washington childcare local resigned after *Harris*. *See* App'x to Rebecca Friedrichs et al. Br.; *see also* Maxford Nelson, *Freedom Foundation Efforts Decimating SEIU 925*, Freedom Found. (Oct. 15, 2015), *available at* https://www.freedomfoundation.com/labor/freedom-foundation-efforts-decimating-seiu-925/. Additionally, this Court's decision in *Harris* emphasized that the minimal role of the union differentiated that system from collective bargaining for "full-fledged" public employees, making *Abood*'s rationale inapplicable. 134 S. Ct. at 2634-35.

Zullo, *Right-to-Work Laws and Fatalities in Construction*, 14 J. of Lab. & Soc'y 225, 228 (2011). Fatality rates in states that bar fair-share agreements do not vary significantly based on the state's percentage of employees who are union members. *Id.* at 231. But in states where employers are permitted to fairly allocate the cost of collective bargaining representation among all workers, "fatality rates with low union density are about double the fatality rate with high union density." *Id.* Accordingly, not only are construction fatalities lower in states that allow fair-share arrangements, but also "the positive effect that unions have on reducing fatalities appears to be stronger in [those] states." *Id.* at 232.

This finding is consistent with what economic theory would predict: unions are less effective representatives without fair-share fees because free-riding leads to fewer resources for representing workers. *See* Zullo, *supra*, at 225, 232 (data confirm hypothesis that construction trades unions in states that bar fair-share arrangements have "fewer resources to devote to safety training and accident prevention"). Dues from members must subsidize the representation of non-member free riders, and there are limits to how much members are willing to pay to do so. As a result, these representatives will have fewer resources per member to engage in core representational activities.

Petitioner argues that the additional cost to represent non-members is "minor." Pet. Br. at 45. But Petitioner provides no support for this assertion, and it makes no sense. Petitioner's argument is essentially that the cost of representation is fixed, regardless of the number of employees in a bargaining unit. It is true that, for larger bargaining units, some economies

of scale exist that may moderate the cost of representing non-members. *See* Section I.A., *supra*. But if Petitioner were right that the costs of representing non-members is "minor," then fair-share fees should be vanishingly small in large bargaining units. This is simply not the case. For example, the fair-share fee for Respondent AFSCME Council 31 – which counts as members 90% of the 66,151 employees it represents – is roughly 79% of full membership dues. JA 76; AFSCME Council 31 2016 Form LM-2 Report. Instead, the expense of negotiating and administering contracts, and communicating with bargaining unit workers, unquestionably increases with unit size.

Petitioner also argues that unions do not actually have to handle grievances for non-members. Pet. Br. at 46-47. But Illinois requires all collective bargaining agreements to provide procedures for grievance arbitration that apply to "*all* employees in the bargaining unit," and further provides that, when the grievance procedure involves arbitration, the "costs of such arbitration shall be borne equally by the employer and the employee organization." 5 Ill. Comp. Stat. 315/8 (emphasis added). Processing such grievances, which frequently requires attorneys and arbitrators, and may require economists and other experts, does not come cheap.

Further, it makes sense for a state to mandate a unit-wide grievance procedure because it serves the employer's interest in uniformity. *See Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967) (uniform grievance procedures benefit employers because an exclusive representative weeds out "frivolous grievances" and assures "that similar complaints will be treated consistently," thereby reducing "the cost of the

grievance machinery."). Uniform, unit-wide grievance procedures have long been the norm for both public and private employers. They are the traditional trade-off for no-strike obligations. *See Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247-48 (1970). Such procedures are simply not, as Petitioner would have it, a union demand to which employers accede and that unions could unilaterally forgo.

D. Opponents of public employee unions understand and exploit the economic logic of free riding.

Petitioner's attempt to minimize the effect of overruling *Abood* is undercut by his own *amici's* recognition of the power of the free rider logic. After the Court's decision in *Harris*, for example, *amicus* Freedom Foundation sent flyers to homecare and childcare workers with the slogan "Opt-out Now. Keep Your Money. Lose Nothing." *Anti-union group targets Oregon public sector unions*, Northwest Labor Press (Sept. 1, 2015).[20] A reproduction of a flyer is included in an Appendix to this brief. These flyers reflect *amicus* Freedom Foundation's attempt to exploit the underlying economic logic: it makes sense to free ride when, by law, unions must represent all workers for free, and members who remain must pay additional dues for those free riders.

There is no doubt that a decision overruling *Abood* would be followed by a similar, if not more vigorous, campaign to encourage union members to resign and free-ride, with the goal of weakening or destroying employee representation in jurisdictions that now use

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[20] https://nwlaborpress.org/2015/09/anti-union-group-targets-oregon-public-sector-unions/

fair-share arrangements. *See* Letter from CEO Tom McCabe to Freedom Foundation Membership (Oct. 1, 2017) (on file with author) (stating that a decision overruling *Abood* would "take government unions out of the game for good"). Far from disputing the problem of free ridership in the absence of a fair-share requirement, opponents of public sector unions seek to exploit the problem to destabilize employee representatives.

III. The Court Should Not Prohibit States from Using What They Determine to be the Most Effective Collective Bargaining System to Fix Employment Terms and Resolve Grievances.

There is no requirement that states establish collective bargaining systems for public employees. This Court has made clear that government officials may, consistent with the First Amendment, negotiate unit-wide contract terms with a majority-chosen representative, *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288-90 (1984), just as government officials may, in the alternative, choose to consult exclusively with individuals, *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 464-66 (1979), or with no one. Although most states use exclusive representative bargaining to set terms for at least some public employees, nine states do not authorize any form of public employee collective bargaining whatsoever. *See* Appendix to Br. for the States of New York et al. as A.C. in *Friedrichs v. California Teachers Ass'n* (14-915).

If a state decides to use exclusive representative collective bargaining to set employment terms for a unit of workers, however, the state should have the

authority to agree to allocate the costs of such representation among all unit workers. Petitioner argues that states have no legitimate policy reason to make this choice because, according to Petitioner, distributing the cost of collective bargaining across all employees does not contribute to union stability. Pet. Br. at 37-38. But basic economic theory and the actual empirical evidence show otherwise.

In the same vein, Petitioner contends that, even if spreading the cost of representation does lead to adequately funded unions, public employers still do not have an important interest in fair-share arrangements because "[n]o rational actor wants to deal with a powerful negotiating opponent." Pet. Br. at 61. Petitioner's view of public sector labor relations is much too simplistic, however, and ignores the actual evidence that effective employee representatives perform an important function within the employer's human resources system, thereby benefiting the employers. The City of Chicago, for example, must manage a workforce numbering in the tens of thousands, including sanitation workers, police officers, and firefighters, who perform the varied functions necessary to maintain and provide services to a city of over 2.7 million residents. The City must have a method of fixing employment terms and resolving employee grievances that will be accepted by the workforce as fair. The City's choice of an exclusive representative collective bargaining system to perform those functions requires an adequately funded, effective employee representative, just as the adversarial system of justice depends on adequate representation of both sides.

Stable employee representation channels employee concerns in a productive manner. *See*

Patricia N. Blair, *Union Security Agreements in Public Sector Employment*, 60 Cornell L. Rev. 183, 189 (1975) (Adequately funded public sector unions are less likely to assume an "unnecessarily militant attitude toward management."). It helps run fair and efficient "grievance machinery." *Vaca*, 386 U.S. at 192. It gives all employees a stake in workplace management, which is especially important when seeking to implement innovative solutions. *See Knight*, 465 U.S. at 291 (describing public employers' interest in basing decisions on the "majority view" of employees); U.S. Dep't of Labor Task Force on Excellence in State and Local Gov't through Labor-Mgmt. Cooperation, *Working Together for Public Service: Final Report* at 1 (1996) (finding numerous examples of public sector labor-management collaborative solutions that were "instrumental" in improving public services). Having a known representative with whom public employers are used to dealing handle employee grievances rather than individual attorneys without a stake in or understanding of the intended constructions of the collective bargaining agreement is much more advantageous to the public employer. Accordingly, there are legitimate reasons for a public employer to prefer to deal with effective public employee bargaining representatives.

Upon choosing a system of exclusive representation, public employers should have the discretion to also agree to fairly allocate the costs of that representation to all of their employees who benefit from it. Depriving public employers of that discretion based on the false assumption that fair allocation makes no difference to the quality and effectiveness of representation is simply "inconsistent with sound

principles of federalism and the separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

CONCLUSION

For the foregoing reasons, the Seventh Circuit's decision should be affirmed.

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APPENDIX

Flyer from Freedom Foundation's post-*Harris v. Quinn* campaign to encourage resignations from union membership.