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 APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The City of New York submits this brief *amicus curiae* to describe how, decades ago, it came to embrace agency fees. This historical perspective will illuminate a key backdrop to *Abood v. Detroit Board of Education*, as well as the City's powerful interest, on behalf of all its residents, in the Court's preserving that decision now.

The story centers on a series of paralyzing public-sector strikes in the 1960s and 1970s that wreaked havoc on millions of City residents, including union members and their families but hardly limited to them. Garbage piled in streets, children missed weeks of school, and subways ground to a halt.

When a ban on strikes paired with collective bargaining and automatic dues collection proved an ineffectual response to the crisis, the City and State turned to agency shop agreements as part of a broader labor management strategy designed to promote labor stability. The City's collective bargaining system flourished thereafter, and its success has helped protect public health and safety ever since.

Over the decades, the reliable funding provided by agency fees has enabled the City's public-sector unions to pursue informed bargaining strategies that benefit the workforce broadly, rather than short-term or confrontational approaches designed to serve only the interests of those most willing to pay union dues. Effective collective bargaining

regimes are time- and resource-intensive, and must protect all represented employees, whether active or inactive, member or nonmember. Financial stability helps empower unions to build long-lasting and constructive bargaining relationships with the City, improving the provision of public services to the benefit of all residents. Indeed, disagreements between the City and its unions now rarely result in the sort of public disruption that plagued New Yorkers before agency fees were used.

Agency fees remain critically important. The City retains over 380,000 workers—more than all but five private employers in the country—and nearly all of those workers are currently represented by a union. It ranks first nationwide in the number of unionized workers it manages. And unionized public-sector workers are responsible for a wide range of services essential to the operation of the nation's densest and most populous city.

Overruling *Abood* would strip jurisdictions like New York City of a vital tool that has for years promoted productive relationships with public workforces. History shows that millions of everyday New Yorkers, including the City's public employees, would ultimately shoulder the cost of any resulting discord. That is a risk that should not be revived.

SUMMARY OF THE ARGUMENT

Under traditional collective bargaining schemes, employees have the right to select a union by majority vote to serve as their exclusive representative in negotiations. Agency shop provisions permit the selected union to charge employees who decline to join it a fee to defray the cost of its non-political activities that benefit the entirety of the workforce it represents. Forty years ago, this Court upheld the constitutionality of the public-sector agency shop in *Abood v. Detroit Board of Education*.[1] Relying on *Abood*, jurisdictions across the nation have legalized and negotiated the collection of agency fees to support public-sector collective bargaining.

New York City agrees with respondents that agency fees do not run afoul of the First Amendment, and that *Abood's* decades-old precedent should be preserved. In support of these contentions, the City submits this brief to highlight two points which illustrate why agency fees are central to many public labor management schemes, and the strength of the government interest—as employer and protector of public welfare—in permitting their collection.

First, as the City's history demonstrates, agency fees are a key means of protecting the public from the disruption of government services caused by

[1] 431 U.S. 209 (1977).

labor disputes. The City embraced the agency shop as part of a comprehensive labor management system at a time when existing collective bargaining policy proved insufficient to yield a reliable alternative to strikes. The change helped to stabilize labor relations for the benefit of all City residents, not just the City's workers.

Second, and relatedly, the City's experience rebuts petitioner's crabbed portrayal of the government interest in agency fees. The collaborative benefits of strong bargaining relationships aside, Petitioner ignores the massive public harm that can arise from the disruption of public services, especially in large, densely populated cities like New York City. Given this threat, tools that reduce the risk of public-sector strikes—like agency fees—serve a compelling government interest that far exceeds mere administrative convenience. While different jurisdictions may reasonably find different labor management strategies better suited for their particular circumstances, *Abood* wisely left those choices to the political process.

ARGUMENT

I. The City authorized agency fees in response to a series of devastating strikes that caused massive public harm.

The City has found it essential public policy both to pursue collective bargaining with public-sector unions and to promote its effectiveness. Successful negotiations not only advance the welfare of wage-earners and their families, but more broadly serve the public's strong interest in prompt and successful resolution of labor disputes. In plain terms, the City's residents suffer when vital public services are interrupted by strikes.

The City had this consideration specifically in mind when it pushed for agency fees as part of a comprehensive program—based on successful private-sector models—that would protect the public from the catastrophic harm of public-sector strikes. The fees served to buttress the existing labor relations framework at a time when collective bargaining and union exclusivity alone proved inadequate to yield a sufficiently stable and robust alternative to strikes.

Certainly, no labor relations system is perfect. Nor can the impact of any of its components be measured in isolation. But it is undeniable that collective bargaining paired with agency fees has proven to be a successful formula for promoting labor peace in New York City (and across New York State).

A. The City's early adoption of public-sector collective bargaining proved insufficient to prevent labor disruption.

Congress protected private-sector workers' right to organize and bargain in the 1935 National Labor Relations Act.[2] For decades thereafter, however, no similar system existed for public-sector workers. Instead, many states, including New York, attempted to minimize the damage of public-sector labor disputes by simply banning government workers from striking and imposing harsh fines on violators.[3]

But banning strikes proved ineffective absent a mechanism to address and remedy the root causes of labor unrest.[4] In response, the City pioneered collective bargaining as a means of promoting the fair resolution of public-sector labor disputes such that employees would not feel compelled to walk out on the job.

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[2] *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C § 157 (2012)).

[3] *See* Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 256 (repealed 1967); *see also* Terry O'Neil & E.J. McMahon, Empire Ctr., SR4-07, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws* 3 (2007), available at http://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf.

[4] O'Neil & McMahon, *supra* note 3, at 3 (noting Condon-Wadlin's "mixed effectiveness" and that it ultimately was deemed "flawed and unenforceable").

In 1958, Mayor Robert F. Wagner issued an executive order authorizing collective bargaining through public-sector labor unions for certain groups of City workers.[5] The order recognized that "labor disputes between the City and its employees [would] be minimized, and that effective operation of the City's affairs in the public interest [would] be safeguarded, by permitting employees to participate … through their freely chosen representatives in the determination of the terms and conditions of their employment."[6] It positioned the City as "one of the first jurisdictions in the nation to adopt an essentially private sector model for municipal labor relations."[7] Similar rights would not be granted to any State workers until 1959,[8] to federal public employees until 1962,[9] or to New York State public employees until 1967.[10]

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[5] *See* Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York* 14 (1990) (describing the Executive Order); O'Neil & McMahon, *supra* note 3, at 4.

[6] Exec. Order (Mayor Wagner) No. 49 § 2 (1958).

[7] Michael Marmo, *More Profile than Courage: The New York City Transit Strike of 1966*, at 72 (1990).

[8] Donovan, *supra* note 5, at v; Steven Greenhouse, *The Wisconsin Legacy*, N.Y. Times, Feb. 23, 2014, at BU1.

[9] Exec. Order No. 10,988, 3 C.F.R. 321 (1959–1963).

[10] *See* Public Employees' Fair Employment Act (Taylor Law), ch. 392, §§ 202–03, 1967 N.Y. Sess. Laws 393, 396 (McKinney)

Without agency fees, the right to collectively bargain, even when paired with an outright ban on public-sector strikes, failed to prevent destructive labor disputes. New York City was the epicenter of a series of strikes from the mid-1960s through the early 1970s. State officials considered the City to be the poster child for the failure of then-existing law to "protect vital public interests."[11] The effect on ordinary New Yorkers, including union members, was profound.

The wave of public-sector strikes began in 1965, when eight thousand welfare workers held a twenty-eight-day work stoppage, closing two-thirds of the City's welfare centers.[12] It disrupted vital services for half a million welfare recipients, many of them children or seniors.[13]

(codified as amended at N.Y. Civ. Serv. Law §§ 202–03 (2015)); *see also* O'Neil & McMahon, *supra* note 3, at 6.

[11] Letter from Governor's Comm. on Pub. Emp. Relations to Governor Nelson A. Rockefeller 10 (Jan. 23, 1969) (on file with the New York City Law Department).

[12] *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205 (2000); O'Neil & McMahon, *supra* note 3, at 3.

[13] Emanuel Perlmutter, *Welfare Help in a City Curbed by a Walkout*, N.Y. Times, Jan. 5, 1965, at 1, 21; Emanuel Perlmutter, *Welfare Strike Due in City Today in Spite of Writ*, N.Y. Times, Jan. 4, 1965, at 1, 25.

Then, on the following New Year's Day, transit workers began a twelve-day strike—which persisted despite a court injunction—that cost the City's economy nearly $9 billion in today's dollars.[14] The strike effectively shut down the subway and bus system, overwhelming railroads, producing historic traffic jams, and closing public schools. This led the mayor to devise "the most urgent civil defense plan New York City has ever had to improvise for its own health and safety."[15] The New York Times captured the scene: "Seldom in its history has New York City been through more difficult days, … and not since the draft riots of the Civil War has the normal course of life in [the] city been more profoundly altered for so many days."[16]

In the aftermath of this vast turmoil, the City and State governments each made it a priority to promote the resolution of labor disputes through an

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[14] Donovan, *supra* note 5, at 19; Freeman, *supra* note 12, at 211; Marmo, *supra* note 7, at 151; O'Neil & McMahon, *supra* note 10, at 4; *see also News Summary and Index: The Major Events of the Day: Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33; *$100-Million Loss Each Day Is Seen*, N.Y. Times, Jan. 5, 1966, at 1, 16

[15] Editorial, *The Big Crush*, N.Y. Times, Jan. 3, 1966, at 26; Homer Bigart, *New Talks Today: Quill Scores Mayor—Says Walkout Could Last for a Month*, N.Y. Times, Jan. 2, 1966, at 1, 58; *Strict Rules Set on Travel into the City During Strike*, N.Y. Times, Jan. 1, 1966, at 1, 6.

[16] Editorial, *This Beleaguered City*, N.Y. Times, Jan. 12, 1966, at 20.

effective bargaining system. In 1967, based largely on the City's recent experience, New York State enacted the Taylor Law to "protect[] the public against the disruption of vital public services …, while at the same time protecting the rights of public employees."[17] The law created a new comprehensive scheme for public-sector labor relations to address the root causes of labor unrest. It paired the State's prohibition on public employee strikes with an overarching process for collective bargaining, including an automatic deduction of union dues from paychecks (or "dues check-off"). The law also established a "new administrative agency charged exclusively with the regulation of public sector labor relations."[18]

Relying on a Taylor Law provision permitting local flexibility and experimentation, the City enacted its own Collective Bargaining Law, creating an Office of Collective Bargaining to

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[17] Governor's Comm. on Pub. Emp. Relations, *Final Report* 9 (1966) (internal quotation marks omitted) (on file with the New York City Law Department); *see also* Public Employees' Fair Employment Act (Taylor Law), ch. 392, § 200, 1967 N.Y. Sess. Laws 393, 394 (McKinney) (codified as amended at N.Y. Civ. Serv. Law § 200 (2015)) (describing its purpose as "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government").

[18] Donovan, *supra* note 5, at v; O'Neil & McMahon, *supra* note 3, at 6.

"effectuat[e] sound labor relations and collective bargaining between public employers and institutions in the city and their employees."[19] The legislation took effect on the same day as the Taylor Law.[20]

While a positive step, the new collective-bargaining laws, without agency shop provisions, failed to solve the problem of labor unrest. Instead, disagreements between the City and public-sector workers continued to impose enormous financial costs and public harm:

- In February 1968, a sanitation strike left the streets piled with nearly 100,000 tons of refuse—enough to fill the Titanic twice.[21] This led to a proliferation of trash fires and the City's first general health emergency since a 1931 polio epidemic.[22] The New York Times likened the City to "a vast slum" as "mounds of refuse grew

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[19] Local Law No. 53 (1967) of City of New York.

[20] John V. Lindsay, City of N.Y., *Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 7 (1969) (on file with the New York City Law Department).

[21] *See Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 23; Tad Fitch, J. Kent Layton & Bill Wormstedt, *On a Sea of Glass: The Life and Loss of the RMS Titanic*, at App. A (2013).

[22] *See Fragrant Days in Fun City*, *supra* note 21, at 23.

higher and strong winds whirled the filth through the streets."[23]

- Later in 1968, three teacher walkouts caused more than a million children to miss thirty-six days of school.[24] The City's poorest children were hardest hit: 240,000 kids went without their free daily lunches.[25] Some parents fashioned improvised classrooms in churches and storefronts, while others resorted to smashing doors and windows to open their children's schools.[26]

- In January 1971, the City's police force held an unscheduled walkout (or "wildcat strike"). For six days, less than a sixth of the City's patrolmen reported for work.[27]

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[23] Emanuel Perlmutter, *Shots Are Fired in Refuse Strike; Filth Litters City*, N.Y. Times, Feb. 5, 1968, at 1, 37.

[24] *See* Leonard Buder, *Strike Cripples Schools, No Settlement in Sight*, N.Y. Times, Oct. 15, 1968, at 1, 38; *Strike's Bitter End*, Time, Nov. 29, 1968, at 89.

[25] *See Strike's Bitter End*, *supra* note 24, at 89.

[26] Leonard Buder, *Parents Smash Windows, Doors to Open Schools*, N.Y. Times, Oct. 19, 1968, at 1, 26; *Strike's Bitter End*, *supra* note 24, at 89.

[27] Jeffrey A. Kroessler, *New York Year By Year: A Chronology of the Great Metropolis* 309 (2002); *The Police Strike in New York*, Chi. Trib., Jan. 21, 1971, at 20; Richard Reeves, *Police:*

> The Chicago Tribune described a city "nakedly exposed to the threat of criminality on a massive scale."[28]

The continued turmoil made abundantly clear that more had to be done to forge an effective system of collective bargaining that would serve, consistently and in the long term, as a bulwark against public-sector strikes.

B. The City's use of agency shop provisions ultimately fortified a successful collective bargaining system.

It was at this pivotal time that New York City looked to agency shop provisions to help create effective and stable collective bargaining and stem labor unrest. In 1969, the City's Mayor urged the State Legislature to adopt "the agency shop, a recognized form of union security," as a means of promoting both "labor harmony and responsibility."[29]

'Attention Must Be Paid!' Say the Men on Strike, N.Y. Times, Jan. 17, 1971, at E1.

[28] *The Police Strike in New York*, *supra* note 27, at 20.

[29] John V. Lindsay, City of N.Y., *Report and Plan Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 9-10 (1969) (on file with the New York City Law Department). The City pursued agency shop arrangements that same year.

Three years later, in 1972, the City explicitly amended its own Collective Bargaining Law to permit the negotiation of agency shop arrangements to the full extent permitted by state law.[30] Only a few years after that, and against the backdrop of repeated disruption of public services in New York and other cities, this Court decided *Abood*. The stakes would have been clear to any newspaper reader of the time—and could not have been lost on the Court.

After *Abood* resolved the constitutionality of agency fees in the public sector, New York State moved quickly to amend the Taylor Law to require state employees to pay agency fees and to designate them a mandatory subject of negotiation at the local level.[31] The Legislature explicitly relied on

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[30] *See* Local Law No. 1 (1972) of City of New York § 10; *see also* Presentation by the Majority Leader, Thomas J. Cuite 4, *reprinted in* New York Legislative Service, NYLS' New York City Legislative History: 1972 Local Law #1 (2010) at unnumbered 221. In *Bauch v. New York*, the Court of Appeals acknowledged that "[t]he maintenance of stability in the relations between the city and employee organizations, as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration." 21 N.Y.2d 599, 607 (1968). The City interpreted agency shop arrangements as "further[ing] these objectives." *Id.*

[31] *See* Act of Aug. 3, 1977, ch. 677, § 3, 1977 N.Y. Sess. Law 1081, 1082 (McKinney); *see also* O'Neil & McMahon, *supra* note 3, at 24 n.17. In 1992, the State amended the Taylor Law to require agency shop arrangements for all public employees.

Abood; a full copy of the decision was included in the bill's official legislative history.[32]

The City strongly supported the amendment, urging the State Legislature that agency fees "generate a more stable and responsible labor relation atmosphere at the bargaining table" by providing unions with the organizational security necessary to resist "divisive elements"—those within and without their ranks who undermine meaningful negotiation—and thereby deterring strikes.[33] When the amendment passed, the Mayor directed city agencies to implement agreements with agency fees "expeditiously."[34]

Within only a few years of state-wide implementation of agency shop provisions, the rate of strikes plummeted by well over 90% across all of

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See Act of July 24, 1992, ch. 606, § 2, 1992 N.Y. Sess. Laws 1650, 1650 (McKinney); *see also* O'Neil & McMahon, *supra* note 3, at 24 n.17.

[32] *See* Bill Jacket for Act of Aug. 3, 1977, ch. 677.

[33] Richard L. Rubin, Memorandum in Support (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677; *see also* Memorandum from Donald H. Wollett, N.Y. State Office of Emp. Relations, to Judah Gribetz, Counsel to the Governor (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677 (noting that agency shop arrangements "provide[] to employee organizations the organizational security necessary for responsible collective bargaining").

[34] Admin. Order (Mayor Beame) No. 38 (1977) (on file with the New York City Law Department).

New York State—a dramatic improvement in cooperation between labor and government.[35] As a result, "the last quarter-century has been an era of labor tranquility in … state and local government throughout New York."[36] Both workers and the general public have benefitted.

While the precise explanation for the reduction in strikes may be complex, government employers like New York City have good reason to conclude that agency shop provisions remain a cornerstone of successful strategies for promoting labor peace. Armed with a stable source of funding, public-sector unions have used collaborative approaches and adopted long-term perspectives in resolving labor disputes, rather than seeing strikes or other confrontational tactics as their only or best option. Agency fees also temper the influence of extreme elements and curb incentives for labor leaders to play up disputes or management intransigence as a means of attracting members.[37] A return to the

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[35] In the 15 years after the first Taylor Law came into effect (1967–1982), there were, on average, about 20 public-sector strikes per year in New York State. *See* O'Neil & McMahon, *supra* note 3, at 10. By contrast, between 1983 and 2006, there were, on average, less than two per year. *Id*.

[36] *Id*.

[37] This mechanism is further explained in the brief of Amici Curiae Los Angeles County's Department of Health Services, NYC Health + Hospitals, and Service Employees International Union.

failed labor regime of the past risks a serious regression which, as the City's history illustrates, would come at great cost to the public at large.

II. Petitioner and amici ignore the compelling public interest of New York City and other jurisdictions in avoiding disruption of essential public services.

The history of New York City's collective bargaining system demonstrates that petitioner and his amici frame the government interest in agency fees far too narrowly. In posing the relevant First Amendment question, petitioner mischaracterizes the pursuit of "labor peace" under *Abood* as an interest in the mere administrative convenience of "bargaining with exclusive representatives."[38] Indeed, petitioner's brief does not even mention strikes or other work stoppages, when agency fees, as a matter of historical fact, were meant to help prevent them.[39]

This amnesia about the origin and purpose of agency fees leads petitioner and his amici to overlook the substantial risk of injury to the public

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[38] *See* Brief for the Petitioner at 61, *see also id.* at 53–60.

[39] *See generally Brief Amici Curiae of Los Angeles County's Department of Health Services, NYC Health + Hospitals, And Service Employees International Union Supporting Respondents.*

as a whole that can be posed by unsuccessful public-sector labor negotiations.[40] But these devastating strikes prompted the City and State to first embrace agency fees. When petitioner and his amici reduce this interest to mere "rational basis justification[s]" like limiting bargaining partners and avoiding confusion,[41] they erase decades of history and ignore hardships endured by millions of City residents.

New York City's experience also refutes petitioner's assumption that the governmental interest in labor peace is uniform nationwide. We are a nation of many different governments—federal, state, and local—all with widely varying circumstances, histories, and needs that in turn may warrant different labor relations strategies.[42]

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[40] Similarly, when petitioner limits the advantages of "collectivization" to securing greater benefits for public-sector employees, he turns a blind eye to the broader public benefit that is confirmed by history, at least for some jurisdictions. *Id.* at 58–59.

[41] *Id.* at 56; *see also id.* at 57–59.

[42] This point shows the fallacy of the blunt comparison offered by Amicus Curiae Freedom Foundation and Economists between states with so-called "right-to-work" laws and those without them. That analysis fails to control for numerous relevant variables, and it cannot measure the impact of agency fees in any particular jurisdiction or predict the consequences of stripping them now. *See* Brief of the Freedom Foundation and Economists as Amicus Curiae in Support of the Petitioners at 6. As New York City's experience

A constitutional rule that mandates a single answer to the agency shop question—the practical result of overruling *Abood*—is simply not workable.

A. The City's circumstances render labor peace a particularly compelling interest here.

In New York City, the disruption of public services presents an untenable risk due to the City's size, density, and diversity. It packs more than eight-and-a-half million residents into its tiny geography[43]—outranking forty states[44] and standing as the nation's most densely populated major city.[45] It also hosts 600,000 commuters each

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illustrates, the unique challenges faced by some government employers, and the nature of the workforces they manage, render agency fees an essential tool, even if they are not uniformly necessary, or even sensible, nationwide.

[43] *See Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2016 Population*: *April 1, 2010 to July 1, 2016*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANNRSIP.US12A.

[44] *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Dec. 6, 2017).

[45] Mike Maciag, *Mapping the Nation's Most Densely Populated Cities*, Governing (Oct. 2, 2013), http://www.governing.com/blogs/by-the-numbers/most-densely-populated-cities-data-map.html.

weekday,[46] joined by over 60 million tourists each year.[47]

Core governmental services loom large for the City's residents and visitors alike, leaving them especially vulnerable to labor disruption. For example:

- Public transportation is essential (less than 45 percent of City households own a car).[48] Mass transit provides nearly nine million rides every weekday, bringing employees and customers to thousands of businesses.[49]

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[46] Sam Roberts, *Commuters Nearly Double Manhattan's Daytime Population, Census Says*, N.Y. Times: City Room (June 3, 2013, 11:56 AM), http://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says/.

[47] Press Release, City of N.Y., *Mayor de Blasio Announces Total NYC Visitors Surpasses 60 Million for First Time* (Dec. 19, 2016), http://www1.nyc.gov/office-of-the-mayor/news/963-16/mayor-de-blasio-total-nyc-visitors-surpasses-60-million-first-time.

[48] *See Physical Housing Characteristics for Occupied Housing Units: 2011-2015 American Community Survey 5-Year Estimates*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S2504/1600000US3651000.

[49] *The MTA Network*, Metro. Transp. Auth., http://web.mta.info/mta/network.htm (last visited Dec. 6, 2017).

- Garbage collection is critical for public health in the City's incredibly dense environment. The volume of residents, visitors, and businesses in the City produces over 21,000 tons of waste every day—which the City employs a small army of sanitation workers to collect.[50] Without them, trash would quickly pile in the streets—as it did in 1968.

- The City runs the largest fire and police departments in the country.[51] It also operates the biggest single-district public school system,[52] employing over 90,000 educators who teach a million public school students each day.[53] The

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[50] *About DSNY*, N.Y.C. Dep't of Sanitation, http://www1.nyc.gov/assets/dsny/about/inside-dsny.shtml (last visited Dec. 6, 2017).

[51] Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Local Police Departments, 2013: Personnel, Policies, and Practices* 3 (2015), *available at* http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf; *Overview*, N.Y.C. Fire Dep't, https://www1.nyc.gov/site/fdny/about/overview/overview.page (last visited Dec. 11, 2017).

[52] *Enrollment, Poverty, and Federal Funds for the 100 Largest School Districts, by Enrollment Size in 2012*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics (2015), https://nces.ed.gov/programs/digest/d14/tables/dt14_215.30.asp.

[53] Dep't of Citywide Admin. Servs., *New York City Gov't Workforce Profile Report, Fiscal Year 2016* at 67 (2016),

> disruption of any of these services would have devastating consequences for City residents.

Because of the scale and critical importance of basic public services in the City, even relatively small disruptions can wreak havoc.[54] Less than a week without mass transit, for example, would cost the City economy over a billion dollars.[55] A week without garbage collection would flood the streets with refuse, threatening a public health crisis.[56] One day without teachers would squander a million days' worth of learning.[57] Simply put, the damage inflicted by public-sector strikes in New York City is too great to risk. The City therefore has an overriding—and compelling—interest in ensuring its collective bargaining system works.

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http://www.nyc.gov/html/dcas/downloads/pdf/misc/workforce_profile_report_fy_2016.pdf; *Statistical Summaries*, N.Y.C. Dep't of Educ., http://schools.nyc.gov/AboutUs/schools/data/stats/"default.htm (last visited Dec. 6, 2017).

[54] *See supra* Part I.

[55] *See* Mike Pesca, *The True Cost of the NYC Transit Strike*, NPR (Dec. 21, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=5064612.

[56] *See supra* Part I.B.

[57] *Cf. Statistical Summaries*, *supra* note 61.

The City's experience also makes plain that the incremental benefit of agency fees does not have to be overwhelming for them to be constitutionally permissible. The harms of public-sector work stoppages are often so large that even a marginal reduction in the risk of strikes is compelling grounds for authorizing agency fees. This is not a theoretical justification. The City *tried* collective bargaining without agency fees, and despite employing techniques like the "government assistance with … dues collection" suggested by petitioner,[58] the public continued to suffer.

B. Governments' practical need to adapt to local circumstances points against constitutionalizing a single approach to public-sector labor relations.

To be sure, not all jurisdictions permit agency fees. Petitioner and his amici paint the variety in labor laws across the nation as evidence that such fees are unnecessary.[59] Yet they draw precisely the wrong conclusion. The diversity of labor laws nationwide is reason for this Court to adhere to *Abood*'s flexible framework, not to abandon it. Divergence in public-sector labor laws is the natural result of the dramatically different circumstances confronted by state and local governments across the nation.

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[58] Brief for the Petitioner at 42.

[59] *See, e.g., id.* at 37; Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioner at 27-36.

For example, while several states have laws that prohibit agency fees (known as "right-to-work" laws),[60] the people in those States did not experience the same series of strikes that New Yorkers endured in the 1960s and 1970s. Nor do those jurisdictions have the same "long, deep tradition" of labor activism as New York City does, where unions are embedded in its institutions and its culture. Even its housing stock bears the imprint of its vibrant labor movement, with more than a dozen union-sponsored housing cooperatives anchoring neighborhoods across the City.[61]

Governments in "right-to-work" states, by contrast, manage different workforces, have endured different histories, and must satisfy different demands. Their legislative choices thus should not control outside their borders any more than New York City's approach should dictate labor policy in Madison, Wisconsin or Fort Worth, Texas. In short, mandating one nationwide rule on agency fees would be deeply inconsistent with this Court's

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[60] *Right-To-Work Resources*, Nat'l Conf. of State Legislators, (2017), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx.

[61] Freeman, *supra* note 12, at 100; David W. Chen, *Electchester Getting Less Electrical; Queens Co-op for Trade Workers Slowly Departs From Its Roots*, N.Y. Times, Mar. 15, 2004, at B1 (describing union-sponsored housing cooperatives providing nearly 50,000 apartments).

recognition that needs vary across the nation,[62] and that local communities should have leeway to promote their own health, safety, and welfare through core labor policies.[63]

Varied circumstances have even led to policy divergence among right-to-work states themselves. Some ban public-sector unions altogether,[64] rejecting collective bargaining as a labor management strategy entirely. Others, however, stop short of abandoning agency fees in all contexts. For example, while Michigan and Wisconsin currently prohibit agency fees for some public-sector unions, both States exempt local police and firefighter unions.[65] The exemptions are necessary because, as Wisconsin's governor put it,

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[62] *See Kelo v. City of New London*, 545 U.S. 469, 482 (2005) ("Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.").

[63] *See Bond v. United States*, 564 U.S. 211, 220–22 (2011) (discussing the role, and virtues, of federalism).

[64] For example, Texas does not permit the recognition of public-sector labor unions as bargaining agents, nor does it allow state officials to enter into collective bargaining contracts with public employees. Texas Gov't Code § 617.002 (2017).

[65] *See* Mich. Comp. Laws § 423.210(4) (2017); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (2017).

"there's no way we're going to put the public safety at risk."[66]

Petitioner and his amici thus mistake public controversy for constitutional error. As this Court has made clear, "[t]he genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."[67] Consistent with this principle, *Abood* left the "wisdom" of adopting agency fees to voters in each State, ensuring that no labor relations policy is frozen in place.[68]

Judgments about risk tolerance and the necessity of public services necessarily differ, and they can even change over time within individual

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[66] Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011, 12:00 AM), http://www.bloomberg.com/news/articles/2011-02-25/walker-says-public-safety-means-wisconsin-cops-keep-collective-bargaining.

[67] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

[68] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977).

jurisdictions.[69] While *Abood* itself concerned a Michigan law authorizing agency fees,[70] the state has since chosen to limit the use of such fees.[71] That change was accomplished through state legislation, not a constitutional rule that imposed Michigan's choice on other communities.

New York City has a powerful interest in labor peace because of its importance to avoiding disruption of essential public services, precisely the rationale that petitioner ignores. Given its unique circumstances and history, the City reasonably views its public services as integral to public safety and welfare, and it accordingly extends to all public unions the same agency shop protection that other jurisdictions offer only to a subset of their public workforces.

More broadly, New York City has for decades chosen to rely on strong, stable unions as a key part

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[69] The range of permissible policy judgments about labor practices is remarkably broad. While most jurisdictions prohibit public workers from striking, some States authorize strikes by some or all government workers. *See, e.g.,* Ohio Rev. Code Ann. § 4117.14(D)(2) (2017). But the existence of those laws does not refute the need to limit or prohibit public-sector strikes in New York and elsewhere.

[70] *Abood*, 431 U.S. at 211.

[71] *See, e.g.,* Jack Spencer, *Right-to-Work Bills Pass Michigan House, Senate*, Mich. Capitol Confidential (Dec. 7, 2012), http://www.michigancapitolconfidential.com/18028; *see also* Mich. Comp. Laws § 423.210(3)(c) (2017).

of its governance strategy, one that embraces the provision of services to strengthen the fabric of the City and better the lives of its residents, while also ensuring fair treatment and protection for workers who serve the public. While other jurisdictions may choose a different course, this Court should not embed that choice in a constitutional rule that overrides New York City's successful long-term labor management scheme or the similar strategies of other cities and states.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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