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

MATTHEW T. BODIE
Saint Louis University School of Law*
100 N. Tucker Blvd.
St. Louis, MO 63101
MBodie@slu.edu
(314) 977-7507

*Provided for identification purposes

CHARLOTTE GARDEN
Counsel of Record
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
RONALD A. PETERSON LAW CLINIC
Seattle University School of Law*
901 12th Ave.
Seattle, WA 98122
GardenC@seattleu.edu
(206) 398-4073

Counsel for Amici Curiae

QUESTION PRESENTED

This brief addresses the following question:

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

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INTEREST OF AMICI CURIAE[1]

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

The institutional affiliations of the signatories listed in Appendix A are provided for identification purposes only.

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

SUMMARY OF ARGUMENT

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

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

Collective bargaining has proven benefits for public employers – including improved delivery of public services – because it provides an efficient method of setting compensation and other working conditions, and a productive channel for workers to be heard and to resolve their differences with management. In addition, collective bargaining is linked to a host of related workplace benefits,

including reduced employee turnover, increased job satisfaction, and improved worker productivity.

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

Agency fees also avoid the collective action problem that would otherwise inevitably arise because workers receive the benefits of union representation whether or not they contribute toward its costs. And research shows both that free riding is common where workers are not required to pay an agency fee, and that it has a deleterious effect on unions' abilities to represent workers. These negative effects will be felt by public employers as well, because under-resourced unions are less likely to achieve the stability- and productivity-enhancing benefits described above.

II. This Court's First Amendment case law has consistently afforded public employers flexibility to manage their employees to deliver public services. In particular, this Court has long permitted governments acting in their managerial capacities (rather than as sovereign) significant leeway to limit employees' speech in the interest of workplace efficiency. In light of that longstanding principle, the key inquiry in this case should be whether governments adopt agency fee policies in their role as employers. Given the workforce management benefits of collective bargaining described above, it is

plain that they do. Accordingly, *Abood* is consistent with this Court's general approach to public employees' First Amendment rights and should not be overturned.

ARGUMENT

States and localities bear responsibility for providing critical government services, including law enforcement, education, sanitation, and fire and disaster protection. As Justice Powell noted in his dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 575 (1985), those services "epitomize the concerns of local, democratic self-government" and "affect the everyday lives of citizens."

Yet setting pay and other working conditions for public workforces is difficult, as is maintaining a working environment in which problems get resolved in a timely and orderly fashion. These challenges can arise in any workplace, but they are multiplied for government employers. For example, the state of Illinois employs thousands of workers across more than fifty agencies; their job titles include police officer, child welfare specialist, janitor, aircraft pilot, steamfitter, toll collector, and more. Illinois Comptroller, Employee Salary Database, http://bit.ly/2rbbbgn (last visited Jan. 18, 2018).

Determining compensation, benefits, and other working conditions for all of these different jobs is a massive undertaking. For example, public employers must weigh budgetary limitations against the need to compete with the private sector for workers – but public sector employers are

monopsonists, and public sector jobs are different from their private sector counterparts in some important ways, making this equation difficult to solve. *See* Joseph Slater & Elijah Welenc, *Are Public Sector Employees "Overpaid" Relative to Private-Sector Employees? An Overview of the Studies*, 52 Washburn L.J. 101 (2013) (discussing difficulty of valuing certain public sector job benefits). And setting initial pay and benefits is only the first hurdle: employees' skills and qualifications, and public employers' requirements will all change over time, meaning new human resources questions will arise repeatedly during employees' tenure.

One way to solve all these problems might be through bargaining with employees on an individual basis. But the sheer scale of many state and municipal workforces makes that impossible, at least where public employers are unwilling to employ massive numbers of human resources professionals and compensation specialists. Unilateral imposition of terms and conditions of employment carries other risks, including that employers may fail to understand what their employees most value, and thus use their limited labor cost budgets inefficiently.

To solve this and other management problems, public employers might either hire a management consultant, or they might give employees the option of bargaining collectively. Here, collective bargaining has three main advantages for employers: first, it gives employees an opportunity to exercise voice, which may be independently valuable to them; second, employees

might see the outcome of collective bargaining as more legitimate than the outcome of an employer's unilateral decision based on a recommendation; and third, a union performs these services without charge to public employers.[2] But bargaining and contract administration are not costless. Rather, unions support themselves in mostly one of two ways: a system of entirely voluntary dues, or a system of agency fees. The advantages of the latter – greater predictability and equality – benefit employers who choose this method of workplace management.

Control over how to manage the critical relationship between public officials and the public employees who carry out the work of government is at the heart of this case. Petitioner asks this Court to prohibit public employers from managing their workforces through a system of collective bargaining with an employee-selected union whose core functions are funded in part through mandatory agency fees. Their argument is inconsistent with this Court's longstanding practice of deferring to public employers that are acting in their managerial capacity to ensure the efficient delivery of public services.

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[2] In addition, public workers have a constitutional right to join unions whether or not their employers establish a framework for collective bargaining. *Smith v. Ark. State Hwy Emp. Local 1315*, 441 U.S. 463, 465 (1979). This means public employee unions are a fact of life for public employers, who may then decide they are better off working constructively with unions than pursuing other courses of action, like ignoring the union and setting pay and working conditions unilaterally.

I. States Should Be Permitted to Establish Their Own Human Resource Structures, Including Collective Bargaining With Elected Unions Supported By Agency Fees.

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

In addition, states may now decide whether or not to permit unions to charge represented workers an agency fee, and many states have concluded that the benefits of collective bargaining are best achieved when each represented employee contributes to his or her union's core representation expenses. In short, agency fees are a fair way of ensuring that elected union representatives have the funding they need to represent every member of the bargaining unit.

A. States Have Managed Their Public Workforces through Collective Bargaining to Avoid Workplace Disruption and Improve Delivery of Public Services.

In addition to making substantive human resources decisions about whom to hire or fire and

how much to pay, state and local governments must decide how to manage the large numbers of workers they employ to provide the high level of services that citizens appreciate and expect. This is a challenge, but public-sector employers do have one significant advantage over private employers: our federalist structure allows states to dictate the laws that govern their internal labor-management relationships. In other words, states sit in the unusual position of simultaneous rule-setter and game-player when it comes to public sector bargaining.

States frequently exercise this freedom in light of their evolving views of how to achieve the best outcomes – that much is clear from recent legislative and regulatory changes in a number of states. *See, e.g.*, Mich. Comp. Laws §§ 423.26, 432.201(1)(a). It is thus instructive that most states allow at least some public employees to bargain collectively. Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512-13 (2013) (noting that as of 2007, all but seven states had some provision for public sector bargaining). States' public sector labor relations regimes reflect a range of decisions on issues such as which employees (if any) may elect a bargaining representative, how to resolve bargaining impasses, whether (and which) public employees may strike, how to process employee grievances, and which working conditions are subject to bargaining. *See id.* at 512-13; Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 Cornell J.L. & Pub. Pol'y 735 (2009) (comparing Virginia, which has outlawed

public sector collective bargaining, with Illinois, which has adopted robust collective bargaining).

These laws came about as part of states' adaptive responses to the challenges described above. Whereas some of petitioners' *amici* suggest that public sector collective bargaining is harmful to the public interest and attribute its existence to misaligned political incentives,[3] both history and empirical research demonstrate important employer and public benefits of public sector collective bargaining. First, states' experiences over the last several decades show the value of collective bargaining in delivering public services; indeed, many public employers began bargaining with employee unions in order to ensure efficient service. Second, research confirms that collective bargaining effectively resolves differences between employees and management, helping minimize potential discord and disruption. Third, collective bargaining improves workers' longevity and productivity, and yields other positive employment and service-delivery outcomes.

1. The utility of public sector bargaining for public employers is illustrated by its use long before the first state public-sector bargaining statute was passed in 1959. Joseph Slater, *Public Workers: Government Employee Unions, the Law, and The*

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[3] *E.g.*, Br. Amicus Curiae of Pac. Legal Found., et al., at 18-26. In contrast to the picture painted by some of petitioner's *amici*, employee organizations (and later unions) have served as an "important wedge between political party machines and public employees." William Herbert, *Card Check Labor Certification: Lessons From New York*, 74 Alb. L. Rev. 93, 101 (2010-11).

State, 1900-62 158 (2004). The first American public worker organizations emerged in the early 1800s in federal shipyards. Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 14 (5th ed. 2014) (describing naval shipyard strike, which was resolved when President Andrew Jackson granted workers a ten hour day); *see also* David Ziskind, *One Thousand Strikes of Government Employees* 24-25 (1940). By the early 1900s, postal clerks, teachers, firefighters, and other public sector workers had begun to unionize, such that the number of unionized public sector workers nearly doubled from 1915 to 1921, and overall union density in the public sector increased from 4.8 percent to 7.2 percent. Slater, *supra*, at 18.

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

through negotiation) and the U.S. Post Office (oral agreements that the Post Office followed). *Id.*

By the late 1950s, increasing acceptance of public sector unions and the growing disparity between law and practice led states and the federal government to begin to authorize public-sector bargaining formally. *Id.* at 158-59, 190. By 1966, sixteen states had enacted laws granting at least some organizing and bargaining rights to public employees, and by the end of the 1970s, a majority of states had adopted such laws. *Id.* at 191; Seth Harris, Joseph Slater, Anne Lofaso & Charlotte Garden, *Modern Labor Law in the Private and Public Sectors: Cases and Materials* 64-65 (2nd ed. 2012).

Statements of purpose in several states' collective bargaining laws as well as legislative materials reveal that these laws were aimed at achieving a set of related goals, including improving the delivery of public services, and recruiting and retaining high-quality employees by establishing positive working relationships with them. *See, e.g.*, NY Civ. Serv. § 200 (1969) (purpose of New York's Taylor Law is "to promote harmonious and cooperative relationships between government and its employees and to protect the public"); Cal. Gov. Code § 3512 (purpose of public sector collective bargaining statute is to "promote the improvement of personnel management and employer-employee relations"); *Pennsylvania Governor's Commission to Revise the Public Employment Law* 7 (1968) (absence of collective bargaining rights "reduces the value of [government employment] to that employe [sic]");

Rhode Island's Commission to Study Mediation and Arbitration 2 (1966) ("To achieve high quality education, good relations between teaching personnel and school boards are indispensable."); Ohio Legislative Service Commission, *Public Employee Labor Relations* 2 (1969) ("the employee's efficiency and contribution to the service generally increases if he participates in the decisions"); New York, *Governor's Committee on Public Employee Relations Final Report* 9 (1966) ("protection of the public from strikes in public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment").

2. Consistent with these states' early findings, research shows that collective bargaining provides a productive channel for employees to set working conditions and resolve differences between public workers and employers.[4] By facilitating employees' input into the terms and conditions of their work,

[4] Consequently, public sector collective bargaining also reduces strikes. Janet Currie & Sheena McConnell, The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation, 37 J.L. & Econ. 519, 532 (1994) (finding, in study of state and local government workers over a fifteen-year period, that "[s]trike incidence is highest when the parties have neither a duty to bargain nor dispute-resolution procedures"); Kearney & Mareschal, supra at 247-48 (reviewing studies). Thus, even states that generally eschew public sector bargaining sometimes permit union representation and collective bargaining for public safety employees, where service interruptions due to strikes would be singularly costly or dangerous. As a result, nearly all states permit bargaining by professional firefighters, including some that authorize no or nearly no other bargaining. Id. at 65-66.

union representation – including contract negotiation, grievance processes, and impasse procedures – prevents or mitigates employee dissatisfaction before it reaches a disruptive level. Moreover, the creation of structured channels for communication can help management and employees to understand each other's perspectives and enable early intervention and ongoing, low-level problem solving.

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

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

Empirical studies find that where mature collective bargaining relationships develop, "unions can increase firm productivity in certain industries, particularly if management constructively embraces, rather than fights, union contributions." Dau-Schmidt & Traynor at 109-10; *see also* Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 19 (1985) ("unions are associated with greater efficiency in most settings"); *see also* Lizanne Lyons & Anthony D. Vivenzio, *Employee Involvement in Seattle: Reengineering Government in a City Lacking a Financial Crisis*, 27 Pub. Personnel Management 93 (1998) (describing successful labor-management partnership aimed at improving workplace efficiency).

Further, public employers have successfully worked with labor to achieve a variety of employer goals, such as rationalizing employee work schedules or lowering health insurance costs. For example, in Peoria, IL, a joint labor-management task force trimmed $1.2 million from a $6 million health care budget, while maintaining high employee satisfaction with the plan. Patrick Parsons *et al.*, *A Labor-Management Approach to Health Care Cost Savings: The Peoria Experience*, 27 Pub. Personnel

Management 23, 24 (1998). Similar examples abound. *See*, *e.g.*, Erin Johansson, *Improving Government Through Labor-Management Collaboration and Employee Ingenuity*, Jobs With Justice Educ. Fund, 7-8 (Jan. 2014), http://bit.ly/2B0wErV;_Mayor's Press Office, *Mayor Emanuel, Labor Management Cooperation Committee Commit to Working Towards $20 Million in Health Care Savings for 2016*, City of Chicago (Sept. 10, 2015), http://bit.ly/2DeR1HF. It is easy to see how union involvement makes a difference in these difficult situations: not only do many unions have substantive expertise about administering health insurance programs, but a union's perceived legitimacy will be critical to achieving employee buy-in to employer cost-cutting.

For similar reasons, public employers and unions can also work collaboratively towards improvements in service delivery. In Ohio, labor-management cooperation led to "millions of dollars in savings" across state government, with former Governor George Voinovich observing that "[m]y feeling is that labor is key" to successful quality management efforts. U.S. Dep't of Labor, *Report of the U.S. Secretary of Labor's Task Force on Excellence in State & Local Government Through Labor-Management Cooperation* (1996), *available at* http://1.usa.gov/1klt2bG. In Massachusetts, a joint venture between labor unions and MassHighway resulted in a sixty percent reduction in workers compensation claims, significant reductions in use of overtime and sick time, and millions in savings. *Id.*, *available at* http://1.usa.gov/1ix3J5e. And in Cuyahoga County, Ohio, the Children and Family

Services agency worked with the union representing its employees to lower turnover by devising ways for social workers to work more proactively, and thus make their jobs more satisfying. Allyne Beach and Linda Koboolian, *Public Service, Public Savings: Case Studies in Labor-Mangement Initiatives in Four Public Services*, The Public Sector Labor-Management Committee & The John F. Kennedy School of Government at Harvard University, 27 (2003), http://bit.ly/2FNjCS6. In all of these examples, public employee unions provided expertise and served as conduits for information-sharing between managers and front-line workers, with positive results for the efficient and effective administration of government service.

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

Many states that have chosen to manage their workforces through collective bargaining have also created a mechanism for duly elected unions to collect agency fees. Agency fees distribute the costs of exclusive representation equally among represented workers to whom a union owes a duty of fair representation, and they ensure that the union has sufficient resources for states to achieve the benefits of collective bargaining.

1. In virtually every state and municipality that bargains collectively with its employees, the obligation to bargain is triggered when a union is

elected to represent all of the employees in a bargaining unit – this is known as the "exclusive representation" system.[5] *See, e.g.*, 5 Ill. Comp. Stat. § 315-7 (2014); Cal. Gov't Code § 3543.3 (1976). Exclusive representation is much more straightforward than alternatives such as bargaining with multiple employee representatives. Only three states have ever experimented with proportional union representation, and two of them rapidly abandoned that initiative.[6] Martin H. Malin,

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[5] Petitioner makes two misleading claims about the nature of exclusive representation. First, he observes that union membership "skyrocketed" in states that adopted exclusive representation, as compared to states that ban exclusive representation, implying that exclusive representation alone is enough to encourage union membership. Pet. Br. at 41 n.20. But the latter states do not just ban exclusive representation – they either make public sector collective bargaining illegal, or they make no provision for mandatory bargaining. *See* Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, Center for Econ. & Pol'y Research, 5 (March 2014), http://bit.ly/2Dbe7ij. Employees who do join unions in those states presumably do so in order to participate in the unions' other activities, such as lobbying and political advocacy.

Second, Petitioner writes that unions assume the role of exclusive representative "voluntarily." Pet. Br. at 43. But a corollary of the exclusive representation system is that public employers will not bargain with a labor union that does not have that status. A union that disclaimed exclusive representative status would have no right to represent any employees in bargaining. *See, e.g.*, 5 Ill. Comp. Stat. § 315-7 (2014).

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

Ann C. Hodges & Joseph E. Slater, *Public Sector Employment: Cases and Materials* 340 (2d ed. 2011).

When acting as an exclusive representative, a labor union has a duty to represent fairly all employees within the bargaining unit. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) ("It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed."); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) ("Our First Amendment jurisprudence therefore recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other."). In light of the relationship between exclusive representation and the duty of fair representation, agency fees fairly distribute the costs of a union's obligations to represent all employees in a bargaining unit. Moreover, this "constellation of powers, privileges, duties, and restrictions unique to labor relations" also justifies treating unions differently than other types of associations – which cannot compel dues, but also do not bear obligations to nonmembers. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 174 (2015);[7] *see also Lehnert* 500 U.S. at 556.

[7] Estlund develops the thesis that labor law restricts and empowers labor unions in ways that set them apart from other

Given public sector unions' responsibilities, the economic consequences of eliminating agency fees are easy to predict. Even an employee who desires union representation may rationally decide not to pay a voluntary representation fee when the benefits of union representation – including individualized benefits like grievance representation – cannot be withheld from non-payers. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 88, 124 (1971) ("A rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union."). This Court has also acknowledged this economic reality. *See Harris v. Quinn*, 134 S.Ct. 2618, 2638 (2014); *Abood,* 431 U.S. at 221-22.

Research confirms the intuitive proposition that when a union's services are available with or without payment, many will choose not to pay. Jeffrey H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington's & Winter's,* The Unions

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voluntary associations, which bear no legal responsibilities to non-members, suffer none of the restrictions on speech and action, and bear none of the other obligations imposed on unions by the 1947 Taft-Hartley Amendments and 1959 Landrum-Griffin Act. As she explains, Congress's carefully calibrated statutory scheme for regulating industrial relations and achieving labor peace requires the continued existence of a fair mechanism for funding the unions' obligations, not only to ensure the efficient operation of the statutory bargaining regimen in the interest of all affected parties, but because the availability of such funding was an essential cornerstone of the legislative compromise. *Id*. at 173-76, 196-200, 206-08, 215-20.

And the Cities, 34 Comp. Lab. L. & Pol'y J. 251, 258 (2013) ("[p]ublic sector open shop laws reduced average employee departmental unionization by 4.0% for fire services, 10% for highways, 12% for sanitation, and 15% for police" and describing research finding "union density is almost double where unions are allowed to negotiate agency shop union security provisions, using CPS data from 1983 to 2004."); *see also* Jeffrey H. Keefe, *On Friedrichs v. California Teachers Association: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation*, Econ. Pol'y Inst. (2015), http://bit.ly/2mKx5Bq; Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, 56 Indus. & Labor Relations Rev. 349, 349–54 (2003). Likewise, when Michigan recently eliminated agency fees for union-represented public sector workers, union membership fell. *See* U.S. Dep't of Labor, *Union Affiliation of Employed Wage & Salary Workers By State*, *available at* http://bit.ly/2mSlam6; *see also* Keefe, *Inextricable Links* at 2-3. And, following this Court's decision in *Harris v. Quinn*, an advocacy group took credit for convincing forty percent of Oregon homecare workers who were covered by the decision to stop paying union dues or fees. Ben Straka, *40 Percent of Oregon Caregivers Leave SEIU After Freedom Foundation Outreach*, Freedom Found. (Jul. 28, 2017), http://bit.ly/2mAZk6y.[8]

[8] The same organization also recently sent an employee dressed as Santa Claus to stand outside government buildings in Washington. The group encouraged workers to "give themselves a present worth several hundred dollars" by opting

Perhaps some of these workers are dissenters who objected to union representation and chose not to pay union dues on that basis. But others surely decided not to subsidize their co-workers' union representation – and instead to be subsidized by others – to save money. *See* Casey Ichniowski & Jeffrey S. Zax, *Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. Lab. Econ. 255, 273 (1991) (empirical study concluding that the "free-rider hypothesis provides a more compelling explanation" of membership decline in right-to-work states than ideological opposition to union representation).

Employee free riding undermines states' interests in equitable workforce policies and risks sowing dissent in the workplace. *Abood,* 431 U.S. at 221-22 (recognizing the state interest in fairly distributing collective bargaining costs); *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (discussing need for public employers to maintain workplace discipline, morale, workplace harmony, and efficiency). Moreover, to the extent states adopt public sector collective bargaining statutes because they prefer that method of setting pay rates and other working conditions, that interest is also undermined: research shows that right-to-work laws make it less likely that public sector

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out of the non-mandatory portion of union dues – an appeal aimed at encouraging workers to make the economically rational decision to opt out regardless of their support for the union's non-chargeable activities, as discussed further in the next paragraph. *Freedom Foundation Santa Delivers Opt-Out Message to Forcibly Unionized State Workers*, Freedom Found. (Dec. 17, 2015), http://bit.ly/2DuWsPQ.

bargaining units will form. Jeffrey S. Zax & Casey Ichniowski, *Excludability and the Effects of Free Riders: Right-to-Work Laws and Local Public Sector Unionization*, 19 Pub. Finance Quarterly 293, 294 (1991).

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

As this Court has recognized, labor unrest may result if dissatisfaction with an under-resourced union leads employees to seek out a representative that is better able to perform its duties. *See Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460

U.S. 37, 52 (1983) (the "exclusion of the rival union may reasonably be considered a means of insuring labor-peace" by preventing the employer from "becoming a battlefield for inter-union squabbles"); *Abood*, 431 U.S. at 224 (discussing the "confusion and conflict that could arise if rival . . . unions, holding quite different views as to [terms and conditions of employment], each sought to obtain the employer's agreement"). Moreover, when unions are at risk of losing funding from any employee dissatisfied with any aspect of the representation, they may respond by concluding that they "must process every grievance, placate every member, fight for every little cause, in order to hold its membership. The secure union, on the other hand, can tell off a member just as well and sometimes better than management can." Md. Dep't of Labor, Licensing and Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 19 (1996).

Eliminating states' choice to permit or require agency fees would not only leave states vulnerable to intra-workforce conflict and resentment as some workers free-ride on others, but would also leave states less able to compete with the private sector for the best workers and respond to employee dissatisfaction through collective bargaining. Of course, the prospect of workplace disruption poses special concerns for public employers and administrators. It also presents a certain irony – as discussed above, the speedy resolution of workplace disputes or disagreements is one significant reason states allow public employees to bargain collectively. Yet if states cannot ensure that an elected union has

the financial means to competently represent its members, they may lose the very benefits that led them to authorize collective bargaining in the first place.

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

In *Abood*, this Court wrote that "[t]he governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal [private sector] labor law." 431 U.S. at 224. In other words, the court viewed the labor peace interests in the NLRA context and in the public sector as similar. But if anything, that comparison undervalues states' interests in implementing their own labor relations policies as compared to Congress's interest in setting labor relations policy for the private sector.[9] As discussed in the previous section, states' and municipalities' have varied interests in structuring collective bargaining with their own workforces, in addition to labor peace: efficiently determining compensation and other working conditions; obtaining employee buy-in and reducing turnover; and substantive improvements in

[9] Since *Abood*, this Court has held as much in the conceptually analogous Eleventh Amendment context. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 67 (2000) (the ADEA was a proper exercise of Congress's commerce power, but not a proper abrogation of state sovereign immunity).

service delivery, just to name a few. Thus, whereas Congress created a labor relations framework that mostly left the substance of collective bargaining agreements to the "free play of economic forces," *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976) (internal quotation marks and citation omitted), public sector employers have intersecting sovereign and managerial interests in arranging their labor relations models to achieve their own substantive goals; these include the hiring and retention of well-qualified workers, the efficient resolution of disputes, and the provision of continuous public service.[10]

This Court has recognized in countless cases that governments acting in their managerial capacity have significantly more power to control workers' speech than governments acting in their sovereign capacities have over non-employee citizens. That principle is especially forceful in the context of state and local governments, where federalism also weighs in favor of states' managerial authority. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (states' managerial choices are entitled to "the same sort of presumption of legislative validity as are state

[10] As discussed above, some states and municipalities adopted formal collective bargaining structures to provide a channel to resolve workplace disputes and avert strikes. To be clear, the phenomenon of strikes by public sector workers, *see generally* Ziskind, *supra*, prompted some public employers to adopt collective bargaining – not the other way around. As the research cited in note 4, *supra*, shows, that was a reasonable response, because formal collective bargaining and dispute resolution mechanisms have been shown to reduce strikes.

choices designed to promote other aims within the cognizance of the State's police power"). The outcome in this case should be no different; indeed, it is petitioner who seeks an anomalous departure from settled law.

Given their responsibilities over core governmental functions, states and localities require significant autonomy in workforce management. For that reason, this Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 599 (2008); *see also Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011) ("The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("The government as employer indeed has far broader powers than does the government as sovereign."); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947) ("For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."). Accordingly, this Court has permitted public sector employers much of the same discretion over human resources management as enjoyed by the private sector. *See NASA v. Nelson*, 562 U.S. 134, 152 (2011) ("Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who

will efficiently and effectively discharge their duties." (internal quotations omitted)); *Connick v. Myers*, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter."); *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564 (1973) (holding Congress may bar public employees from engaging in certain political activity).

Managing public sector labor relations by bargaining with an elected exclusive representative that is financially supported by agency fees is no different than the numerous other restrictions or requirements that government employees must accept. The balance struck in *Abood* recognized as much in holding public employees could be required to pay their share of union expenses related to collective bargaining – that is, expenses attributable to the union's dealing with the state in its capacity as employer – but not other activities, including those related to the union's dealing with the state in its capacity as sovereign. 431 U.S. at 235-36. Subsequent cases, including *Harris v. Quinn*, have only reinforced that principle. 134 S. Ct. at 2642 ("with respect to the [workers at issue], the State is not acting in a traditional employer role"); *Locke v. Karass*, 555 U.S. 207, 213 (2009); *Lehnert*, 500 U.S. at 520-21; *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301-02 (1986).

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

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

Accordingly, this Court has permitted significant limits on public employees' speech and association, provided they are reasonably linked to the government employer's managerial interests. That principle explains why government may prohibit some public employees' core political speech even when they are off-duty. *Mitchell*, 330 U.S. at 99-100 ("If . . . efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."); *see also Nat'l Ass'n of Letter Carriers*, 413 U.S. at 565 (holding that Hatch Act limits on public employees' participation in political campaigns are constitutional because

they "will reduce the hazards to fair and effective government"). *Mitchell* and its progeny also illustrate that this Court typically defers to government employers' determinations about what employment policies will promote the efficient provision of public services. 330 U.S. at 100 (government employer need not prove that political neutrality is "indispensible"); *see also Kelley*, 425 U.S. at 247 (regulation of law enforcement personnel is entitled to deference, unless "there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property"); *Broadrick v. Okla.*, 413 U.S. 601, 697 n.5 (1973) (stating that "the legislature must have some leeway" in implementing restrictions on employees' partisan political activities).[11]

This Court has applied the same principle in countless other cases involving limits on public employee speech, upholding limits that are

[11] The dispositive significance of the government-as-employer's interests in maintaining organizational efficiency is further illustrated by this Court's decisions concerning the role of political considerations in employment decisions. On one hand, this Court has rejected political patronage systems for most employees because the interests that support political patronage for non-policymaking employees "are not interests that the government has in its capacity as an employer." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 n.4 & 75 (1990). However, the Court also noted that patronage may be permissible where "'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Id.* at 71 n.5 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). It is the presence of legitimate managerial concerns that makes the difference to the First Amendment outcome.

reasonably connected to the public employer's interests in managing its workforce, and rejecting those that are not, even when the worker speaks as a citizen. *E.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1988) (public school teacher could not be punished for speaking as a citizen where speech did not "impede[] the teacher's performance of his daily duties" . . . or "interfere[] with the regular operation of the schools generally"); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995) (prohibition on compensation for public employees' outside speeches or writing is unconstitutional where employees' speech occurred in "their capacity as citizens," and "does not even arguably have any adverse impact on the efficiency of the offices in which they work"); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("[T]he state interest element of the [*Pickering*] test focuses on the effective functioning of the public employer's enterprise."). *Harris v. Quinn* is simply the latest iteration of this principle; there, this Court's holding rested largely on its conclusion that Illinois did not employ the personal assistants who opposed payment of a mandatory agency fee, 134 S.Ct. at 2638, and therefore by definition was not entitled to the deference usually afforded to public employers.

Thus, even if collective bargaining is speech on a matter of public concern by employees acting as citizens, a key inquiry in this case is whether

collective bargaining supported by an agency fee is reasonably related to Illinois's interest in managing its workforce. And, as the previous section illustrates, states adopt systems of collective bargaining with elected unions that may charge agency fees for the management-related goals of improving operational efficiency and minimizing workforce conflict and disruption.

When an elected union sits across the bargaining table from a public employer or pursues a grievance, it acts as an agent for one or more public employees regarding their terms and conditions of employment in a manner that quintessentially involves government-as-employer rather than government-as-sovereign. This is perhaps most readily apparent in the context of grievance proceedings where a union argues on behalf of a single employee that a single contract term has been misapplied. *See Guarnieri*, 131 S. Ct. at 2496 (allowing close First Amendment scrutiny of "grievances on a variety of employment matters" . . . "would raise serious federalism and separation-of-powers concerns"). Relatedly, the application of contract terms in individual grievance proceedings would be unlikely to raise an issue of public concern. *Guarnieri*, 131 S. Ct. at 2501 (public employees may not "transform everyday employment disputes into matters for constitutional litigation in the federal courts"); *see also* William B. Gould IV, *Organized Labor, The Supreme Court, &* Harris v. Quinn*: Déjà vu All Over Again?*, 2014 Sup. Ct. Rev. 133, 158-59.

Negotiation over terms and conditions of employment for a bargaining unit as a whole is no

different. As Justice Scalia pointed out during oral argument in *Harris v. Quinn*, there is no meaningful difference between an individual public employee asking for a raise on behalf of all public employees (perhaps because the employee is aware that civil service protections limit the authority of the employer to give a single employee a raise) and a union seeking a raise on behalf of all employees in a bargaining unit.[12] Transcript of Oral Argument at 8 (No. 11-681) ("it's the same grievance if the union had presented it . . . the grievance is the salaries for policemen are not high enough."). Moreover, many collectively bargained terms and conditions of employment concern prosaic issues that may be of significant importance to public employees, but are of little public importance. For example, petitioner cites employee retention, discipline, and transfer policies "political" issues about which some unions bargain, Pet. Br. at 14, but this Court has already held that internal decisions about when or how to transfer public employees are generally not a matter of public concern. *Connick*, 461 U.S. at 148. In all of those examples, the government acts as an employer managing its employees; accordingly, deference to states' managerial choices about when – and under

[12] Even as to wages and benefits, the effect of collective bargaining on the size of public budgets is often small, and therefore should not implicate the *Harris* majority's concern about the effects of collective bargaining on overall program budgets. Keefe, *A Reconsideration and Empirical Evaluation supra*, at 272-73 (2013) (citing studies); *cf. Harris*, 134 S. Ct. at 2642-43 (reasoning that collective bargaining over Medicaid-funded home healthcare providers would qualify as a matter of public concern because it "would almost certainly mean increased expenditures under the Medicaid program").

what terms – collective bargaining supported by an agency fee should be permitted is appropriate under this Court's case law.

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

[13] As *City of Madison* illustrates, represented workers remain free to oppose their bargaining representative in any forum to which they can gain access; indeed, the average union wage premium leaves represented workers with more resources with which to oppose union positions in public fora or lobby for revocation of public sector bargaining statutes. Thus, the restriction on public employees in this case is much less than *Mitchell*'s complete ban on certain political activity.

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

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

If this Court holds that public employees have a right not to fund union activities related to collective bargaining, other common workplace arrangements will also be called into question.

Many states now sponsor defined contribution pension funds for their employees, which are both managed by and invested in private companies. Alicia H. Munnell *et al.*, *Defined Contribution Plans in the Public Sector: An Update*, Ctr. for Retirement Research at Boston College, 1-2 (2014), http://bit.ly/2ESBmdJ; *see also* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 867-68 (2012). For example, since 1997, new Michigan state employees have been enrolled in a 401(k) plan, and employees hired after 2010 have two percent of their salary contributed to the plan, which is administered by a private company called Voya Financial. Alicia H. Munnell *et al.*, *A Role for*

Defined Contribution Plans in the Public Sector, Ctr. for Retirement Research at Boston College, 5 (2011), http://bit.ly/2ER3zRU; Mich. Office of Retirement Servs. Home Page, http://www.michigan.gov/orsstatedc (last visited Jan. 18, 2019).[14] Public employees who participate in plans like Michigan's necessarily pay investment management companies' fees, which the management companies can then use to make political contributions, hire lobbyists, and otherwise participate in the public sphere. In other words, the structure of privately managed public employee benefits is a close parallel to the agency fee structure, except that *Abood* is more protective of employees who do not want part of their compensation put towards a private entity's political spending. Accordingly, these benefits could also be vulnerable to First Amendment challenge if this Court overrules *Abood*.[15]

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

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[14] In addition, even employees with defined benefit plans have long had supplementary tax-deferred accounts that are similar to defined contribution plans. Munnell *et al.*, *Defined Contribution Plans in the Public Sector supra*, at 1.

[15] Similarly, states sometimes pay human resources consultants, employment lawyers, and dispute resolution experts to manage public workplaces, and provide no opportunity for employees to "opt out" of the political and lobbying spending by those third-party providers. *See* Estlund, *supra*, at 171.

CONCLUSION

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

Respectfully submitted,

MATTHEW T. BODIE
Saint Louis University
School of Law*
100 N. Tucker Blvd.
St. Louis, MO 63101
MBodie@slu.edu
(314) 977-7507

*Provided for identification purposes

CHARLOTTE GARDEN
Counsel of Record
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
RONALD A. PETERSON LAW CLINIC
Seattle University
School of Law*
901 12th Ave.
Seattle, WA 98122
GardenC@seattleu.edu
(206) 398-4073

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