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 FOR RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31

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QUESTIONS PRESENTED

1. Whether this Court lacks subject-matter jurisdiction under *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914), which held that a new plaintiff's intervention cannot be used to "cure" the lack of federal subject-matter jurisdiction over the original case.

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

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INTRODUCTION

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed the constitutionality of "fair-share fees" to finance collective-bargaining activities of unions obligated under state law to represent both union members and non-members. *Abood* should be reaffirmed.

Abood accords with the First Amendment's original meaning, which afforded public employees *no* rights against curtailments of free speech in the workplace setting. Overturning *Abood* would thus mark a radical departure from the original understanding of the Constitution. *Abood* also aligns with more recent jurisprudence deferring to government management decisions by upholding public employers' rights to limit employee speech as contrasted with citizen speech. This Court's application of *Abood* to other non-employment contexts highlights its stature as foundational First Amendment precedent.

Nearly half the States have relied on *Abood* in their labor-relations systems. Currently, 22 States permit fair-share fees for public employees, two (Michigan and Wisconsin) permit agency fees for some public employees, and 26 States prohibit fair-share fees or public-sector collective bargaining completely. As this diversity of viewpoints reflects, the Framers' design functions well when States are "laboratories of democracy." State legislatures often debate these issues and periodically change their policies. Overruling *Abood* would remove this issue from the people and their elected representatives and override their policy judgments about managing public workforces.

Petitioner asks this Court to upend the collective-bargaining systems of many States – in a jurisdiction-

ally flawed case without any record – based on numerous unsupported and inaccurate factual assertions. For example, petitioner claims all collective bargaining is inherently political and employees choose not to join unions because they object to the union's collective-bargaining positions. Those assertions are false – and unsupported by an evidentiary record.

This Court's jurisprudence should rest on evidence, not fiction, and arise out of cases over which the Court has subject-matter jurisdiction, which is lacking here. If the Court considers re-evaluating *Abood* necessary, it should await a case with a factual record that does not require overruling or ignoring a century-old jurisdictional rule.

STATEMENT

A. Legal Background

1. "As originally understood, the First Amendment's protection against laws 'abridging the freedom of speech' did not extend to *all* speech." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting). To the Framers and for another 150 years after the Founding, public employees' speech did *not* fall within the First Amendment's ambit. Rather, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983). In Justice Holmes's formulation, a public employee "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

That perspective arose out of laws restricting government employees' rights from 17th-century England, where Parliament banned certain government

officers from electioneering, 5&6 Gul. & Mar. c. 20, § XLVII (1694); 12&13 Gul. III c. 10, § LXXXIX (1700), and ultimately disenfranchised them, 22 Geo. III c. 41, § XLI (1782). In the United States, Congress restricted government employees' rights as early as 1789. *See Ex parte Curtis,* 106 U.S. 371, 372-73 (1882) (recounting many laws restricting activities of government employees between 1789-1870); *see also* Act of Apr. 10, 1806, ch. 20, § 1, Art. 5, 2 Stat. 359, 360 (forbidding soldiers and officers to "use contemptuous or disrespectful words against the President of the United States, against the Vice President thereof, against the Congress of the United States"). With the first presidential administration change, the government removed public employees based on their political speech. *See* Carl R. Fish, *The Civil Service and the Patronage* 19 (1905). In 1800, Thomas Jefferson directed Executive Branch department heads to forbid government employees from electioneering. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973) ("*Letter Carriers*").

More recently, the Hatch Act of 1939 prevents most Executive Branch employees from engaging in certain forms of political speech. *See*, *e.g.*, 5 U.S.C. § 7321 *et seq.*; *Letter Carriers*, 413 U.S. at 559-61. And this Court has recognized the government's authority as an employer to restrict employee speech to further a range of significant interests, from the government's "effective operation," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386-87 (2011), to protecting "secrecy" and "national security," *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam).

2. During the Warren Court era, this Court began recognizing limited protections for public-employee

speech that departed from the First Amendment's original meaning. Yet even under that more expansive modern conception, the First Amendment leaves public employers free to regulate speech by public employees in the workplace setting. *Abood* stems from that jurisprudential line.

In *Abood*, the Court addressed a government acting as employer of a workforce that democratically elected a union as the exclusive representative to negotiate and administer a collective-bargaining agreement ("CBA"). Under state law, the union had to represent all workers but could charge non-members their fair share of costs associated with "collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. Though such fees implicate the First Amendment, the Court explained, collection of them is justified by States' strong interest in promoting labor peace through collective bargaining and avoiding the "free rider" incentive that arises when non-member employees can avoid paying *any* fees while retaining the benefits of representation by an informed and expert agent. *See id.* at 224-26. However, the Court held, the government could *not*, consistent with the First Amendment, compel non-members to pay for union expenditures relating to "political and ideological purposes unrelated to collective bargaining." *Id.* at 232.

For more than four decades, *Abood* has served as foundational law in numerous States and thousands of localities – as well as for thousands of public-sector employment contracts – that authorize the payment of agency fees to public-sector representatives for expenditures germane to collective bargaining.

B. Background Of Agency-Shop Arrangements

1. For much of the Nation's history, workers formed self-help organizations that pressed employers to ameliorate depressed wages, harsh working conditions, and excessive hours. *See* Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 1-3 (5th ed. 2014) ("Kearney & Mareschal"); Richard B. Morris, *Government and Labor in Early America* 200 (Northeastern Univ. Press 1981). Economically disruptive conflict between these organizations and employers "abundantly demonstrated" that a formal mechanism for bargaining regarding the terms and conditions of employment was "an essential condition of industrial peace." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *see* Kearney & Mareschal at 1-6. *See also* David Ziskind, *One Thousand Strikes of Government Employees* (Colum. Univ. Press 1940).

To eliminate "industrial strife" caused by "[r]efusal to confer and negotiate," Congress enacted the National Labor Relations Act ("NLRA"), which guarantees private-sector employees' rights to self-organization and collective bargaining. *Jones & Laughlin Steel*, 301 U.S. at 41-42. The NLRA and the Railway Labor Act ("RLA") amendments confirm Congress's determination that agency-shop agreements (1) "'promote[] stability by eliminating "free riders,"'" *NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963) (quoting S. Rep. No. 80-105, pt. 1, at 7 (1947)); and (2) implement the "'firmly established . . . national policy'" of permitting agreements requiring all employees to pay their fair share of collective-bargaining costs, *Communications Workers v. Beck*, 487 U.S. 735, 750 (1988) (quoting H.R. Rep. No. 81-2811, at 4 (1950)).

The NLRA expressly excludes States and their political subdivisions from its definition of "employer." 29 U.S.C. § 152(2). Indeed, "States [are] free to regulate their labor relationships with their public employees." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181 (2007). In a small minority of States, public employers unilaterally impose terms and conditions of employment, allowing employees no formal role in the process. *See* Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962*, at 196 (2004). Responding to the same forces at play in the private sector – employee self-organization, assertion of grievances, and willingness to disrupt operations to have disputes addressed – most States have followed the NLRA model and bargain collectively with their workers. *See id*. Such States determine which topics can be subjects for collective bargaining and the non-public settings in which those subjects are discussed. Those States have decided that fairness and efficiency demand that unions represent every employee – union and non-union – equally in the negotiation and administration of employment terms. *See*, *e.g.*, 5 ILCS 315/6(d); Del. Code Ann. tit. 19, § 1304; 43 Pa. Stat. Ann. § 1101.606.

Unions incur significant costs in representing employees. To negotiate effectively for better wages, benefits, and working conditions and to represent adequately all employees in grievance proceedings, unions employ lawyers, economists, negotiators, and research staff. And, pursuant to CBAs, unions work with employers to promote job training, education, occupational health and safety, and worker retention.

By permitting CBAs that require non-union workers to contribute to collective-bargaining costs, agency-shop statutes prevent "financial instability of the

duly-elected bargaining agent [that] may jeopardize meaningful collective bargaining." Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 189 (1975). Agency-shop arrangements facilitate that financial support through payments shared by *all* union-represented employees to avoid the predictable collective-action problem that results when employees receive services but paying for them is optional. *See* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 811-12 (2012).

2. Pursuant to *Abood*'s distinction between union expenditures "germane" to collective bargaining and other expenditures that non-members cannot be required to pay, unions in jurisdictions that authorize agency fees must itemize annually their expenses to identify non-chargeable expenses. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 874 (1998).[1] That exercise is overseen and "verifi[ed] by an independent auditor," *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), which must conduct a "rigorous[]" review (CPAs Br. 16), approach the union's accounting with "professional skepticism" (*id.* at 8), and question not merely unlawful classifications but even "aggressive" or "questionable" ones (*id.* at 15). Once it confirms the union's classifications, the auditor also must confirm proper *application* of those standards by reviewing "supporting documentation of relevant expenses." *Id.* at 19.

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[1] "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *accord* App. 30a-32a.

After the audit, unions issue a "*Hudson* notice," which informs non-members of the chargeable and non-chargeable expenses the union incurred, the resulting fee expressed as a percentage of dues, and how to challenge the union's accounting of those charges. *See*, *e.g.*, App. 28a-41a.

C. Collective Bargaining And Contract Administration In Illinois

1. Illinois requires collective bargaining with duly selected public-sector unions and authorizes those unions to charge agency fees to represented non-members. Under the Illinois Public Labor Relations Act ("IPLRA"), "wages, hours and other conditions of employment" are subject to collective bargaining "to provide peaceful and orderly procedures for protection of the rights of all." 5 ILCS 315/2; *see also* JA114-15. Employees in a bargaining unit[2] may democratically select a labor organization to be "the exclusive representative for the employees of such unit for the purpose of collective bargaining." 5 ILCS 315/6(c). A selected organization must "represent[] the interests of all public employees in the unit," including non-members, in both collective bargaining and grievance proceedings. 5 ILCS 315/6(d).

2. The CBA at issue is between the Illinois Department of Central Management Services ("CMS") and respondent American Federation of State, County, and Municipal Employees, Council 31 ("AFSCME" or "the Union"). Under the CBA, AFSCME represents public employees including cor-

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[2] State law defines a "[u]nit" as "a class of jobs or positions that are held by employees whose collective interests may suitably be represented by a labor organization for collective bargaining." 5 ILCS 315/3(s)(1).

rections officers, firefighters, crime-scene investigators, maintenance and clerical employees, and child-welfare specialists such as petitioner Mark Janus. AFSCME represents those employees in negotiations over labor-management issues such as wages, career advancement, overtime, paid time-off, safety and protective equipment (*e.g.*, stab vests and riot gear for corrections officers, or fire protection gear for firefighters), disciplinary procedures, parking, grooming standards, lunch-break schedules, and eligibility for bereavement leave. *See generally* ALJ *CMS v. AFSCME* Decision[3] at 18-97.

The Union's various locals solicit views on topics for collective bargaining at open meetings attended by members and non-members. Non-members have every opportunity to speak and be heard at those meetings. To reflect the representative nature of the process, the Union sends representatives from each local unit to attend the bargaining sessions with Executive Branch management. Those sessions, which involve hundreds of management and labor representatives, occur over a multi-month period and are closed to the public. Before 1984, the State paid CBA representatives for the days they missed work to participate in that process; under the current system, the representatives take unpaid leave, which the union reimburses through union dues and fair-share fees. *See* Agreement Between State of Illinois and

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[3] *See* Admin. Law Judge's Recommended Decision and Order, *CMS v. AFSCME, Council 31*, Case Nos. S-CB-16-017 *et al.*, PDF at 28-287 (Ill. Labor Relations Bd. Sept. 2, 2016) ("ALJ *CMS v. AFSCME* Decision"), *adopted in relevant part*, Decision and Order of the Illinois Labor Relations Board State Panel, PDF at 1-26 (Ill. Labor Relations Bd. Dec. 13, 2016) ("ILRB *CMS v. AFSCME* Decision"), PDF *available at* https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf.

AFSCME, Art. VI, § 3 (1981-1983); Agreement Between State of Illinois and AFSCME, Art. VI, § 3 (1984-1986).

Petitioner Janus became a state employee in 2007, approximately two decades after the current fair-share system had been enacted. He claims he "does not agree with what he views as the union's one-sided politicking" and that "AFSCME's behavior in bargaining does not appreciate the current fiscal crises in Illinois." App. 18a. However, this litigation is, to AFSCME's knowledge, the first time Janus has ever voiced disagreement with any aspect of the Union's bargaining position. Although many non-member employees attend meetings to share opinions with the Union and propose views on bargaining positions, AFSCME possesses no record of Janus ever voicing an opinion or seeking to change a position in collective bargaining. Nor does AFSCME have any record of Janus disclaiming any raise or economic benefit the Union has obtained for public employees during his tenure as a state employee.

Consistent with Illinois law, *see* 5 ILCS 315/6(e), the CBA requires CMS to deduct from each non-member's paycheck a *pro rata* portion of that employee's "cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment." JA124. Non-members are not charged for so-called "non-chargeable" expenses.

AFSCME's *Hudson* notice provides non-members the Union's agency-fee calculations. The notice identifies expenditures in which non-members share to the dollar, App. 28a-32a, 34a-39a, and expenditures the fee "does not include," App. 32a-33a. It explains that non-members may challenge the Union's calculations

before an American Arbitration Association arbitrator at the Union's expense. App. 40a-41a. The Union bears the burden in such proceedings "of proving that the fair share fee is proper." App. 41a. AFSCME represents approximately 65,000 employees in Illinois, of whom about 5 to 10 (0.007% to 0.014%) initiate arbitral challenges to the agency-fee calculation each year.[4]

3. "In the more than 40 years" AFSCME has been bargaining with CMS, the parties "have reached more than two dozen CBAs with administrations of six different governors, three Democrats and three Republicans." ALJ *CMS v. AFSCME* Decision at 10. AFSCME has been unable to negotiate a successor CBA with the current administration. On the first day AFSCME and CMS began negotiations, Governor Bruce Rauner issued an executive order directing CMS to "immediately cease enforcement of the Fair Share Contract Provisions" in its public-sector CBAs and to hold "all fair share deductions in an escrow account." *Id.* at 123.

In December 2016, despite concessions by the Union and its expressed willingness to continue bargaining, the Illinois Labor Relations Board (on Governor Rauner's request) found the parties had reached a bargaining impasse and the State had violated the IPLRA in withholding from AFSCME "information necessary and relevant to its role as the employees' exclusive bargaining representative." ILRB *CMS v. AFSCME* Decision at 8.

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[4] AFSCME has no record of petitioner ever challenging the Union's calculation.

D. Procedural History

The same day Governor Rauner ordered the escrowing of agency-fee payments, he filed a declaratory judgment action in federal court against the State's public-sector unions seeking to have the State's statutory provisions authorizing agency fees declared unconstitutional. *See* Compl. for Decl. J., *Rauner v. AFSCME, Council 31*, No. 1:15-cv-01235, Dkt. #1 (N.D. Ill. filed Feb. 9, 2015).

The unions moved to dismiss, and the Illinois Attorney General intervened to defend state law. In addition to arguing that *Abood* required dismissal on the merits, respondents argued that the court lacked Article III jurisdiction because the Governor did "not allege an invasion of *his own* First Amendment rights" and thus lacked standing to sue. JA49. Respondents further contended the court did not have federal-question jurisdiction under the well-pleaded-complaint rule because the First Amendment argument arose only as an anticipated defense to a suit by the unions seeking to compel fair-share-fee withholding under state law. *See* JA46-47.

While the motions to dismiss the Governor's lawsuit were pending, Mark Janus and two other non-member state employees (Marie Quigley and Brian Trygg) (collectively, "Employees") sought leave to intervene as plaintiffs. The Attorney General opposed the intervention, arguing that the court's lack of jurisdiction over the case precluded it from deciding – much less granting – the Employees' motion to intervene. *See* Illinois Att'y Gen.'s Supp. Mem. at 7-8, *Rauner*, Dkt. #114 (N.D. Ill. filed Apr. 30, 2015).

On May 19, 2015, the court ruled that Governor Rauner lacked standing and had not raised a federal question. JA107. The court agreed that the Governor

had "no personal interest at stake" in the lawsuit and had raised no federal question (other than the anticipated constitutional defense). JA108. It thus granted the defendants' motions to dismiss the case.

The court also granted the Employees' motion to intervene. JA112. The court acknowledged that "a party cannot intervene if there is no jurisdiction over the original action." JA110. It "ha[d] no power" to grant the motion to intervene and could not "allow the Employees to intervene in the Governor's original action because there is no federal jurisdiction over his claims." *Id.* The court nonetheless observed that "some courts" have held that a court may "treat pleadings of an intervener as a separate action" to reach the merits of those claims. JA111. The court granted the motion to intervene on that basis, JA112, and then granted the unions' motion to dismiss under *Abood*, App. 6a-7a.

On appeal, the Seventh Circuit acknowledged that the district court "granted the employees' motion to intervene" even though, "[t]echnically, of course, there was nothing for Janus and Trygg to intervene in." App. 3a. With respect to Janus,[5] however, the court held that allowing intervention despite the lack of subject-matter jurisdiction was "the efficient approach." *Id.* It then affirmed the dismissal under *Abood*. *Id.*

[5] The Seventh Circuit affirmed the dismissal of Trygg's lawsuit because his claim was precluded. App. 3a-4a. Quigley, the third original intervenor, voluntarily dismissed her claims.

SUMMARY OF ARGUMENT

I. The courts below undisputedly lacked jurisdiction over Governor Rauner's lawsuit, and petitioner's intervention could not "cure th[at] vice in the original suit." *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914). Petitioner fails to address this jurisdictional defect or to justify overruling *McCord*.

II. Overruling *Abood* and applying exacting scrutiny to the government's decisions as employer is inconsistent with the First Amendment's original meaning, which imposed no barrier to conditions on public employees' free-speech rights. Deviating further from the Framers' original intent unjustifiably removes policy decisions regarding the management of public workforces from the democratic realm.

III. Even under the Court's more expansive view of public employees' First Amendment rights beginning with the Warren Court, this Court has never applied strict scrutiny when the government acts as employer. As the Court held in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), when a public-sector employee engages in speech *as an employee*, strict scrutiny does not apply, even if the employee is speaking on a matter of public concern.

Those principles preclude strict scrutiny here. By statute, the State chooses to administer its employment function, in substantial part, through a collective-bargaining system. It selects every topic for collective bargaining. It creates a controlled environment for deciding typical employment issues, such as wages and benefits. Fair-share fees implicate employee speech, not citizen speech, because they derive from the government's decision about how to manage

its workforce. Indeed, individuals pay these fees only because they accepted state employment in the relevant bargaining unit.

Abood correctly held that, giving appropriate deference to the government's broad managerial prerogatives, agency fees pass First Amendment muster because they prevent free-riding, support workplace fairness, and maintain labor peace. Those managerial prerogatives apply when the government compels, as when it limits, employee speech. Moreover, petitioner's assertions – made primarily without any factual support – fail to displace legislative findings and this Court's judgments that those interests are compelling and justify reasonable restrictions on employees' speech rights.

The distinction between collective bargaining and lobbying is sound. The mere fact that certain collective-bargaining topics affect the public fisc or touch on matters of public concern does not erase this distinction. Many collective-bargaining topics are mundane employment conditions. Contract *enforcement* and *administration* generally do not raise matters of public concern, yet consume significant union resources. If any employee speech over a personnel matter or grievance were deemed citizen speech on a matter of public concern based on its potential cost, little would be left of *Pickering*'s longstanding recognition of the need for deference to public managerial discretion on employment matters.

Even if petitioner shows that *certain* currently chargeable Union activities are entitled to greater First Amendment protection, the proper course is to clarify (or revise) the chargeability standard last assessed in *Lehnert*, not to overrule *Abood*.

IV. *Stare decisis* also strongly counsels in favor of reaffirming *Abood*. No "special justification" exists to overturn it. The Court should be especially cautious discarding a 40-year-old precedent based on factual assumptions without an evidentiary record. Overruling *Abood* would also upend several strains of First Amendment law, including cases governing employee speech, the integrated bar, and other compelled subsidies.

V. Even if the Court determines that certain currently required payments violate the First Amendment, whether those fees may be charged subject to employee objection is not presented here. If the Court reaches that question, it should affirm the longstanding rule that individuals must assert their own constitutional rights.

ARGUMENT

I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION

This Court long has held that "[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action," because intervention "presupposes the pendency of" a properly brought lawsuit. 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1917, at 581 (3d ed. 2007); *see McCord*, 233 U.S. at 163-64. That principle, which petitioner does not question (Pet. i), requires dismissal, because Governor Rauner undisputedly lacked standing to sue and failed to raise a federal question. *See* AFSCME Opp. 14-15.

The district court nonetheless allowed the intervenors to pursue the lawsuit in their own name while "simultaneously dismissing the Governor's original complaint." JA112. The courts below had no right to

ignore *McCord*. This Court has never endorsed an exception to *McCord* – relief no party has requested. And it should not now endorse an exception without the benefits of adversarial briefing and a more fulsome lower-court analysis. *See United States v. IBM Corp.*, 517 U.S. 843, 856 (1996) (counseling "against overruling a longstanding precedent on a theory not argued by the parties"); AFSCME Opp. 16-17 & n.9.

McCord should not be overturned. It embodies the fundamental principle "that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)). The "time-of-filing rule is hornbook law (quite literally)," and it is strictly applied, "regardless of the costs it imposes." *Id.* (footnote omitted). Accordingly, this case should have been dismissed.

II. OVERRULING *ABOOD* IS INCONSISTENT WITH THE FIRST AMENDMENT'S ORIGINAL MEANING

A. The Framers Believed It Uncontroversial That The Government Could Condition Public Employment On The Relinquishment Of First Amendment Rights

The Founders recognized that public employees had "no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights." *Connick*, 461 U.S. at 143. Consequently, the Republic's first 150 years are replete with government curtailments of public employees' free-speech rights, including on issues of public concern. *See supra* p. 3.

That original understanding was so well-settled that a challenge to a restriction on government-employee speech did not reach this Court until 1882. In *Ex parte Curtis*, this Court upheld a law restricting government employees' ability to make political contributions, stating that the restrictions raised no constitutional concerns. 106 U.S. at 373-75. In the 1950s, the Court explained that, although public-school teachers "have the right under our law to assemble, speak, think and believe as they will . . . [,] they have no right to work for the State in the school system on their own terms." *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952).

Only in the Warren Court era did this Court begin to depart from the original First Amendment understanding and hold that the government may not "leverage" public employment on the sacrifice of "liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419; *see Connick*, 461 U.S. at 144 (discussing cases). Even then, however, the Court carefully excluded from First Amendment oversight employment decisions regulating speech that the government *acting as employer*, like any employer, may make in managing its workforce. The Court enshrined its narrow workplace speech doctrine in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which holds that, unless an employee is speaking *both* "as a citizen" *and* "on a matter of public concern," "the employee has no First Amendment cause of action." *Garcetti*, 547 U.S. at 418; *see Lane v. Franks*, 134 S. Ct. 2369, 2378-80 (2014) (treating speech "as a citizen" and "on a matter of public concern" as distinct elements). In that situation, "liberties the employee might have enjoyed as a private citizen" yield to the

employer's need to "exercise . . . control" of its workforce and "manage [its] operations." *Garcetti*, 547 U.S. at 421-22.

B. Respect For The First Amendment's Original Meaning Justifies Reaffirming *Abood*, Not Overruling It

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," even if "future legislatures or (yes) even future judges" prefer a broader or narrower scope. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (Scalia, J.). Thus, like the Second Amendment addressed in *Heller*, the Court should be mindful of the First Amendment's original meaning in revising the scope of "the freedom-of-speech guarantee that the people ratified" with respect to speech in the public-sector-employment context; that original meaning did *not* contemplate that public employees had a constitutional right to curtail workplace conditions on free speech. *Id.* at 635.

In seeking a substantial expansion of the First Amendment beyond its original understanding, petitioner asks this Court to depart from its judicial role and assume a "legislative – indeed, *super*-legislative – power; a claim fundamentally at odds with our system of government." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting). Such a usurpation of legislative power is not just improper, but ineffectual: "[f]ederal courts are blunt instruments when it comes to creating rights." *Id.* at 2625 (Roberts, C.J., dissenting). Because they decide "concrete cases," courts lack a legislature's "flexibility" to "address concerns" or "anticipate problems" that a new right may occasion. *Id.*

Both petitioner and the Solicitor General wholly ignore the First Amendment's original meaning. Fidelity to the First Amendment supports reaffirming *Abood*, which correctly honors the Framers' limited vision of the First Amendment's applicability to public employees and leaves the relationship between the government and public employees in "the realm of democratic decision." *Id.*

III. OVERRULING *ABOOD* IS INCONSISTENT WITH THE GOVERNMENT'S PREROGATIVE AS EMPLOYER

A. Neither Strict Nor Exacting Scrutiny Applies When The Government Acts As Employer

This Court has *never* applied strict or exacting scrutiny in a case involving the government acting as an employer to regulate its employees' speech. Even after partially departing from the First Amendment's original meaning with respect to public-sector employees' speech, this Court consistently recognized "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. As the Court recently explained, "the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008)). Thus, what petitioner terms (at 18) *Abood*'s "failure" to apply heightened scrutiny is no failure at all.

1. Workplace Speech

a. Balancing – not strict scrutiny – has guided this Court's cases regarding workplace speech. In *Pickering*, this Court announced a framework for analyzing government restrictions on employees' speech. Under that framework, government regulation of an employee speaking as an employee rather than "as a citizen on a matter of public concern" receives no First Amendment scrutiny. *Garcetti*, 547 U.S. at 418. As to citizen speech on matters of public concern, the Court should "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In *Connick*, the government's interest in workplace harmony was found to outweigh the employee's interest in speech that "touched upon matters of public concern in only a most limited sense," even though the employee's speech did not "impede[] [the employee's] ability to perform her responsibilities." 461 U.S. at 151, 154. In balancing the government's interest against the employee's, this Court believed it critical not to impose too "onerous [a] burden on the state." *Id.* at 149-50.

Abood's holding comports with *Pickering* and its progeny. The Court determined after weighing individual employee interests that fair-share fees for activities germane to collective bargaining are "constitutionally justified" by "the important contribution of the union shop to the system of labor relations." 431 U.S. at 222-23. But it held that the balance of employer and employee interests supported the opposite

conclusion regarding the imposition of fees for political or ideological activities. *See id.* at 225-26. Indeed, this Court has long situated *Abood* and *Pickering* together as applications of the Court's balancing framework to specific contexts. *See Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674-76 (1996).

b. In *Garcetti*, this Court applied *Pickering* balancing to employee speech that "owes its existence" to the employee's "professional responsibilities" and held that such speech is not protected by the First Amendment. 547 U.S. at 421-22; *see also Guarnieri*, 564 U.S. at 389-90 ("Government must have authority, in appropriate circumstances, to restrain employees who . . . frustrate progress towards the ends they have been hired to achieve."). As the Court explained, when employees engage in speech "pursuant to . . . official duties," they "are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications." 547 U.S. at 421.

Abood's holding comports with *Garcetti* because agency fees embody speech engaged in as part of the employee's "official duties." Collective bargaining is part of the government's internal operations. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) (union acting as exclusive representative "assume[s] an official position in the operational structure of the District's schools"). States that permit agency fees effectively make majority-elected union representation – and concomitant fair compensation – conditions of employment, as part of their "discretion to manage their operations." *Garcetti*, 547 U.S. at 422. The Solicitor General's conclusory assertion (at 27) that labor-management negotiations are "far removed" from an individual's job duties ignores collective bargaining's centrality to the

government's management of its workforce. When a public employer has established a collective-bargaining system as part of its internal administrative operations, it can require that employees provide the support needed for that system to operate efficiently.

The Solicitor General's narrow reading of *Garcetti* also ignores its rationale. This Court's "emphasis . . . on affording government employers sufficient discretion to manage their operations," 547 U.S. at 422, applies not just to managing an employee's day-to-day work, but also – and more forcefully – to setting the terms or rules of employment. *See Guarnieri*, 564 U.S. at 389 ("a cautious and restrained approach to the protection of speech by public employees" is justified by the interest in "the efficient and effective operation of government"). The government's decision to require its employees to present bargaining positions through a democratically elected representative – and not allow tens of thousands of employees to bargain one-by-one or impose terms of employment unilaterally – plainly serves "the efficiency of the public services [the government] performs through its employees." *Pickering*, 391 U.S. at 568. Employee speech in the CBA context concerns government-prescribed topics and procedures for administering the statutorily mandated contract to govern employment conditions. It thus represents the kind of expression over which "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

c. This Court has recognized that the State's design of its labor-management relations system implicates its core prerogative as an employer. In *Smith v.*

Arkansas State Highway Employees, 441 U.S. 463 (1979) (per curiam), for example, the Court rejected a union's First Amendment challenge to the Arkansas State Highway Commission's policy of refusing to entertain grievances filed by a union rather than directly by the employee. Although the First Amendment protects employees' rights as citizens to "speak freely and petition openly," it does not impose any obligation on the State "to listen, to respond, or . . . to recognize the [union] and bargain with it." *Id.* at 465. Rather, in managing their workforce's operations, public employers may structure grievance procedures in their discretion, free from constitutional regulation. *See id.* at 464 ("[T]he First Amendment is not a substitute for the national labor relations laws.").

d. The Court has employed the same deferential approach when the government regulates the entire workforce's speech prophylactically. In *Letter Carriers*, for example, the Court applied *Pickering* balancing to uphold the Hatch Act's prospective restriction of nearly all public employees' free speech. *See* 413 U.S. at 564-65. The Court observed that, under the Hatch Act, as under the agency-fee statute at issue here, an employee remains free to "express his opinion as an individual privately and publicly on political subjects and candidates." *Id.* at 579 (alteration omitted); *see* 5 C.F.R. § 734.306.

Critically, *Garcetti* protects the government's authority as proprietor *even if* the speech "implicates matters of public policy" or public concern. U.S. Br. 15; *see* Pet. Br. 10-18; *Garcetti*, 547 U.S. at 414-15, 425 (acknowledging that prosecutor's speech involved "[e]xposing governmental inefficiency and misconduct" – "a matter of considerable significance"). The

fact that fair-share fees may support a union's collective bargaining on subjects that touch on public policy does not change the fact that those fees are paid to support speech in which the State requires workers to engage as part of their job duties. *See* 547 U.S. at 421-22 ("controlling factor" was that prosecutor engaged in speech "pursuant to [his] official duties").

2. Political Patronage

Like *Pickering* and its progeny, the Court's political-patronage cases do not apply exacting scrutiny. Rather, as *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), explained, "the inquiry is whether the [political] affiliation requirement is a *reasonable* one." *Id.* at 719 (emphasis added). The Court recognized that the case-by-case analysis this inquiry entails would "allow the courts to consider the necessity of according to the government the discretion it requires in . . . the delivery of governmental services." *Id.* at 719-20; *see also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 98 (1990) (Scalia, J., dissenting) ("Although our decisions establish that government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when the governmental function operating is not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage its internal operations.") (alterations omitted).

Rutan did not apply strict scrutiny to a case involving the government acting as employer. The Court there applied strict scrutiny – over the objections of the dissent – only after it determined that the interests the government relied upon – stabilizing political parties and fostering the political system – were "interests the government might have in the structure

and functioning of society as a whole" and "not interests that the government has in its capacity as an employer." *Id.* at 70 n.4; *see also id.* at 98-100, 115 (Scalia, J., dissenting) (arguing that strict scrutiny "finds no support in our cases"). The case thus turned critically on the Court's determination that the government was regulating its employees' speech as a sovereign regulator and *not* as a proprietor or employer. *Id.* at 70 n.4 (majority). Similarly, the three-Justice plurality in *Elrod v. Burns*, 427 U.S. 347 (1976), applied exacting scrutiny only after it rejected the premise that patronage practices relate to the State's legitimate interests in achieving operational efficiencies. *See id.* at 365 ("it is doubtful that the mere difference of political persuasion motivates poor performance").[6]

The Court's political-patronage cases thus further indicate that strict scrutiny does not apply when the government is acting as an employer and exercising its discretion to organize its internal operations.

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[6] Moreover, the political-affiliation requirements challenged in the political-patronage cases involved employees' "private beliefs," *Branti v. Finkel*, 445 U.S. 507, 516 (1980), and not just speech made in the employment context. *See also Elrod*, 427 U.S. at 355-56 (concluding that "[a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job" and, therefore, "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained"); *Rutan*, 497 U.S. at 73 (observing government employees would feel pressure "to engage in whatever political activity is necessary" and "to refrain from acting on the political views they actually hold"). The same cannot be said of the agency shop, which does not infringe on employees' private beliefs and leaves employees "free to participate in the full range of political activities open to other citizens." *Abood*, 431 U.S. at 230.

3. Forum Analysis

Abood also comports with this Court's public- and non-public-fora cases, which track the distinction between speech as a citizen and speech as an employee. Government employees' speech is protected in a "forum" designed "for direct citizen involvement," but not similarly protected in fora specially designated by the government for workplace speech – for example, "true contract negotiations," which reflect the government's selected personnel-management process. *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 174-75 (1976).

That distinction undergirded *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which upheld exclusive union representation under the First Amendment and concluded that the "'meet and confer' session" at issue was "obviously not a public forum." *Id.* at 280. The same is true of collective bargaining and grievance procedures in Illinois. *See* 5 ILCS 315/24 (collective bargaining not subject to State's "Open Meetings Act"). The Court does not apply strict scrutiny in those circumstances in part because the employee remains free to speak as a private citizen. *See Knight*, 465 U.S. at 280, 288 (observing that exclusive representation "in no way restrained . . . freedom to speak").

4. Compelled Speech and Association

Petitioner argues (at 19-21) for exacting scrutiny by comparing *Abood* to this Court's "compelled association," "compelled speech," and "expenditures for speech" cases. But those cases are not inconsistent with *Abood* or the employee-speech cases' deference to the government acting in its capacity *as a manager of*

employees because they concern conduct far beyond the workplace.[7]

Petitioner also contends (at 23-24) that, even if government *restriction* on employee speech receives First Amendment deference, the same rationale cannot justify regulation of employee speech that *compels* employee speech. But the doctrinal bases of the protection against "compelled" speech are no different from those underlying the protection of free expression. Both stem from the recognition that the constitutional "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); *see also Riley*, 487 U.S. at 796 (distinction between compelled speech and compelled silence is "without constitutional significance").

Moreover, in arguing (at 24) that Illinois has no "interest" in compelling expression, petitioner confuses the *interest* with the regulation adopted to *further* that interest. Whether the government adopts regulations preventing or compelling "expressive activities," *id.*, the government interest is in "the efficient and effective operation of government." *Guarnieri*, 564 U.S. at 389. Petitioner offers no principled reason why that

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[7] *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010) (limitations on "corporate independent expenditures" on political speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-57 (2000) (expressive-association claim of private organization); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572-73 (1995) (right of "private organizers" to exclude groups from parade); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795-96 (1988) (compelled speech during fundraising communications to private donors); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (compelling citizens to display message on their "private property").

interest cannot justify requiring payment of fair-share fees.

B. *Knox* And *Harris* Do Not Justify Strict Or Exacting Scrutiny When The Government Acts As Employer

Petitioner relies (at 18-19) on the comment in *Knox v. SEIC*, 567 U.S. 298 (2012), repeated in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that compelled subsidization is subject to "exacting" scrutiny. 567 U.S. at 310; *see also Harris*, 134 S. Ct. at 2639 (citing *Knox*). But *Knox*'s only cited authority was an inaccurate reference to *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), which did not involve the government's regulation of its own workforce in its capacity as "proprietor."[8] *United Foods* applied a standard for "'regulatory'" fees. *Knox*, 567 U.S. at 310 (quoting *United Foods*, 533 U.S. at 414). It said nothing about the appropriate standard for compelled subsidies when the government acts as an employer. Indeed, even in the regulatory context, *United Foods* adopted *Abood*'s "germane[ness]" standard in judging the fees challenged by objectors. 533 U.S. at 415.

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[8] Unlike agricultural-marketing disbursements, fair-share fees reimburse unions' statutorily mandated activities of obtaining, administering, and enforcing agreements on employment terms and conditions in the public-employment setting, which is entitled to greater deference. That these activities sometimes involve speech on many matters related to personnel management "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Requiring employees to pay unions for the services they perform as exclusive representative "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *Id.*

Likewise, *Knox* and *Harris* did not implicate the government's interests as proprietor. *Knox* concerned the union's notice obligations to maintain *Abood*'s line between chargeable and non-chargeable activities. *See* 567 U.S. at 314 (addressing "special assessment billed for use in electoral campaigns" that was collected without providing new opt-out opportunity). The union's special assessment for non-chargeable political expenditures did not implicate the State's internal operational interests in any way. The State was not a party and did not defend the assessment, even as *amicus*. *Harris* involved a personal-assistant program in which the "employer-employee relationship [was] between the person receiving the care and the person providing it" and "the State's role [wa]s comparatively small." 134 S. Ct. at 2624. The Court thus held that Illinois was "not acting in a traditional employer role" or "as a 'proprietor in managing its internal operations.'" *Id.* at 2642 & n.27 (quoting *Nelson*, 562 U.S. at 138, 150).

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Petitioner's pleas for strict or "exacting" scrutiny simply cannot be squared with the Court's repeated holdings that employee-speech restrictions are subject to "*deferential* weighing of the government's legitimate interests" against its employees' "First Amendment rights." *Umbehr*, 518 U.S. at 677-78 (emphasis added). *See generally Rutan*, 497 U.S. at 97-102 (Scalia, J., dissenting). Overturning precedent based on *Knox*'s inaccurate citation disserves the rule of law.[9]

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[9] Even if "exacting scrutiny" accurately described the First Amendment standard when the State acts as employer, it would not warrant overruling *Abood*. *Abood*'s careful line between

C. This Court's Longstanding Fair-Share Jurisprudence Appropriately Balances Employees' Workplace Speech Rights Against The Government's Legitimate Interests As Employer

1. Fair-Share Fees Implicate Speech by Government Employees as Employees

The free-speech interests asserted by petitioner implicate speech not as a citizen but as an employee. Nothing in the IPLRA precludes petitioner from publicly criticizing the CBA. The payment of an agency fee to compensate a union for representing every member of a bargaining unit unquestionably "owes its existence" to the way States and localities have decided to manage their workforce. *Garcetti*, 547 U.S. at 421. As petitioner observes (at 58), "the government *controls* its employment terms" and hires employees subject to those terms. Exercising that control, 24 States (and countless localities) have authorized collective bargaining and agency fees to set employment terms. Giving employees, through an elected exclusive representative, a seat at the bargaining table to shape employment terms – and, concomitantly, ensuring that representational costs are borne equitably by all who benefit – is a critical part of how those governments "manage their operations." *Garcetti*, 547 U.S. at 422.

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speech germane to collective bargaining and political speech unrelated to those activities is narrowly tailored to that vital government interest because without mandatory fees non-members would free-ride on the union's collective-bargaining efforts. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part) (*Abood* found the "distinctive" "free-rider" problem a "'*compelling state interest*' that justifies this constitutional rule") (emphasis added).

That system, by law, sets the topics for collective bargaining, 5 ILCS 315/4, 315/7, 315/7.5; prescribes bargaining procedures, 5 ILCS 315/7; and mandates the manner and content of grievance proceedings, 5 ILCS 315/8. It functionally conditions employment on the workers' acceptance of these terms, including that personnel administration be conducted through a collective-bargaining system and that employees pay fair-share fees to support that system. In that respect, the State's law affects employee speech no differently than requirements that employees abstain from writing books about top-secret matters or discussing confidential information with the press, or that employees give compelled answers to questions in a polygraph examination as a condition of employment.

Moreover, CBA negotiations concern "bread-and-butter" employment issues – such as "wages, benefits, working conditions," "job security," upward mobility, safety equipment, and grievance and dispute-resolution procedures that affect all similarly situated employees. Kearney & Mareschal at 6. *See*, *e.g.*, JA159-60 (holidays), 179 (meal periods), 186-90 (overtime procedures), 229-33 (job-assignment procedures), 269-70 (transfers). Speech concerning these sorts of prosaic "employment matters," *Guarnieri*, 554 U.S. at 391, does not warrant strict scrutiny. Indeed, the Court has warned that strict scrutiny "would occasion [judicial] review of a host of collateral matters typically left to the discretion of public officials," such as "[b]udget priorities" and "personnel decisions." *Id.*

That conclusion is all the more compelling when a union represents a unit employee in a grievance procedure. *See Connick*, 461 U.S. at 154 (First Amendment does not "constitutionalize the employee grievance"). Employees initiate grievance procedures "pursuant to"

explicit CBA terms, which necessarily are limited to terms of employment. *Garcetti*, 547 U.S. at 421; *see* JA124 ("Grievance Procedure"). In both grievance and collective-bargaining contexts, the agency-fee payment dedicated to funding those union activities is speech undertaken "as a government employee," "pursuant" to the process state and local governments have selected for managing the workforce and setting the terms of employment. *Garcetti*, 547 U.S. at 421, 422.

Employees who object to fair-share fees fundamentally are complaining about the State's internal processes for negotiating employment terms and resolving workplace disputes with employees, as well as the conditions of employment to which they knowingly assent when they accept public-sector jobs. Janus's counsel has stated that Janus "would prefer to negotiate with the state on his own." Ian Kullgren, *Politico Pro Q&A: Jacob Huebert, Mark Janus' Attorney* (Dec. 27, 2017). Contrary to Janus's – impractical – desire, the First Amendment does not require that the State negotiate 60,000 individual employment contracts. Nor does it require States to impose unilaterally all terms and conditions of employment on workers; if States choose to have more inclusive interactions with their workers, nothing in the Constitution precludes a requirement that all workers pay their fair share of services provided. The Constitution is indifferent to whether the government finances its access to worker input through lower salaries, a surtax on all workers, or fair-share fees. *See* Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 Harv. L. Rev. (forthcoming Feb. 2018) (manuscript at 5).

Importantly, *Abood*'s agency-fee holding preserves employees' rights *as citizens* "to participate in the full

range of political activities open to other public citizens." 431 U.S. at 230. They can express disagreement with the union in public meetings, newspaper editorials, or any other public forum. *See id.* ("every public employee is largely free to express his views, in public or private orally or in writing"). The limited First Amendment protection *Abood* identified in the agency-fee context is consistent with how this Court treats the government's prerogatives as an employer to control its employees' speech and thereby "ensur[e] that all of its operations are efficient and effective." *Guarnieri*, 564 U.S. at 386.

2. The Government Has Legitimate Interests in Preventing Unfair Free-Riding by Non-Members

When a union serves as exclusive representative, the State's interest in effectively managing its workforce justifies ensuring that the costs of union services are "fairly" allocated among all employees in the bargaining unit. *Abood*, 431 U.S. at 221-22. As *Abood* recognized, the union's tasks "are continuing and difficult ones" and "often entail expenditure of much time and money" to pay "lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Id.* at 221. Because state law compels the union to expend those resources "equitably to represent all employees," *id.*, exclusive representation creates a "distinctive" "free-rider" problem: the non-members are "free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests," *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also id.* (calling State's interest in avoiding free-riding "compelling").

Free-riding is indeed *precisely* what economic theory predicts when members of a bargaining unit may choose independently whether to vote for *and* whether to pay for a bargaining agent. Even if a non-member believes she benefits from the union's representation, she may vote *for* the union as representative (and reap the benefits of bargaining representation and assistance in grievance proceedings) yet opt *not* to join the union to avoid paying dues.

Although a developed record would demonstrate the free-riding problem in this context, free-riding is a classic collective-action problem. When state law obligates a union elected by a bargaining unit to represent the entire unit, *see* 5 ILCS 315/6(d), the incentive of "[a] rational worker" – even one who supports every position taken by the union – is "not [to] voluntarily contribute" to the union, because the union's activities (and thus the worker's benefits) will not be affected by that individual action alone. Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 88 (1965); *see also* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133, 137-38 (1996) ("each [individual] actor finds it rational to cheat").

For decades, Congress and this Court have recognized that fundamental economic concern. Even as the Taft-Hartley Act prohibited the closed shop and authorized States to pass right-to-work laws, 29 U.S.C. §§ 141-187, Congress did not prohibit agency fees and thereby create the inevitable free-rider problem. Beyond the concerns about access to employment that led Congress to abolish the closed shop, "[t]he 1947 Congress was equally concerned" that, "without such [closed-shop] agreements, many employees

would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Beck*, 487 U.S. at 748. Senator Taft observed that, absent a legislative solution, "if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay his dues rides along freely without any expense to himself." 93 Cong. Rec. 4887 (1947); *see also Beck*, 487 U.S. at 748 n.5 (noting "[t]his sentiment was repeated throughout the hearings").

To address that concern, Congress preserved States' rights to authorize union-security agreements. *See* 487 U.S. at 749; S. Rep. No. 80-105, pt. 1, at 6 (expressing concern that "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost"). Thus, under Taft-Hartley, and under *Abood*'s recognition that the same policies could be utilized by public employers, union-security agreements may require new hires to join the union or pay fees soon after their hiring, as limited to expenses germane to the collective-bargaining process. *See* 431 U.S. at 235-36. Those requirements avoid the unfairness of free-riding.

3. The Government Also Has Legitimate Interests in a Well-Funded Exclusive Representative

a. *Abood* properly recognized the State's interest in an effective bargaining partner based on the multi-decade experiences of private-sector employers, as well as Congress's recognition that fair-share fees facilitate stable labor relations. *See International Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961) ("The

complete shutoff of [fair-share fees as a] source of income . . . threatens the basic congressional policy of . . . self-adjustments between effective carrier organizations and *effective* labor organizations.") (emphasis added); *Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting) ("Private employers, *Abood* noted, often established [fair-share provisions] to ensure adequate funding of an exclusive bargaining agent, and thus to promote labor stability."). Petitioner provides no basis – particularly without a factual record – for questioning that assessment by Congress and private employers, States, and localities across the country.

Petitioner vaguely asserts (at 24) that management lacks an interest in collecting agency fees because nonmembers are simply trying "to do their jobs." But the States and localities with agency-fee laws have determined legislatively that part of the employee's job is to work within a labor-relations system that requires a well-funded exclusive representative to provide input on terms and conditions of employment. The United States also asserts without citation (at 24) that agency fees have "little to do with the government's need to maintain an efficient workplace or assert managerial control." But, again, that assertion reflects a policy judgment with which many States disagree. The Federal Government itself reimburses union members with paid leave to perform the same functions Illinois requires the unions (and fair-share-fee payers) to pay, such as participating in bargaining and representing non-members in disciplinary proceedings. *See* 5 U.S.C. § 7131. Involving the federal courts in factual disputes about this choice among different payment mechanisms "would raise serious federalism and separation-of-powers concerns." *Guarnieri*, 564 U.S. at 391.

Petitioner's basic premise (at 36) is that agency fees are "[n]ot [n]ecessary for [e]xclusive [r]epresentation." But necessity is not the standard. Public employers have latitude to prevent harm to their operational interests *before* they occur. *See Connick*, 461 U.S. at 146. The question is not whether the *union* would still agree to serve as the exclusive representative even without agency fees. The question is whether the *government* has an interest in ensuring stability by enabling the union to be compensated for its costs in representing members and non-members alike. *See* 5 ILCS 315/6(d). As Justice Scalia recognized in *Lehnert*, "[m]andatory dues allow the cost of 'these activities' – *i.e.*, the union's statutory duties – to be fairly distributed; they compensate the union for benefits which 'necessarily' – that is, by law – accrue to the nonmembers." 500 U.S. at 553 (Scalia, J., concurring in the judgment in part and dissenting in part). Such laws ensure a more fully funded, cohesive bargaining partner, and that in no way offends the Constitution.

Representing non-members in grievance proceedings generates additional costs to the union. *Contra* Pet. Br. 46; *see also Harris*, 134 S. Ct. at 2637 ("[The union] has the duty to provide equal and effective representation for nonmembers in grievance proceedings, an undertaking that can be very involved.") (citation omitted). Petitioner falsely claims (at 45-46) that AFSCME and Illinois law "compel employees to have the union represent them." Nothing in Illinois labor law "prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization." 5 ILCS 315/6(b). AFSCME's CBA similarly provides that employees are "entitled," but not required, to use "Union representation." JA125-26.

Some non-members *choose* to be represented by the Union. As a developed record would show, such service is encompassed within the fair-share fee (so the non-member does not have to pay extra for her own lawyer) and the Union has a record of securing favorable outcomes for non-members, such as reinstatement following termination, backpay for disputed time worked, or the expungement of unjustified disciplinary measures.

b. Petitioner further questions (at 48-52, 53-61) whether the First Amendment permits exclusive representation. Petitioner claims the governmental interest in labor peace does not justify an exclusive-bargaining representative. Petitioner asserts (at 51) that non-members do not "benefit" from union representation, but rather "suffer an associational injury." That question is not presented here. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). This Court resolved the constitutionality of exclusive representation more than 30 years ago. *See Knight*, 465 U.S. at 278-79, 282-83. Congress and 41 States, the District of Columbia, and Puerto Rico authorize exclusive representation for at least some employees.

Moreover, any "associational injury" is not cognizable under *Garcetti* because exclusive representation occurs as a condition and in the context of the non-members' employment. *See* 547 U.S. at 421 (speech "owes its existence" to employee's job); *supra* pp. 22-23. Nor is the assertion that employees suffer an associational injury factually correct. It long has been understood that the exclusive representative does not represent the view of every individual member of the bargaining unit, each of whom may express divergent

views in their capacities as citizens.[10] *See Abood*, 431 U.S. at 230 ("[E]very public employee is largely free to express his views, in public or private orally or in writing."); *cf. Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring in the judgment) ("[E]veryone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual.").

Contrary to petitioner's misunderstanding of the government's interest in labor peace, this Court consistently has recognized the government's interest in the "efficient provision of public services." *Garcetti*, 547 U.S. at 418. States and localities across the country have long *chosen* to set employment terms in a collaborative process that weighs concerns about the public fisc with a professional and organized accounting of government employees' interests. *See* 5 ILCS 315/7 (duty to bargain includes "an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment"). Petitioner's suggestion (at 61) that a government employer could not rationally "want[] to deal with a powerful negotiating opponent" oversimplifies employee management. Like any private corporation, the government's ability

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[10] There is no record here of non-member beliefs about the effect of union representation. Petitioner asserts only hypothetical harms. *See*, *e.g.*, Pet. Br. 49 (CBAs "may harm some employees' interests"), 50 (exclusive representative's advocacy "may" harm non-members' interests), 51-52 (non-members "may find themselves on the short end of the deals their representative strikes"). Petitioner's complaint alleges only vaguely that AFSCME engages in "one-sided politicking," "does not appreciate the current fiscal crises in Illinois," and "does not reflect his best interests or the interests of Illinois citizens." JA87. But he identifies no concrete disagreements with AFSCME and has not availed himself of the fora AFSCME provides to request that the Union take different positions.

to hire and retain high-quality employees may turn on management's responsiveness to employee concerns and the wages, benefits, and other employment conditions that are the subjects of collective bargaining. Petitioner's disagreement with that policy choice – and his suggestion (at 48) that exclusive representation "[h]arms" employees' interests – is an issue for the Illinois state legislature, not this Court.

D. Petitioner's Contention That All Collective Bargaining, Contract Administration, And Grievance Procedures Are Equivalent To Political Lobbying Is False

1. The Long-Recognized Distinction Between Collective Bargaining and Political Lobbying Is Sound

a. Under this Court's precedents, the subject matter of speech is not the only determinant of whether it is "political speech" receiving heightened First Amendment protection. *See Connick*, 461 U.S. at 147-48 (inquiry focuses on "the *content, form, and context* of a given statement, as revealed by the whole record") (emphasis added). That is why a public-school student may, as a citizen, lobby for legalization of marijuana, but a school may nonetheless prohibit him from displaying a "BONG HITS 4 JESUS" sign at a school event. *Morse v. Frederick*, 551 U.S. 393, 397, 410 (2007); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-74 (1991) (noting restrictions on attorneys that do not apply to ordinary citizens); *Brown v. Glines*, 444 U.S. 348, 354-58 (1980) (soldier acting as a citizen may circulate petitions off base but not on base). Likewise, the government may regulate statements by employees in the workplace that it could not regulate if made in the public square. In *Garcetti* it-

self, for example, the Court held the government's prerogative as employer applicable because the speech was workplace speech, even though its subject matter had broader political import. *See* 547 U.S. at 414, 421. Had a private citizen levied the same criticism of the government in a legislative hearing, however, the government could not censor it. Petitioner's contention (at 10-18) that bargaining with the government is always "political speech" fails to appreciate this key distinction.

Besides, petitioner's premise that all collective bargaining raises matters of public concern contradicts reality. Petitioner's inaccurate description of AFSCME's collective-bargaining efforts in Illinois obscures the significant distinctions between collective bargaining and lobbying. The vast majority of collective bargaining involves reaching agreements on non-political issues. AFSCME represents those employees in negotiations over labor-management issues including salary, promotions, overtime qualifications and pay, vacation, safety equipment, and parking. *See generally* ALJ *CMS v. AFSCME* Decision at 18-97. The CBA contains agreements about when employees can take time off work, including vacation time (JA152-56), holidays (JA159-60), and sick leave (JA281-83). And it states when employees can submit their vacation requests and when the employer will notify them of upcoming vacation schedules (JA156) and employee leave balances (JA316). The parties have bargained over such details as grooming standards, lunch-break schedules, and eligibility for bereavement leave. *See* ALJ *CMS v. AFSCME* Decision at 22-24, 70. If employee speech about such personnel issues constitutes citizen speech on matters of public

concern, little will be left of the deference the law has accorded public managerial authority.

b. The suggestion that collective bargaining is no different from political lobbying cannot be squared with the fact that state law literally *requires* bargaining to set employment terms. *See* 5 ILCS 315/7. The government has the right to choose to whom it listens in a private forum. *See Knight*, 465 U.S. at 282. Illinois has chosen to mandate discussions over wages and benefits through collective bargaining between management and an exclusive representative. Those sessions thus reflect employee speech, not citizen speech. Unlike lobbying, which is a voluntary expression of citizens' views on policy questions, collective bargaining represents mandated speech on topics selected by the legislature to set terms and conditions of employment. The Union must formulate positions on those topics.

c. A third distinction between lobbying and collective bargaining is that bargaining occurs between a public employer and an entity granted official representative status through an internal government-administered system of employee designation.

Lobbying, by contrast, entails citizens meeting and speaking with public officials to influence public policies. Any individual or group – including non-union-member government employees – can publicly lobby the government. The First Amendment's petition clause precludes government from restricting the speaker in lobbying; collective bargaining, by contrast, *does* entail a lawful restriction on who may speak with management on terms and conditions of employment within the officially prescribed system. When a government employee representative asks the employer to agree to a condition of employment within the

collective-bargaining process, it is not lobbying; it is complying with a statutory process for resolving issues of importance to government management. When a union in a non-public, internal grievance proceeding represents an employee accused of violating a workplace rule, it is not lobbying; it is playing a prescribed role to resolve a dispute in the manner established by the government for that purpose.

d. Admittedly, some subjects of collective bargaining have fiscal consequences, but a factual record would show that negotiating the economic terms of CBAs represents a small share of the activities germane to collective bargaining and contract enforcement that are chargeable to fee payers. Paying salaries is a reality of the government acting as an employer. At bottom, it cannot be that all topics with fiscal effects necessarily raise matters "of legitimate public concern." *Pickering*, 391 U.S. at 571; *cf.* Pet. Br. 14. Almost every personnel issue may affect the public fisc, particularly when aggregated across many public employees. A rule constitutionalizing every such interaction "would subject a wide range of government operations to invasive judicial superintendence." *Guarnieri*, 564 U.S. at 390-91. The Framers could not have imagined the First Amendment as a regulatory sword wielded by unelected judges to preclude government from engaging in routine management decisions. Even Justice Powell's separate *Abood* opinion recognized that the First Amendment likely permitted requiring employees to contribute to collective bargaining over "narrowly defined economic issues" such as "salaries and pension benefits." 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment); *see* 5 ILCS 315/6(a).

Since *Abood*, the Court consistently has recognized the distinction between lobbying and collective bargaining. Although the principal dissent in *Lehnert* disagreed about precisely where to draw the line between chargeable and non-chargeable activities, it, like all nine Justices in *Abood*, recognized the existence of core workplace speech not subject to First Amendment protection. Petitioner seeks to overrule an almost unanimous conclusion of the Court based on the mere assertion – without any record support – that collective bargaining inherently is fraught with issues of political concern. That view is demonstrably false.

2. Contract Administration and Grievance Procedures Are Wholly Unlike Lobbying

Collective bargaining also produces highly specific discipline procedures, including deadlines for when the employer must begin disciplinary proceedings and union notification requirements.[11] JA146-51. Petitioner's classification (at 14) of grievance proceedings as "political" is even more divorced from reality. Grievances are often handled privately, with the stated goal that low-level supervisors will "undertake meaningful discussions" and "settle . . . grievance[s], if appropriate." JA124-25. Thus, grievances often are resolved without prejudice or precedential effect and are of no significance to other employees or, in many cases, to the general public. JA132, 134; *contra* Pet. Br. 15. That sort of low-level, bread-and-butter "employee grievance" is not political speech at the First Amendment's core. *Connick*, 461 U.S. at 154. Indeed, Justice Powell's separate *Abood* opinion recognized

[11] Because AFSCME and the Illinois CMS sign multi-year CBAs, most years the Union does not engage in collective bargaining, and the majority of its expenses are attributable to grievance proceedings and contract administration.

that "[t]he processing of individual grievances may be an important union service for which a fee could be extracted with minimal intrusion on First Amendment interests." *Abood*, 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment). The costs of handling routine employee grievances, like those of managing a workforce generally, are costs government has to incur – and may decide how to fund – in the normal course of employing people.

3. In an Appropriate Case, This Court Can Reconsider the Line Drawn in *Lehnert*

Abood recognized that aspects of union expression do enter the sphere of political First Amendment speech. *See* App. 32a-33a (listing non-chargeable activities). It also supplied the doctrinal tools for isolating that expressive conduct and excusing non-members from supporting it financially if they object. *Abood* determined that only expenses "germane" to the collective-bargaining process constitutionally could be charged to non-members. 431 U.S. at 235-36. *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), *Hudson*, and *Lehnert* long ago refined that distinction.

Even if some chargeable union activity could be considered political, that would not justify overruling *Abood* or striking down the Illinois law on its face. Petitioner cannot demonstrate that *all* union representation and *all* agency-fee payments reflect core First Amendment-protected political speech and thus that the statute is invalid in all possible applications as is necessary to sustain a facial challenge. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Rather, petitioner's arguments implicate the debate in *Lehnert* over the line between chargeable and non-chargeable activities. Thus, for example, to the extent

this Court disagrees with *Lehnert*'s holding that lobbying for ratification of a CBA should be chargeable to objecting non-members, the solution is to re-draw the *Lehnert* line to make such lobbying expenditures non-chargeable, not to upset the entire regime that has governed for four decades. *See generally* Fried & Post Br. 22-27. Reexamining the fact-sensitive line drawn in *Lehnert*, however, cannot reasonably be done without a developed factual record.

IV. OVERRULING *ABOOD* IS INCONSISTENT WITH *STARE DECISIS*

A. *Stare Decisis* Principles Support Affirmance

Because *Abood*'s core principle remains sound, the Court need not reach *stare decisis*. But, even if the Court would not agree with *Abood*'s "reasoning and its resulting rule, were [it] addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). *Stare decisis* "contributes to the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), by ensuring that this Court's decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Thus, the Court requires a "special justification" to overrule a precedent. *Dickerson*, 530 U.S. at 443. The agency-shop model has created strong reliance interests. And *stare decisis* "does not ordinarily bend" to petitioner's "'wrong on the merits'-type arguments." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015). In short, petitioner cannot supply the "special justification" necessary to displace such a well-entrenched precedent. *Dickerson*, 530 U.S. at 443.

1. *Abood*'s Longevity and Repeated Reaffirmance Compel *Stare Decisis*

Although *stare decisis* is not an "inexorable command," "[o]verruling precedent is never a small matter." *Kimble*, 135 S. Ct. at 2409. And *Abood* is not just any precedent.

This Court has reaffirmed and applied *Abood*'s core holding in five subsequent decisions over a 40-year period.[12] It repeatedly has reaffirmed that the State's interest in maintaining orderly relations with its employees outweighs non-member employees' diminished First Amendment interest in withholding fair-share fees. *See Ellis*, 466 U.S. at 455-56 (holding "the governmental interest in industrial peace" justifies requiring employees to pay fair-share fees); *Hudson*, 475 U.S. at 302-03 ("the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights") (footnote omitted).

Contrary to petitioner's erroneous claims (at 33), this Court has relied on *Abood* outside the union-dues context. It repeatedly has relied on *Abood* to conclude that, if the government constitutionally may require membership in a group, it also may require group members to pay dues or other fees to support the group's core activities.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court held unanimously that, just as the

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[12] *See Ellis*, 466 U.S. 435 (unanimous except for a limited dissent by Justice Powell); *Hudson*, 475 U.S. 292 (unanimous); *Lehnert*, 500 U.S. 507 (unanimously reaffirming *Abood*'s basic holding that employees may be required to pay their share of expenses of exclusive representative's collective-bargaining activities); *Davenport*, 551 U.S. 177 (same); *Locke v. Karass*, 555 U.S. 207 (2009) (unanimous).

State's interest in stable labor relations justifies exclusive representation, "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. Thus, the Court held, under *Abood* "[t]he State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 14. *See also Board of Regents v. Southworth*, 529 U.S. 217, 231 (2000) (reaffirming "constitutional rule" of *Abood* and *Keller* as "limiting the required subsidy to speech germane to the purposes of the union or bar association").

The Court also adopted *Abood*'s standard in agricultural-marketing cases. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472-73 (1997) (reaffirming *Abood*'s holding that "assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group" as long as the funds are "'germane' to the purpose for which compelled association was justified"); *United Foods*, 533 U.S. at 415 (mushroom advertisements did not satisfy *Abood*'s "germane[ness]" test because "the compelled contributions for advertising [we]re not part of some broader regulatory scheme"); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (describing *Abood* and *Keller* as "controlling").

In all, 17 Justices have authored or joined opinions recognizing *Abood*'s key principle. As that consensus reflects, *Abood* correctly held that the "vital policy interest[s]" of public employers in fairly allocating the costs of the union's services outweigh the comparatively modest limitations on public employees' expressive freedom. *Lehnert*, 500 U.S. at 519.

2. Petitioner Does Not Seriously Dispute That Overruling *Abood* Would Upend Significant Reliance Interests

Strong reliance interests underlie *Abood* and its progeny.

First, petitioner does not dispute that overruling *Abood* would disrupt the laws of at least 24 States that have – based on this Court's repeatedly reaffirmed decisions – adopted collective-bargaining systems with fair-share fees. *Stare decisis* counsels strongly in favor of restraint "when the legislature . . . ha[s] acted in reliance on a previous decision" and "overruling the decision would . . . require an extensive legislative response." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Second, contrary to petitioner's assertion (at 32) that overruling *Abood* will "not affect government [CBA]s," overruling *Abood* would call into question thousands of public-sector union contracts governing millions of public employees and affecting scores of critical services, including police, fire, emergency response, hospitals, and, of course, education.[13] Those contracts require unions to provide vital services to the State, which unions agreed to provide with the agreement of funding for the significant costs of those services. *See Abood*, 431 U.S. at 221-22.

In such a scenario, *stare decisis* concerns "are 'at their acme.'" *Kimble*, 135 S. Ct. at 2410. "[R]eliance interests are important considerations in . . . contract cases" *and* are heightened "where parties may have acted in conformance with existing legal rules in order

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[13] *See* Robert Jesse Willhide, U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 9, tbl. 3 (Dec. 19, 2014), http://www.census.gov/content/dam/Census/library/publications/2014/econ/g13-aspep.pdf.

to conduct transactions." *Citizens United*, 558 U.S. at 365.

3. *Abood* Has Proved Workable

This Court's precedents belie petitioner's argument (at 26-32) that *Abood* is unworkable. *Abood* itself recognized that the line between collective-bargaining and ideological activities would be "somewhat hazier" in the public-employee context. 431 U.S. at 236. But line-drawing difficulties are insufficient reason to abandon sound constitutional principle. *See id.* at 235-37. Petitioner's disagreement with that considered judgment does not provide special justification for overruling it, especially given that petitioner's facial challenge presents a "lack of factual concreteness . . . to aid [the Court] in approaching the difficult line-drawing questions." *Id.* at 236-37.

Nor, contrary to *Harris*'s suggestion, has this Court "struggled repeatedly with this issue." 134 S. Ct. at 2633; *see* Pet. Br. 27. By *Harris*'s own count, the Court has decided four cases in 32 years placing particular types of expenditures on one side or the other of that line – hardly a torrent evidencing an unadministrable rule. It is wholly unsurprising that *Abood*, which was the first "in-depth examination" subjecting portions of agency-fee payments to constitutional scrutiny, failed to "clarify the entire field." *Heller*, 554 U.S. at 635. Subsequent cases have refined the line between chargeable and non-chargeable activity, and those decisions have not been divisive. *See Ellis*, 466 U.S. at 457 (unanimous except for Justice Powell's limited dissent); *Hudson*, 475 U.S. at 310-11 (establishing notice and opt-out procedures); *id.* at 311 (White, J., concurring); *Locke*, 555 U.S. at 221 (concluding litigation expenses were chargeable); *id.* at 221-22 (Alito, J.,

concurring). Only *Lehnert* generated significant dissension, as Justice Scalia advocated for a stricter line between chargeable and non-chargeable expenses. *Compare Lehnert*, 500 U.S. at 519, *with id.* at 556-57 (Scalia, J., concurring in the judgment in part and dissenting in part).

Petitioner also contends (at 27, 28-29) that the "amorphous" germaneness test unions apply "invite[s] abuse." AFSCME's test (App. 28a) is nearly verbatim from *Lehnert*. *See* 500 U.S. at 519. And its Fair Share Notice provides significant detail, listing activities "not include[d]" in the fair-share fee, App. 32a; itemizing the Union's activity-by-activity costs to the single dollar, App. 34a-39a; and explaining the fair-share challenge process, which offers the challenger binding arbitration at the Union's expense, App. 40a-41a. Moreover, the audit process protects against abuse, contrary to petitioner's characterization (at 28-29). Far from taking the unions' categorizations "for granted," auditors must in fact "review those classifications . . . with professional skepticism" under the code that governs CPAs. CPAs Br. 11-12.

At most, petitioner's workability concern counsels clarifying *Lehnert*'s rule, and not overruling *Abood*.

4. There Is No Exception to *Stare Decisis* Applicable Here

Contrary to petitioner's attempt to require respondents to justify *keeping* established law on the books, *see* Pet. Br. 35, this Court has never held that *stare decisis* lacks force in constitutional cases. Indeed, it consistently has held that *stare decisis* demands "special justification" for "*any* departure" from precedent, *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (emphasis added), including "in constitutional cases," *IBM*, 517 U.S. at 856.

Stare decisis would also further federalism values. Voters in different States have come to different conclusions on whether and how to recognize agency shops. Political debate on labor-relations policy continues. *See*, *e.g.*, Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. Times (June 12, 2015). That "fair and honest debate . . . 'is exactly how our system of government is supposed to work.'" *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (quoting *id.* at 2627 (Scalia, J., dissenting)). The variety of approaches reached through the States' democratic processes counsels against finding a new First Amendment right to avoid paying any fair-share fees. As Justice Scalia noted: "It is profoundly disturbing that the varying political practices across this vast country, from coast to coast, can be transformed overnight by an institution whose conviction of what the Constitution means is so fickle." *Umbehr*, 518 U.S. at 687 (Scalia, J., dissenting).

B. Petitioner's Arguments Concerning *Abood*'s Vitality Depend On Assertions Of Contested (And Incorrect) Facts, And This Case Lacks A Factual Record

Petitioner asks this Court to overrule *Abood* and its progeny and hold that *any* fair-share fees collected without affirmative consent by *any* public-employee union in *any* State for *any* purpose are unconstitutional. Petitioner's challenge exemplifies the kind of facial challenge "disfavored" by this Court. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). As even Justice Powell's *Abood* opinion recognized, for *some* collective-bargaining topics an individual's First Amendment in-

terests are "comparatively weak" and the State's interests "strong." 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment).

Moreover, petitioner raises his sweeping challenge without *any* evidentiary record and without having specified the issues on which he purportedly disagrees with the Union. Given the "fact-poor record[]" before this Court, *Sabri v. United States*, 541 U.S. 600, 609 (2004), it should be particularly unwilling to announce a sweeping new constitutional right. Instead, the Court should "proceed with caution and restraint," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), and reject petitioner's blanket challenge to all fair-share fees.

A more fulsome record, for example, would provide further evidence concerning the routine nature of grievance procedures. As the IPLRA requires, AFSCME pursues grievances on behalf of non-members – at those employees' elections – literally hundreds of times per year, and it generates many positive outcomes, including reinstatement, backpay, and expungement of incorrect written reprimands. Such representation comes at a financial cost to the Union. And far from being precedential, *see* Pet. Br. 15, grievances are often resolved without "precedent" or "prejudice." JA132, 134.

Petitioner also calls it "difficult" (at 29) for employees to determine whether a union has accurately described its expenditures in its *Hudson* notice and thus whether to challenge the calculation, and cites *Knox*'s assertion that union-funded arbitration in which the union bears the burden of proof is still a "painful burden." 567 U.S. at 319 n.8. But "mounting a challenge is for all practical intents and purposes free," as "to file a challenge costs only a postage stamp plus a small

amount of time to supply the tiny amount of information that the challenge must set forth." *Gilpin v. AFSCME*, 875 F.2d 1310, 1315-16 (7th Cir. 1989) (Posner, J.). A record would allow the lower courts to test petitioner's claim and the correctness of *Harris*'s footnote.

Finally, *nothing* in this lawsuit – no assertion in petitioner's brief or allegation in his intervenor complaint – identifies a single view that petitioner takes in opposition to his union representative. A developed record would include evidence necessary to allow the lower courts to interrogate Janus's claim, including the number of times Janus availed himself of the opportunity to provide the Union with his disagreements in the forum it provides (0), and the specific areas on which Janus disagrees with the position AFSCME takes (to assess whether they reflect speech "as a citizen" or "as an employee"). Typically, when this Court decides that a person's constitutional rights have been violated, the alleged violation stems from something concrete. The vague and overblown nature of this lawsuit does not.

A record would also illuminate the prosaic nature of most employee disputes and the extent to which they reflect routine labor-management issues. Without facts proving the contrary, petitioner's arguments for discarding *Abood* reflect the triumph of ideological fervor over empirical experience.

C. Overruling *Abood* Would Disrupt Other Long-Settled First Amendment Doctrines

1. *Abood*'s principle is consistent with First Amendment decisions in the employee-speech, compelled-subsidy, and public-forum contexts. *See supra* pp. 21-28. Not only was *Abood* correctly decided, but

overruling it would call those additional lines of precedent into question. *See Arizona v. Gant*, 556 U.S. 332, 358, 361 (2009) (Alito, J., dissenting) (citing reliance and "[c]onsistency with later cases" as weighing in favor of honoring *stare decisis*) (emphasis omitted). Because those cases rest on *Abood*'s foundation, it is not the sort of "doctrinal dinosaur or legal last-man-standing" justifying reduced adherence to *stare decisis*. *Kimble*, 135 S. Ct. at 2411.

2. "The United States previously defended *Abood* by relying primarily on the balancing test for public-employee speech claims established in *Pickering*." U.S. Br. 9. That position was unsurprising and reflected the federal government's vested interest, "[a]s the nation's largest public employer," *id.* at 1, in managing its workforce effectively. If the United States' new position were adopted, *Pickering*'s force would be significantly reduced, and a far larger swath of public-employee speech would be subject to "exacting First Amendment scrutiny." *Id.* at 8. This includes, potentially, speech by public-employee leakers of government secrets or employee disagreements with the government's third-party contracts. Though leaks very frequently "implicate[] concerns of politics and public policy," *id.* at 15, that conduct traditionally has been subject to the more permissive First Amendment standard allowing "reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment," *Snepp*, 444 U.S. at 509 n.3. The United States' reversal in position would leave that and other areas of First Amendment law in limbo in ways the government's brief does not address.

3. Petitioner does not hide that the core of his challenge implicates the validity of exclusive union representation itself. *See*, *e.g.*, Pet. Br. 50 (agency fees

"compound the First Amendment injury that [exclusive representation] already inflicts"). The logic of petitioner's argument is thus directly at odds with *Knight*, adding yet more ripple effects counseling against overruling *Abood*.

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Stare decisis has additional force where a "decision's close relation to a whole web of precedents means that reversing it could threaten others." *Kimble*, 135 S. Ct. at 2411. As that concern applies here, the Court should decline "to unsettle stable law." *Id.*

V. PETITIONER'S REQUEST FOR AN AFFIRMATIVE CONSENT REQUIREMENT SHOULD BE REJECTED

A. The Scope Of Required Consent Is Outside The Question Presented

Petitioner invites the Court (at 61-63) to decide whether the First Amendment requires employees to provide "affirmative consent" to non-chargeable fees, rather than an annual opt-out mechanism. The Court should decline the invitation.

The Court granted certiorari on one question: "should *Abood* be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment?" Pet. i. Unlike in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam), it did not grant certiorari (nor was certiorari sought) on whether the First Amendment permits a system requiring employees to opt out of supporting non-germane activities. *See* Pet. i, *Friedrichs*, No. 14-915 (U.S. filed Jan. 26, 2015). It is apparent why. Under the CBA, AFSCME's default rule is to charge non-members *only* for "their share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and

conditions of employment subject to the terms and provisions of the parties' fair share agreement." JA124; *see also* 5 ILCS 315/6(a). Full union dues are collected only from employees "who individually request it." JA122. Given the facts of the case, no "holding" (Pet. Br. 62) could address the consent question.

B. Any First Amendment Interest Against Compelled Subsidization Is Properly Protected By A Right To Opt Out

The Court repeatedly has recognized that an individual given the chance to object is not being compelled to engage in expressive activity. *See Davenport*, 551 U.S. at 181 ("Neither *Hudson* nor any of our other cases . . . has held that the First Amendment mandates that a public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*."); *Beck*, 487 U.S. at 745 (RLA prohibits political expenditures "over the objections of nonmembers").

This conclusion reflects holdings in other First Amendment cases. *See*, *e.g.*, *Christian Legal Soc'y Chapter of Univ. of California v. Martinez*, 561 U.S. 661, 682 (2010) ("regulations that *compelled* a group to include unwanted members, with no choice to opt out," have been held unconstitutional, whereas less strict requirements have not). Moreover, the right to opt out adequately protects other constitutional rights. *See*, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'"). In court, individuals can forfeit constitutional rights by failing to object affirmatively to their violation. *See*, *e.g.*,

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313 n.3 (2009) ("[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence").

Petitioner merely asserts (at 62) that affirmative consent is necessary to satisfy the First Amendment. But he makes no effort to distinguish (or even cite) the many contexts in which this Court has said otherwise. As the cases above demonstrate, it long has been the rule that individuals affirmatively must invoke their own constitutional rights.

CONCLUSION

The case should be dismissed for lack of subject-matter jurisdiction. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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