

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MARK JANUS,)
)
 Petitioner,)
)
 v.) No. 16-1466
)
 AMERICAN FEDERATION OF STATE,)
)
 COUNTY, AND MUNICIPAL EMPLOYEES,)
)
 COUNCIL 31, ET AL.,)
)
 Respondents.)

Pages: 1 through 71

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MARK JANUS,)

Petitioner,)

v.) No. 16-1466

AMERICAN FEDERATION OF STATE,)

COUNTY, AND MUNICIPAL EMPLOYEES,)

COUNCIL 31, ET AL.,)

Respondents.)

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Washington, D.C.

Monday, February 26, 2018

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:06 a.m.

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2

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1466,
5 Janus versus the American Federation of State,
6 County, and Municipal Employees.

7 Mr. Messenger.

8 ORAL ARGUMENT OF WILLIAM L. MESSENGER
9 ON BEHALF OF THE PETITIONER

10 MR. MESSENGER: Mr. Chief Justice, and
11 may it please the Court:

12 Abood should be overruled because it
13 failed to apply heightened First Amendment
14 scrutiny to a compulsory fee for speech to
15 influence governmental policies. Abood's
16 failure places it at odds with Harris, with
17 Knox, and a slew of other speech and
18 association precedents.

19 Now Respondents attempt to justify
20 Abood's results with rationales found nowhere
21 in that decision, which undercuts any stare
22 decisis value in retaining Abood.

23 JUSTICE GINSBURG: May I ask,
24 Mr. Messenger, if you are right about agency
25 fees, what about three things: One is student

1 activities fees. Are they different and, if
2 so, why? Another is mandatory bar association
3 payments. And the third is you have a public
4 sector case. What about the private sector,
5 agency fees compelled by state law in the
6 private sector?

7 MR. MESSENGER: Yes, Your Honor. With
8 respect to the first two instances, the student
9 association or student fees and the bar
10 association fees, those cases are
11 distinguishable for reasons stated in Harris.
12 They're justified by different interests.

13 The state bar associations are
14 justified by the state's compelling government
15 interest in regulating the practice of law
16 before its courts. The student association
17 fees are justified by the government's or what
18 -- a university's compelling interest in
19 setting up a viewpoint-neutral forum for
20 speech.

21 And then, with respect to the private
22 sector cases, they hinge on a question of state
23 action. So, in this case, only public sector
24 union fees are being challenged. In the
25 private sector, you'd have a question of

1 whether state action applied, and, therefore,
2 the rule of Janus would apply to that case.

3 JUSTICE SOTOMAYOR: I'm sorry, I
4 thought that we had always recognized that the
5 government as employer had a compelling
6 interest in regulating its employment
7 decisions.

8 We permit the government to fire
9 people, deprive them of all money, not just a
10 fair share fee, but deprive them of any income
11 if they speak outside of the government's
12 approved policy messages or messages generally.

13 So, if we can permit the government as
14 employer to have a compelling interest to do
15 something as dramatic as firing someone, why
16 can't that interest in having workplace peace,
17 workplace routine in which issues are decided
18 in a -- in a collective way, why isn't that a
19 compelling interest comparable to the others?

20 MR. MESSENGER: Well, the government's
21 interests in restricting speech don't apply to
22 compelling support for speech. In fact,
23 oftentimes they cut the opposite way.

24 So the government's interest in
25 restricting speech, for example, in the Hatch

1 Act, restricting political activities, was in
2 preventing the politicalization of the
3 workforce and preventing government employees
4 from being organized into a political machine.

5 Of course, those same interests don't
6 justify forcing individuals to support the
7 speech of an advocacy group.

8 JUSTICE SOTOMAYOR: But that's no
9 different than forcing student -- student
10 participation in fees to provide a public
11 forum, to have a bar association regulated.
12 These are all forcing the subsidization of
13 private interests for a government purpose.
14 And the government purpose here is labor
15 relations and labor peace. Why isn't -- you
16 still haven't told me why that's not a
17 compelling state interest.

18 MR. MESSENGER: Well, irrespective of
19 whether --

20 JUSTICE SOTOMAYOR: Or -- I shouldn't
21 say state. A compelling federal -- government
22 interest.

23 MR. MESSENGER: Yes, Your Honor.

24 The Court doesn't need to reach
25 whether or not labor peace into that -- such

1 interests are compelling because agency fees
2 are not a least restrictive means to satisfy
3 any labor peace interest the government may
4 have in listening to one union.

5 So the labor peace interest, as this
6 Court has explained in *Abood*, is the
7 government's interest in listening only to one
8 union so it doesn't have to listen to multiple
9 unions.

10 JUSTICE SOTOMAYOR: Well, there's
11 another way of doing student fees. You can
12 have students who don't pay not participate in
13 any student activity because the price of -- of
14 being permitted to participate. You can have
15 bar associations that the state runs. You can
16 have alternatives of all kinds, but the
17 question is, is the alternative that the state
18 has chosen one that is well-fitted to the -- to
19 its need? Is it well-tailored, narrowly
20 tailored?

21 I don't see how you can do that given
22 the interests of the government in ensuring
23 that unions represent everybody.

24 MR. MESSENGER: Well, an agency fee
25 isn't necessary for exclusive representation.

1 JUSTICE SOTOMAYOR: Why not? You have
2 free riding.

3 MR. MESSENGER: Well, the reason, Your
4 Honor, is exclusive representation in and of
5 itself is a valuable benefit for a union. It
6 provides unions with extraordinary powers to
7 compel the government to listen to it at the
8 bargaining table, to not listen to other
9 advocacy groups.

10 JUSTICE GINSBURG: But it drains it of
11 resources that make it an equal partner in the
12 marketing setting. If you are right, that it's
13 not only the people who are opposed to the
14 union but also union supporters who may think
15 I'd rather keep the money in my own pocket, and
16 then you'll have a union with diminished
17 resources, not able to investigate what it
18 should demand at the bargaining table, not
19 equal to the employer that it faces.

20 MR. MESSENGER: Well, I think there's
21 two things in that question, Your Honor.

22 The first, the question is, does the
23 duty to represent nonmembers raise union
24 bargaining costs? And I submit that it does
25 not. The union -- there's no reason why

1 negotiating a contract for all employees in a
2 unit would be more expensive than negotiating a
3 contract just for the union members, because
4 the union's discretion in bargaining is
5 incredibly wide. And so the duty that the
6 union has to the nonmembers, which it assumes
7 over them by assuming exclusive representative
8 authority, doesn't necessarily add any costs
9 above and beyond what the union would already
10 confer.

11 JUSTICE GINSBURG: But you're not
12 taking into account what I --

13 JUSTICE KENNEDY: Have unions --

14 JUSTICE GINSBURG: -- I suggested,
15 that it's not just the people who oppose the
16 union but the people who support the union but
17 say we have a chance to get out of paying fees
18 to the union, and so, although not for
19 ideological reasons, we're going to pass and
20 we're not going to pay dues either.

21 MR. MESSENGER: Well, I submit, Your
22 Honor, it's immaterial why an individual does
23 not wish to support union advocacy. The First
24 Amendment prohibits the government from probing
25 into individuals' subjective belief.

1 JUSTICE GINSBURG: So you're saying
2 that you do then recognize that the unions can
3 be in a position where they will be -- that the
4 resources available to them could be
5 substantially diminished?

6 MR. MESSENGER: Well, to -- to the
7 degree to which the union resources are
8 diminished by individuals exercising their
9 First Amendment right not to subsidize that
10 union, I submit that's a perfectly acceptable
11 result. The --

12 JUSTICE ALITO: Does -- does the
13 Constitution require states to demand that
14 unions provide services for nonmembers?

15 For example, is there a constitutional
16 requirement for a union to handle the
17 grievances of nonmembers, or is that something
18 that's imposed by state law?

19 MR. MESSENGER: It varies, Your Honor.
20 In the federal law, this Court implied the duty
21 of --

22 JUSTICE ALITO: Well, no, we're
23 talking about state law.

24 MR. MESSENGER: Yes. In state law,
25 for example, in Illinois state law, there is a

1 provision in the Illinois Labor Relations Act
2 that expressly provides a duty of fair
3 representation.

4 JUSTICE ALITO: Yeah, I understand
5 that. Are they -- is that constitutionally
6 required?

7 MR. MESSENGER: No, Your Honor.

8 JUSTICE KENNEDY: With reference to
9 some of the other cases they've discussed, have
10 the unions at any point in this litigation or
11 any point in their history ever said that
12 they're committed to the -- to the idea of
13 viewpoint neutrality?

14 MR. MESSENGER: No, Your Honor.

15 JUSTICE BREYER: I wonder, since your
16 time is limited, let me say three -- three
17 quick questions.

18 What you're doing basically is trying
19 to apply a more modern framework to some older
20 cases. This has been the law for 50 years just
21 about. Okay?

22 Holmes and Brandeis didn't know about
23 these modern framework. How many cases should
24 we go back? Do you think we should apply
25 modern frameworks to all old cases, begin with

1 Marbury versus Madison? There are lots of very
2 good lawyers in this room. They will think of
3 all kinds of older cases where we haven't
4 applied modern frameworks.

5 So, one, what's your limiting
6 principle there? Two, what is your limiting
7 principle on the matter that we're talking
8 about?

9 I mean, Stewart, Justice Stewart, who
10 wrote Abood in the '70s, thought the case is
11 identical or near identical to the Railway
12 Labor Act cases. Railway Labor Act, that's a
13 railroad, they're regulated, government's
14 involved, just as your clients are involved,
15 you know, just as the unions here.

16 What's the distinction, if you're
17 going to try to make one?

18 And -- and -- and -- and really,
19 three, and this is for all of you, all the
20 lawyers here, what do you think of the -- what
21 I think of as a compromise put forth by
22 Justices Kennedy, Scalia, Souter, and O'Connor
23 in Lehnert, called to our attention
24 specifically by the brief of Professor Fried
25 and Professor Post? Does that solve most of

1 your problem for any side?

2 Those are the three. You see? Stare
3 decisis, even if it weren't there, how do you
4 distinguish all the other unions, particularly
5 those in regulated industries, and, three, what
6 about the compromise?

7 MR. MESSENGER: Yes. So, to address
8 your questions in order, Justice Breyer, on the
9 first point, Abood is not only inconsistent
10 with cases that came after it; it was
11 inconsistent with cases that came before it,
12 such as Elrod. Even the dissent in Elrod,
13 Justice Powell would have applied exacting
14 First Amendment scrutiny to patronage.

15 So Abood wasn't just a departure or
16 isn't just inconsistent with prior precedent or
17 -- sorry, subsequent precedents, but with the
18 precedents that came before it. So this would
19 not necessarily be solely applying a new
20 doctrine to Abood but applying what the law was
21 even prior to Abood.

22 With the Railway Labor Act, as this
23 Court explained in Harris, there you have the
24 private sector. You don't have the union in
25 dealing with government, which, of course, is

1 political advocacy, and that political advocacy
2 is subject to heightened First Amendment
3 protection, which you don't necessarily have in
4 the private sector.

5 And then, with respect to the third
6 point, the test suggested in the dissent in
7 Lehnert, the problem with that is that it
8 allows for charging of collective bargaining
9 and anything else that the government decided
10 that the union had a duty to bargain over.

11 So, in other words, that test, the
12 statutory duties test, allows the government to
13 decide what is constitutionally chargeable
14 under the First Amendment.

15 So that test would, of course, among
16 other things, allow for charging of collective
17 bargaining. But here collective bargaining is
18 the core political activity, which we submit
19 individuals cannot be compelled to support.

20 JUSTICE SOTOMAYOR: Is it just the
21 collective nature of the union? You're not
22 suggesting that if an employee goes to the
23 state and tries to negotiate his or her wages
24 that that's a First Amendment activity. We've
25 said it's not, right?

1 MR. MESSENGER: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: That
3 employment-related issues are not entitled to
4 First Amendment protection, correct?

5 MR. MESSENGER: Yes, Your Honor,
6 generally speaking.

7 JUSTICE SOTOMAYOR: So, if an employee
8 is disciplined by the state for some
9 malfeasance, that's an employment-related issue
10 not entitled to First Amendment protection?

11 MR. MESSENGER: Oftentimes.

12 JUSTICE SOTOMAYOR: Oftentimes. If
13 employees come to the union -- come to the
14 state and want greater training, employment
15 issue, correct?

16 MR. MESSENGER: Generally, yes.

17 JUSTICE SOTOMAYOR: So why does it
18 transform into some entitlement to First
19 Amendment protection merely because a
20 collective body of employees are coming to the
21 table at once? What's the transformative
22 nature now of making these substantive
23 questions matters of public policy?

24 MR. MESSENGER: As this Court
25 recognized in Harris, it's the scale. So here

1 you have AFSCME bargaining over issues that
2 affect hundreds of millions of dollars and
3 affect thousands of employees across the board.
4 The scale of that is what makes it a political
5 --

6 JUSTICE SOTOMAYOR: It's not going to
7 change whether the union asks for it or the
8 employees come -- what you're now saying is if
9 the employees came into an auditorium at a
10 business site of the state and every one of
11 them got up and said, I want higher wages, the
12 scale of that demand makes it protected by the
13 First Amendment? It's still a work-related
14 demand.

15 MR. MESSENGER: Well, in that
16 hypothetical, it would arguably be a matter of
17 public concern if there was a stage-in, you
18 know, at a public auditorium in which employees
19 stood up.

20 JUSTICE SOTOMAYOR: Well, let's --
21 let's not -- don't put in facts. They have
22 permission to be in the auditorium. They walk
23 in as a group. Every one of them gets up and
24 says, I want higher wages.

25 Is that an employment issue, or does

1 that now become public policy because,
2 something that every employee wants, they've
3 now articulated?

4 MR. MESSENGER: I would submit that it
5 starts to move towards a matter of public
6 policy if it isn't entirely.

7 JUSTICE SOTOMAYOR: So it's now scale,
8 not subject?

9 MR. MESSENGER: Well, it's both scale
10 and subject. I mean, here the subject are
11 wages, health insurance, many ways in which the
12 government operates which are very important
13 both to the public fisc and to the operation
14 and delivery of services.

15 JUSTICE SOTOMAYOR: Scale --

16 JUSTICE KAGAN: Mr. Messenger, may I
17 ask you about reliance interests here? I don't
18 think that we have ever overruled a case where
19 reliance interests are remotely as strong as
20 they are here.

21 So just a few things to put on the
22 table. Twenty-three states, the District of
23 Columbia, Puerto Rico, all would have their
24 statutes declared unconstitutional at once.
25 Thousands of municipalities would have

1 contracts invalidated. Those contracts
2 probably cover millions, maybe up to over 10
3 million, workers.

4 So property and contract rights, the
5 -- the -- the -- the statutes of many states
6 and the livelihoods of millions of individuals
7 affected all at once.

8 When have we ever done something like
9 that? What would be the justification for
10 doing something like that?

11 MR. MESSENGER: Well, I'd say two
12 things, Justice Kagan.

13 The first is that the prevalence of
14 these compulsory unionism provisions isn't
15 reason for retaining Abood; it's reason for
16 reversing Abood. You have wide-scale First
17 Amendment violations, as you said, in 23 states
18 affected.

19 JUSTICE KAGAN: But that would be to
20 flip our usual stare decisis doctrine. Our
21 usual stare decisis doctrine makes it quite
22 clear that reliance is an important
23 consideration on the scales.

24 MR. MESSENGER: Reliance on something
25 that's constitutional. Reliance on an illegal

1 practice, no. For example, in Arizona v. Gant,
2 which involved searches of cars under the
3 Fourth Amendment, the Court said the fact this
4 was occurring in many places across the board
5 is a reason for reversing it, and many
6 individuals' Fourth Amendment rights were being
7 violated.

8 And so, in that instance, the
9 prevalence of compulsory unionism in the states
10 is a reason for reversing it.

11 And then, in terms of contracts in
12 general, I submit the contracts will survive,
13 except for the excision of the compulsory
14 unionism provisions due to severability.

15 JUSTICE KAGAN: Well, why is that?
16 How many of these contracts have severability
17 clauses, do you know?

18 MR. MESSENGER: I couldn't find a
19 number for the public sector, Your Honor, but
20 the general -- most contracts at least I have
21 seen for anecdotal do have severability clauses
22 and the general rule under the Restatement of
23 Contracts, I think it's 184.

24 JUSTICE BREYER: California says the
25 opposite. I mean, California has a whole brief

1 there. You've read that.

2 MR. MESSENGER: Of course, yes, Your
3 Honor.

4 JUSTICE BREYER: So what's the answer
5 to that?

6 MR. MESSENGER: The answer, Your
7 Honor, is that I submit they're severable in
8 California because they're not an essential
9 provision of the contract that would require
10 the excision of anything more than the clause.

11 JUSTICE KAGAN: Of course, even if
12 that's true, presumably they're bargained-for
13 provisions. The contract would have been
14 different if the unions and the employers had
15 known that this was going to be declared
16 unconstitutional.

17 So to leave the contract as is, except
18 for one particular bargained-for provision, is
19 to do something that's inequitable for the
20 union.

21 MR. MESSENGER: Well, I don't think
22 that's necessarily always true as a legal
23 matter. Foremost in some states, compulsory
24 unionism is mandated by the statute, for
25 example, in California. And in other states,

1 once the provision is there, it stays there, so
2 it's not even a subject of bargaining usually.
3 It's something that was always there from the
4 prior contract. It's taken as an assumption.

5 And even to the extent it was a
6 bargained-for issue in a recent contract, these
7 contracts will expire the next one to three
8 years and need to be renegotiated anyways. So
9 I don't think that really changes the reliance
10 interests.

11 Mr. Chief Justice, if I can reserve
12 the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 General Francisco.

16 ORAL ARGUMENT OF GENERAL NOEL J. FRANCISCO
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 IN SUPPORT OF THE PETITIONER

19 GENERAL FRANCISCO: Mr. Chief Justice,
20 and may it please the Court:

21 I'd like to focus on three basic
22 issues. The first is the government's interest
23 in having a necessity of agency fees. The
24 second is the stare decisis question that we've
25 been talking about, and then the third is the

1 Lehnert issue.

2 In terms of whether agency fees are
3 necessary to further the compelling interest in
4 having an exclusive bargaining representative
5 on the other side of the table, I don't think
6 there's really any basis for concluding that.
7 For example, in the federal government, we
8 don't have agency fees either in the government
9 generally or under the --

10 JUSTICE SOTOMAYOR: We also have more
11 benefits that are given without unions.

12 GENERAL FRANCISCO: Not in the Postal
13 Service, Your Honor. The Postal Service --

14 JUSTICE SOTOMAYOR: Well, that may be
15 a different one, but doesn't that beg the
16 question, Mr. General, about not having a
17 record here? It's an awful lot of assumptions
18 that have been bandied back and forth by both
19 sides on the actual effects of this. You're
20 saying it's okay because the federal
21 government's the same, the Postal Service is
22 like other jobs, but that's a whole lot of
23 allegations about the reality, factual
24 reality --

25 GENERAL FRANCISCO: Right.

1 JUSTICE SOTOMAYOR: -- of things that
2 have not been tested anywhere.

3 GENERAL FRANCISCO: Right. Well, two
4 responses, Your Honor. First, the Postal
5 Service does have the full range of
6 negotiation. And in the rest of the federal
7 government, I would submit that the more
8 limited bargaining range should make it harder
9 for them to recruit members into the union.

10 And, in fact, in the Postal Service,
11 according to Bureau of Labor Statistics data,
12 we find that about 94 percent of employees who
13 are subject to collective bargaining agreements
14 are members of the union even though you don't
15 have agency fees. In the federal government
16 generally, including the Postal Service, that
17 number is about 80 percent, and if you just
18 take the -- the Postal Service out and look at
19 the federal government, it's still north of
20 80 percent.

21 JUSTICE SOTOMAYOR: How much of the
22 workplace --

23 GENERAL FRANCISCO: That's according
24 to Bureau of Labor Statistics data.

25 JUSTICE SOTOMAYOR: How much of the

1 workplace is unionized for the federal
2 government?

3 GENERAL FRANCISCO: I believe that in
4 the federal government generally, about a
5 quarter of the workplace, a quarter to a third
6 of the workplace is unionized.

7 JUSTICE SOTOMAYOR: And how much is
8 their unionization in the general corporate
9 sector?

10 GENERAL FRANCISCO: I think --

11 JUSTICE SOTOMAYOR: Or private sector?

12 GENERAL FRANCISCO: My -- I -- I don't
13 know for sure. I think it's on the order of --
14 I think it's less than that, but I'm not
15 exactly sure what the private sector rate is.

16 JUSTICE SOTOMAYOR: In the mechanical
17 industry, in the printing industry, in -- I
18 know a lot of industries --

19 GENERAL FRANCISCO: Yeah.

20 JUSTICE SOTOMAYOR: -- that are
21 controlled by union.

22 GENERAL FRANCISCO: I don't have that
23 number.

24 JUSTICE SOTOMAYOR: I don't mean that
25 in a negative sense.

1 GENERAL FRANCISCO: No, no.

2 JUSTICE SOTOMAYOR: Meaning that
3 almost all work --

4 GENERAL FRANCISCO: And I -- and I
5 don't have that number at the top of my head,
6 Your Honor.

7 JUSTICE KENNEDY: You -- you were
8 trying to get to two other points.

9 GENERAL FRANCISCO: Yes. So my other
10 point was on the motion to dismiss issue, the
11 need for a record, this case came up on a
12 motion to dismiss. So I think the appropriate
13 course is, as in Harris, you reverse the motion
14 to dismiss and you send it back.

15 Turning to the stare decisis point and
16 particularly the reliance interests, collective
17 bargaining agreements are generally two- to
18 four-year contracts. So that means that almost
19 all of them were negotiated under the shadow of
20 Harris and Knox. So I don't think that there
21 was an enormous amount of reliance on the
22 continued vitality of Abood.

23 But even if there were some reliance,
24 I think it would be very short-lived, until the
25 next negotiating session, where any new

1 decisions from this Court would be factored in.
2 And I do agree that there also probably
3 wouldn't be much disruption at all since you
4 would simply invalidate individual agency fee
5 provisions. Now --

6 JUSTICE GINSBURG: General Francisco,
7 I would like to get your answer to the question
8 I asked Mr. Messenger and didn't have time to
9 ask him a follow-up.

10 Let's say you prevail in this case.
11 What happens in the private sector? We have a
12 doctrine you know well, Shelley against
13 Kraemer, that says if a contract is illegal,
14 the court can't enforce it.

15 GENERAL FRANCISCO: Uh-huh.
16 Respectfully, Your Honor, I don't think
17 anything would happen in the private sector for
18 largely the reasons that Justice Alito
19 identified in his Third Circuit opinion on the
20 issue and the D.C. Circuit identified in an
21 opinion that I -- I believe you were part of,
22 which held that in the private sector, there
23 simply is no state action when it comes to
24 collective bargaining agreements.

25 JUSTICE BREYER: Look, the --

1 GENERAL FRANCISCO: That's also what
2 the United States argued in its Beck amicus
3 brief here a few -- a few years ago.

4 JUSTICE BREYER: Labor peace, I once
5 heard Archie Cox, maybe it was in your position
6 right here, say the greatest instrument for
7 labor peace and prosperity from the years 1945
8 to 1970 was grievance arbitration in the
9 unions.

10 GENERAL FRANCISCO: Uh-huh.

11 JUSTICE BREYER: So suddenly we're
12 changing the method of financing that. You
13 say, well, it's just public unions.

14 But if I were in a regulated industry,
15 and I read the Court's opinion siding with you,
16 I would wonder if it didn't apply to me.

17 GENERAL FRANCISCO: Uh-huh.

18 JUSTICE BREYER: And not all workers
19 are lawyers. And all they've seen is that this
20 Court has suddenly cut legs, at least one, out
21 of the financing of a system that at least in
22 some aspects, though it's debatable, some
23 people think it brought labor peace.

24 GENERAL FRANCISCO: Right.

25 JUSTICE BREYER: Now you are the

1 government of the United States. What do you
2 think about that?

3 GENERAL FRANCISCO: Well, Your Honor,
4 I think that the core of this issue goes to --
5 and I'm reading from the agency brief -- the
6 agency fee provision itself, the cost of the
7 collective bargaining process.

8 And that's separate from the grievance
9 process. I actually think the grievance
10 process raises serious First Amendment concerns
11 as well, but for purposes of this case, the
12 focus is on the cost of collective bargaining,
13 and I don't think you necessarily have to go
14 any further than that to resolve this case,
15 since the whole --

16 JUSTICE KAGAN: Please.

17 GENERAL FRANCISCO: -- since the whole
18 idea of agency fees, their justification and
19 their purpose, has been predicated on the need
20 to compel support for the collective bargaining
21 process.

22 JUSTICE KAGAN: General, an important
23 part of Mr. Messenger's argument is the idea
24 that all speech about employment conditions,
25 about pay, about vacation, you know, about all

1 of the various employee benefits that -- that
2 are subjects of collective bargaining, that are
3 really the heart of collective bargaining, that
4 all speech about that is -- are matters of
5 public concern when it happens in the public
6 workplace because they all cost money and, as
7 taxpayers, we would be interested in things
8 that cost money. Is that the government's
9 position as well, that all of that speech is a
10 matter of public concern?

11 GENERAL FRANCISCO: Yes, Your Honor.
12 I think in the public bargaining context, all
13 of it goes to the size, structure, cost of
14 government, and the delivery of public
15 services, although I would agree that there are
16 some things that more vividly implicate public
17 policy than others.

18 JUSTICE KAGAN: Can I ask -- and it
19 strikes me as a very unusual position for the
20 government to be taking, looking after the
21 long-term interests of the United States
22 government, because essentially what that means
23 is that you will have to litigate all
24 employee/employer disputes under the --

25 GENERAL FRANCISCO: Yeah.

1 JUSTICE KAGAN: -- second step of
2 Pickering rather than under the first --

3 GENERAL FRANCISCO: Well --

4 JUSTICE KAGAN: -- which is quite a
5 striking thing for the government to be saying
6 that it agrees with.

7 GENERAL FRANCISCO: Yeah. Well, I --
8 I very much disagree with that, Your Honor. I
9 think the Pickering framework is an established
10 framework that works very well, and the nature
11 of individual wage disputes, the reason it
12 rises to the level of public interest when it
13 comes to collective bargaining agreements is
14 because it really does all go to the overall
15 size, structure, and the cost of the
16 government. Pickering is very different.

17 JUSTICE KAGAN: So you're saying that
18 when a union collectively bargains, it's a
19 matter of public concern but that if employees
20 in their workplace, 10 or 20 of them, get
21 together without the formal collective
22 bargaining that a union does, that that's not a
23 matter of public concern?

24 GENERAL FRANCISCO: Very much so, Your
25 Honor, because when an individual employee is

1 negotiating with his employer over his
2 particular wage, that's a negotiation that's
3 taking place between the employee and the
4 employer.

5 In the public sector collective
6 bargaining context, it's taking place between a
7 private third-party organization, a union, and
8 the government in order to set the overall
9 size, scope, and structure of government.

10 JUSTICE KAGAN: Well, that union is a
11 representative of the employees and has been
12 chosen to represent the employees so that the
13 employees can better wield their power --

14 GENERAL FRANCISCO: Right. And --

15 JUSTICE KAGAN: -- over terms and
16 conditions of employment. So why should it
17 matter -- I mean, that's -- I'm -- I'm trying
18 to understand this because it struck me as a
19 quite amazing thing --

20 GENERAL FRANCISCO: Yeah.

21 JUSTICE KAGAN: -- for the government
22 to be saying that these were matters of public
23 concern. Why should it matter if 50 employees
24 get together and say we want higher wages and
25 then, on the other hand, if employees get

1 together and say, you know what, we think it's
2 right to elect a union so that the union can
3 say that, it's the exact same subjects and the
4 exact same speech that's going to be involved.

5 GENERAL FRANCISCO: And I think it
6 matters for two reasons: One is the scope of
7 the issue. But, two, and more importantly,
8 it's the nature of Pickering.

9 Even in Pickering, the government is
10 allowed to prohibit core political speech when
11 it interferes with the employee's ability to do
12 their job.

13 JUSTICE SOTOMAYOR: I'm sorry.

14 GENERAL FRANCISCO: And that's the --

15 JUSTICE SOTOMAYOR: If we're going to
16 get into scope under the Pickering test, then
17 the employee who, contrary to the chain of
18 command, talks about rampant corruption in a
19 government agency, then we're not going to
20 permit, as we already have, that employee to be
21 fired because the scope of that affects the
22 public fisc in a huge way.

23 GENERAL FRANCISCO: I very much
24 disagree with that, Your Honor.

25 JUSTICE SOTOMAYOR: I -- I -- I don't

1 understand what you're arguing. This is such a
2 radical new position on your part.

3 GENERAL FRANCISCO: I don't -- I don't
4 think --

5 JUSTICE SOTOMAYOR: Mr. -- Mr.
6 General, by the way, how many times this term
7 already have you flipped positions from prior
8 administrations?

9 GENERAL FRANCISCO: Your Honor, I
10 believe --

11 JUSTICE SOTOMAYOR: This may be -- how
12 many?

13 GENERAL FRANCISCO: Your Honor, I
14 think that we have revised the position in so
15 far three cases.

16 JUSTICE BREYER: That's fair.
17 Regardless, what is -- what is the answer to
18 Justice Kagan's question?

19 GENERAL FRANCISCO: Yeah. The answer
20 to the question goes to the nature of the
21 Pickering inquiry itself. Pickering reflects
22 the government's interest in controlling the
23 words and actions of its employees in order to
24 make sure they're doing their jobs.

25 And Pickering reflects the teaching

1 that heightened scrutiny is fundamentally
2 incompatible with that interest, since if you
3 apply heightened scrutiny to it, you basically
4 prohibit employee -- employers from controlling
5 their words and actions. But there's no
6 corresponding interest when it comes to
7 compelling employees to subsidize third-party
8 advocacy.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 General.

11 Mr. Franklin.

12 ORAL ARGUMENT OF DAVID L. FRANKLIN,
13 SOLICITOR GENERAL OF ILLINOIS,
14 ON BEHALF OF THE STATE RESPONDENTS

15 MR. FRANKLIN: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 This Court's cases uniformly recognize
18 that the state has a much freer hand when it
19 manages its personnel as an employer than when
20 it regulates its citizens as a sovereign, and
21 this has come up already today, that freer hand
22 includes broad authority to put conditions on
23 employees' speech.

24 Now my friends on the other side this
25 morning argue that that deference to the

1 employer's prerogatives somehow depends on the
2 scale or the scope of the speech in question.
3 That has never been the law.

4 The government is still acting as an
5 employer when it treats with its employees as a
6 group or as a whole. That's why this Court has
7 repeatedly used the Pickering framework and
8 other deferential public employee tests to
9 uphold generally applicable workplace policies.

10 You see that in the Letter Carriers
11 case, upholding the Hatch Act. You see that in
12 San Diego versus Roe, the rule in Garcetti
13 applies to millions of public employees around
14 the country.

15 JUSTICE KENNEDY: Garcetti involved
16 government speech. What we're talking about
17 here is compelled justification and compelled
18 subsidization of a private party, a private
19 party that expresses political views
20 constantly.

21 MR. FRANKLIN: I'm happy to speak to
22 that, Justice Kennedy. You're right. The
23 Garcetti case is an official duties case, and
24 we're not arguing this case as an official
25 duties case.

1 However, agency fees are a condition
2 of public employment because they pay for the
3 workplace services -- not just collective
4 bargaining -- but as Justice Breyer pointed out
5 referencing General Cox, day-to-day workplace
6 grievance resolution under an employment
7 contract. All of those activities involve
8 speech by an employee representative to an
9 employer in an employment --

10 JUSTICE KENNEDY: Suppose that --
11 suppose that 80 percent of the fees of the
12 union dues went to matters that were highly
13 political in nature and 20 percent to wage and
14 grievance -- wage hour -- wage negotiations and
15 grievances. Would that change your view?

16 MR. FRANKLIN: I -- I don't know that
17 it would, Your Honor. You know, the Abood
18 case, the Keller case, Beck, Ellis, all of them
19 --

20 JUSTICE KENNEDY: Then -- then it
21 seems -- then it seems to me your argument
22 doesn't have much weight.

23 MR. FRANKLIN: Well, first of all, we
24 don't know what percentage of the union's
25 activities are wrapped up with grievances. If

1 you -- you know, we don't have a record here.
2 We're on a motion to dismiss.

3 But if you look at publicly available
4 Hudson notices that do break out categories of
5 chargeable expenses in this way, which ours in
6 the record doesn't happen to do, you'll find
7 that in many cases, especially in the out-years
8 when the CBA is not being renegotiated, charges
9 for field representatives -- those are the
10 people in -- day in and day out who are doing
11 workplace grievance work, advising employees,
12 et cetera -- can be three times, six times,
13 seven times as much on the chargeable expenses
14 line than the line for collective bargaining.

15 So to decide this case in an
16 evidentiary vacuum on the basis of assumptions
17 about how that speech breaks down or how those
18 expenses break down would in our view be
19 irresponsible, frankly, because what you've got
20 --

21 JUSTICE ALITO: There are -- there are
22 numerous differences between Pickering and the
23 situation here, but let me just ask you about
24 one. Do you think there are any limitations on
25 the authority of the State of Illinois to

1 compel its employees to say what the state
2 wants them to say? And if there are
3 limitations, what are they?

4 MR. FRANKLIN: If the -- if what the
5 state wants them to say is a function of their
6 official duties in the workplace, that's
7 Garcetti --

8 JUSTICE ALITO: No, if it's not a
9 function of their official duties. I
10 understand you could not -- you probably agree
11 with the position you're arguing, but if you
12 didn't, coming here representing the State of
13 Illinois, you couldn't just argue what you
14 like.

15 MR. FRANKLIN: No, my boss is right
16 behind me.

17 JUSTICE ALITO: That's right.

18 (Laughter.)

19 MR. FRANKLIN: I -- I -- I -- I'm
20 acting pursuant to official duties, Your Honor.

21 JUSTICE ALITO: I know. I understand
22 that and in that situation.

23 MR. FRANKLIN: Right. No, but, I
24 understand you're not --

25 JUSTICE ALITO: But aside from your

1 official duties, are there any limitations?

2 MR. FRANKLIN: Yes.

3 JUSTICE ALITO: What are they?

4 MR. FRANKLIN: What the Garcetti case
5 underlines is that when the state takes the
6 employment relationship and exploits or
7 leverages that relationship in such a way as to
8 have an effect on the broader marketplace of
9 citizen speech, so that the employer interest
10 is really pretextual, then we're --- we've got
11 a different story.

12 Pickering accounts for this, Justice
13 Alito.

14 JUSTICE ALITO: Well, let me ask you,
15 I'll give you a concrete situation. In
16 Connick, an assistant district attorney -- the
17 Court held that an assistant district attorney
18 could be fired for circulating a writing that
19 suggested that there was a lack of confidence
20 in the supervisors in the office. Okay? It
21 was a limitation on what she could say.

22 Do you think the case would have been
23 the same if the district attorney required the
24 assistant district attorney to appear before a
25 meeting of everybody in the office and say: I

1 love my supervisors; they are the best
2 supervisors anybody could possibly want?

3 MR. FRANKLIN: It would -- I'll answer
4 your question. But the preface to my answer
5 has to be, though, because I want to lay this
6 marker down, that would still be analyzed under
7 Pickering, step 2. Okay?

8 Under Pickering, step 2, we -- we'd
9 assess the strength of the state's --

10 JUSTICE ALITO: No, the Court said
11 that that was a matter of -- that was a -- that
12 was a subject of private concern.

13 MR. FRANKLIN: Well, it's possible
14 that if you've got an Orwellian scenario where
15 the employee is being required in the workplace
16 to speak about matters of public concern, we
17 would get to step 2.

18 JUSTICE ALITO: Private concern.
19 Private concern.

20 MR. FRANKLIN: What we wouldn't get to
21 is strict scrutiny then. The -- the -- the --
22 the Petitioner wants to vault over all of the
23 break points in this Court's First Amendment
24 law with respect to public employees and go
25 straight to strict scrutiny.

1 And the fact is this Court has never
2 applied strict scrutiny to a condition of
3 public employment that was backed by a bona
4 fide interest that the state has as an
5 employer. Never, not once.

6 And I'm happy to talk about the -- the
7 political affiliation cases, because I don't
8 think they are to the contrary.

9 So, you know, implicit I think in your
10 question, Justice Alito, was the distinction
11 that my friend tried to draw between compulsion
12 and restriction. But this Court has said again
13 and again in *Wooley*, in *Riley*, and elsewhere,
14 that compulsion and restriction of speech are
15 two sides of the same coin.

16 JUSTICE ALITO: Then why won't you
17 answer my question about what the assistant
18 district attorney could be required to do?

19 Throughout history, many people have
20 drawn a line between a restriction on their
21 speech and compelled speech.

22 I'll give you an example that's only
23 -- that's quite different given the nature of
24 the -- of the subject from what's involved
25 here.

1 Do you remember the -- the -- the
2 movie and the play "A Man For All Seasons"? So
3 Thomas Moore didn't insist on saying that he
4 thought the act of supremacy was wrong, but he
5 drew a line and paid for it with his life
6 because he would not affirmatively say that it
7 was wrong.

8 When you compel somebody to speak,
9 don't you infringe that person's dignity and
10 conscience in a way that you do not when you
11 restrict what the person says?

12 MR. FRANKLIN: You do, Your Honor, in
13 some circumstances. But what we're talking
14 about here is a compelled payment of a fee. So
15 it's one step removed from compelled speech.

16 And I don't want to disparage the
17 First Amendment interests that are at issue
18 here. Aboud recognized them. We take them
19 seriously. But it's important to recognize
20 that agency fees are not "A Man For All
21 Seasons" scenario by any stretch. They don't
22 --

23 JUSTICE ALITO: No, they're not a --
24 it's not "A Man for All Seasons" scenario.

25 MR. FRANKLIN: Right.

1 JUSTICE ALITO: But I'm just asking
2 you about the point whether you think that
3 compelling somebody to speak is exactly the
4 same thing as saying you may not speak?

5 MR. FRANKLIN: No, it's not exactly
6 the same, Your Honor.

7 JUSTICE ALITO: No.

8 MR. FRANKLIN: The Pickering balance
9 could come out differently in certain
10 instances. I would grant you that.

11 I do think, not to use Garcetti again,
12 but if Mr. Ceballos had been required to write
13 a disposition memo and has said I won't do it,
14 as opposed to what actually happened, which was
15 that he wrote one and was disciplined for what
16 was in it, nothing about the logic or the
17 outcome would change.

18 JUSTICE SOTOMAYOR: Counsel, what is
19 there -- what is there about compelled speech?
20 I mean, our line has drawn a big difference
21 between compelled speech and compelled subsidy.

22 MR. FRANKLIN: I agree with that,
23 Justice Sotomayor. I mean, if you look at the
24 cases --

25 JUSTICE SOTOMAYOR: And -- and we've

1 compelled people to pay bar associations, so
2 long as you're not compelled or stopped from
3 speaking when you disagree. We've said that's
4 a compelled subsidy.

5 MR. FRANKLIN: And all --

6 JUSTICE SOTOMAYOR: Bar members can
7 come out any day they want and say they don't
8 take the same position on a policy question as
9 the bar association. Any union member is free
10 to get up publicly in any setting he or she
11 wants to say they don't agree with the position
12 the union is taking, correct?

13 MR. FRANKLIN: Correct. And all of
14 those cases, Keller, Southworth, Glickman, were
15 outside of the workplace context, where the
16 state has always been recognized to have
17 paramount interests in ensuring that its
18 managerial prerogatives can be carried out.

19 You know, the state's interest here,
20 if I can spend just a few moments talking about
21 that, is, first, we have an interest in dealing
22 with a single spokesman for the -- for the
23 employees. Second, we have an interest in
24 imposing on that spokesman a legal duty to
25 represent everyone.

1 But as regards agency fees, they are
2 complementary to those first two interests.
3 They serve our managerial interests in two
4 ways. First, they allow us to avoid a
5 situation where some employees bear the cost of
6 representing others who contribute nothing.
7 That kind of two-tiered workplace would be
8 corrosive to our ability to cultivate
9 collaboration, cohesion, good working
10 relationships among our personnel.

11 Second, independent of that, we have
12 an interest at the end of the day in being able
13 to work with a stable, responsible, independent
14 counterparty that's well-resourced enough that
15 it can be a partner with us in the process of
16 not only contract negotiation --

17 JUSTICE KENNEDY: It can be a partner
18 with you in advocating for a greater size
19 workforce, against privatization, against merit
20 promotion, against -- for teacher tenure, for
21 higher wages, for massive government, for
22 increasing bonded indebtedness, for increasing
23 taxes? That's -- that's the interest the state
24 has?

25 MR. FRANKLIN: No. The -- the state

1 has no interest or no overriding interest --

2 JUSTICE KENNEDY: Doesn't it --
3 doesn't it -- doesn't it blink reality to deny
4 that that is what's happening here?

5 MR. FRANKLIN: We -- with all due
6 respect, Justice Kennedy, we've never denied
7 that many of the topics that come up at the
8 bargaining table with public employee unions
9 have serious fiscal and public policy
10 implications. We've never denied that.

11 JUSTICE BREYER: All right. So what
12 about the compromise?

13 MR. FRANKLIN: The -- the line that
14 Justice Scalia drew in his Lehnert separate
15 opinion was, in our view, superior to the one
16 that was drawn by the plurality.

17 We've offered a test for where to draw
18 the line between chargeable and non-chargeable
19 expenses that, in practice, would overlap with,
20 would coincide with, Justice Scalia's line in
21 most cases, but the reason that we think that
22 it's superior to the plurality's line is that
23 the germaneness test does have a vagueness
24 problem and in -- in some instances, it allows
25 what it shouldn't allow, which is, for

1 chargeability, for speech to the government as
2 a sovereign. And we think a very firm line can
3 be drawn there.

4 JUSTICE KAGAN: Mr. -- Mr. Franklin,
5 Mr. Messenger has suggested, and -- and -- and
6 General Francisco, that if we overruled Abood,
7 things would in a few years get back to normal.
8 The state would pass a new statute, and these
9 municipal contracts would all be renegotiated
10 and it wouldn't be any real issue.

11 So could you -- what do you think
12 about that? What would the difficulties be, if
13 any, if the state -- if -- if the Court were to
14 overrule Abood?

15 MR. FRANKLIN: I'm happy to speak to
16 that, Justice Kagan. Here's what we know, and,
17 obviously, we're on a motion to dismiss, but
18 more broadly, what we know is that tangibly,
19 when these kinds of obligations of financial
20 support become voluntary, union membership goes
21 down, union density rates go down, union
22 resources go down. We've seen it again and
23 again. Mancur Olson spoke about it in the
24 foundational text of behavioral economics.

25 We also know that, intangibly, there

1 are plenty of studies that show that when
2 unions are deprived of agency fees, they tend
3 to become more militant, more confrontational,
4 they go out in search of short-term gains that
5 they can bring back to their members and say
6 stick with us.

7 CHIEF JUSTICE ROBERTS: Well, the
8 argument on the other side, of course, is that
9 the need to attract voluntary payments will
10 make the unions more efficient, more effective,
11 more attractive to a broader group of their
12 employees. What's wrong with that?

13 MR. FRANKLIN: Well, two things that
14 -- that I would say about that. First, the
15 studies that I've read indicate that, yes,
16 there can be an initial first flush of
17 mobilization and organizing when something like
18 this gets taken away, but that over the long
19 term, human nature and basic economics dictate
20 that the free-rider problem will become endemic
21 and, not only that, but contagious, because if
22 I'm an employee and I stick with a union and
23 others over time decide not to, my fees and my
24 dues are going to go up and up and up and the
25 pressure on me to make the same choice will

1 increase as well.

2 But the other point I'd make would be
3 a legal point. You know, this Court has said,
4 for example, in the Connick case that there
5 ought to be judicial deference to the
6 predictive judgments about workplace harm and
7 that in particular -- this is a quote from
8 Connick -- "we do not see the necessity for an
9 employer to allow events to unfold to the
10 extent that the destruction of working
11 relationships has to be manifest before the
12 state can take prophylactic action to stop it."

13 This is an area, Your Honor, where not
14 only has this Court -- we're, of course, aware
15 this Court has addressed this topic three times
16 in the past, what, four years, but also the
17 people around the country are addressing this
18 issue in a very visible and sustained way.

19 JUSTICE KAGAN: Mr. -- Mr. Franklin, I
20 mean, you just addressed what you considered to
21 be the harmful effects of a different rule, but
22 I was trying to get at a slightly different
23 question. I was asking you, even beyond that,
24 what are the effects on -- given that this rule
25 has been in place for so long?

1 MR. FRANKLIN: Mr. Chief Justice --

2 CHIEF JUSTICE ROBERTS: Please.

3 MR. FRANKLIN: -- may I respond?

4 We do think the reliance interests are
5 serious here. Under state law, because of the
6 severability clause, there would be state law
7 contract issues. There might even be a duty to
8 bargain that kicks in under state law where we
9 would have to renegotiate not only this
10 provision but surrounding provisions. That's a
11 serious reliance interest in our view.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Frederick.

16 ORAL ARGUMENT OF DAVID C. FREDERICK
17 ON BEHALF OF RESPONDENT AFSCME COUNCIL 31

18 MR. FREDERICK: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 I would note at the beginning that all
21 of these arguments were before the Court 40
22 years ago in Abood. And when the Court
23 unanimously upheld the idea of agency fees, it
24 considered whether or not these issues would
25 constrain the constitutional prerogatives of

1 government to act under democratic impulses to
2 come up with a system that would fit the local
3 culture, history, private sector background of
4 what state governments were having to do to
5 recruit and attract the most willing and able
6 people to discharge the public services that
7 public employees are required to perform.

8 So, when this Court addressed in
9 Lehnert the question of how do you draw the
10 line between those fees that are deemed to be
11 ideological and those that are deemed to be
12 part of a statutorily mandated process, the
13 Court cleaved, and the question of whether or
14 not the statute mandated, as it does here,
15 exclusive representation and the union is
16 required to represent the minority members,
17 what Justice Scalia said was it is fair to
18 assign a fee for the services that the union by
19 statute is required to provide.

20 JUSTICE ALITO: And what if the
21 statute -- what if the state statute says that
22 lobbying is a man -- is a mandatory subject of
23 bargaining?

24 MR. FREDERICK: Well, I -- I think
25 that the question -- I guess, what do you mean

1 by lobbying, Justice Alito? I'm not sure
2 exactly what you mean.

3 JUSTICE ALITO: Well, there's no -- is
4 there any limit on what states can make a
5 mandatory subject of collective bargaining? So
6 if the test is whether it's -- whether the --
7 it's mandated by the -- by the state, the state
8 can make anything it wants a mandatory subject
9 of bargaining.

10 MR. FREDERICK: Justice Alito, I would
11 say that that hypothetical is so far outside of
12 what this case is really all about that if you
13 think that there's a problem, that if any state
14 ever in the union would come up with some
15 requirement like that as part of collective
16 bargaining, you have the opportunity to review
17 it at this time.

18 But what we're talking about here is a
19 system that is well settled within the states
20 to allow for this kind of dynamic interchange
21 for the benefit of management.

22 JUSTICE KENNEDY: Well, do you think
23 that this case affects the political influence
24 of the unions?

25 MR. FREDERICK: No. The reason --

1 JUSTICE KENNEDY: So you've -- I can
2 try to find a union newsletter which says don't
3 worry about the Supreme Court, our political
4 influence will be exactly the same as it was
5 before, if this case comes out against us?

6 MR. FREDERICK: That's not a
7 chargeable expense, Justice Kennedy. We're
8 talking about --

9 JUSTICE KENNEDY: I'm asking --

10 MR. FREDERICK: Chargeable --

11 JUSTICE KENNEDY: I'm asking you
12 whether or not in your view, if you do not
13 prevail in this case, the unions will have less
14 political influence; yes or no?

15 MR. FREDERICK: Yes, they will have
16 less political influence.

17 JUSTICE KENNEDY: Isn't that the end
18 of this case?

19 MR. FREDERICK: It is not the end of
20 the case, Your Honor, because that is not the
21 question. The question is: Do states, as part
22 of our sovereign system, have the authority and
23 the prerogative to set up a collective
24 bargaining system in which they mandate that
25 the union is going to represent minority

1 interests on pain of being subject to any fair
2 labor practice.

3 JUSTICE KENNEDY: And in which they
4 mandate people that object to certain union
5 policies to pay for the implementation of those
6 policies against their First Amendment
7 interests?

8 MR. FREDERICK: Justice Kennedy, I
9 would ask you to read Justice Harlan's opinion
10 in Lathrop where he addressed every single one
11 of those considerations.

12 JUSTICE KENNEDY: I -- I read it, I
13 think, last night between 7:00 and 8:30.

14 (Laughter.)

15 MR. FREDERICK: It's a wonderful --
16 it's a wonderful opinion, because what he says
17 is that the -- what he says is that the
18 subsidization goes to the purpose of the
19 organization, here that is state-mandated
20 collective bargaining, and in which the person
21 who doesn't agree with the positions basically
22 gets two cracks.

23 One is to try to persuade the group
24 that he's right and, if that doesn't fail, he
25 still has his conscience and his speech to

1 speak outside as a citizen to explain why that
2 position is wrong.

3 JUSTICE BREYER: Is -- is it possible
4 to --

5 JUSTICE ALITO: Mr. Frederick, when I
6 -- when I read your brief I saw something I
7 thought I would never see in a brief filed by a
8 public employee union, and that is the argument
9 that the original meaning of the Constitution
10 is that public employees have no free speech
11 rights.

12 Where do you want us to go with that?

13 MR. FREDERICK: Well --

14 JUSTICE ALITO: Should -- should we
15 adopt that rule?

16 MR. FREDERICK: What I would say is
17 that what this Court, Justice White's opinion
18 in Connick, explains that if you look at this
19 from a question of what are the three choices
20 before you, at the origins, there were no
21 rights.

22 What they are asking for is basically
23 unfettered First Amendment for public servants
24 and what Justice White explained was that, as
25 the First Amendment evolved, there were

1 limitations on what the government could do
2 with respect to certain expression, but the
3 core principle, from the founding to today, is
4 that government has a free rein in regulating
5 expressive rights in its workplace.

6 That principle from the founding to
7 today is at stake here because what they are
8 saying is that every grievance, every
9 employment issue, becomes a constitutional
10 issue. And Justice White's opinion in Connick
11 says, of course you can't run government if
12 that becomes the principle --

13 JUSTICE ALITO: Do you think that's a
14 fair characterization of their argument?

15 MR. FREDERICK: I do think that it's a
16 fair characterization insofar as what they say
17 is the collective bargaining issues that are in
18 the contract are all raising matters of public
19 concern.

20 You could look at them. They are
21 talking about who gets assignments on holidays?
22 What are leave policies all about? Things that
23 do not affect the public fisc at all but go to
24 who can manage the workplace in an appropriate
25 way where there is buy-in by the employee --

1 JUSTICE KAGAN: If I understood --

2 JUSTICE BREYER: Can you do that? Can
3 you limit it to wages, hours, working
4 conditions, where mandated as subjects of
5 compulsory bargaining by the state, those three
6 terms have a hundred years of history written
7 around them. It shouldn't be hard to
8 administer and should keep the things like
9 lobbying and so forth out of it.

10 MR. FREDERICK: That's correct. And
11 even in this statute --

12 JUSTICE BREYER: Is that correct? Is
13 that what you favor?

14 MR. FREDERICK: Yes. It is.

15 JUSTICE BREYER: And can we get that
16 from the Connick -- from the Connick -- from
17 the Lehnert Kennedy, Scalia compromise there?

18 MR. FREDERICK: Yes, you can, Justice
19 Breyer. And I would point out that the state
20 here has carved out the questions about
21 managerial discretion. Managerial policy
22 cannot be bargained for.

23 The state's budget, that can't be
24 bargained for. So what we're talking about is
25 --

1 CHIEF JUSTICE ROBERTS: Well how does

2 --

3 MR. FREDERICK: -- how you manage the
4 workplace.

5 CHIEF JUSTICE ROBERTS: How do
6 negotiation over wages not affect the state
7 budget?

8 MR. FREDERICK: Your Honor, what
9 essentially happens as I understand it is that
10 either the budget is set and the negotiation
11 occurs within that parameter or the Governor
12 takes the collective bargaining agreement to
13 the state and the legislature decides to either
14 ratify it or not.

15 CHIEF JUSTICE ROBERTS: So the public
16 unions do not engage in advocacy with respect
17 to the state budget to the extent that impacts
18 the available wages?

19 MR. FREDERICK: I think -- I wouldn't
20 put it quite that way. What I would say is
21 that of course most public servants are
22 underpaid, and I will stipulate to that before
23 this body.

24 (Laughter.)

25 MR. FREDERICK: And the question is --

1 the question is how do you come to the
2 appropriate compromises in order to achieve a
3 system that attracts the best workers?

4 JUSTICE KENNEDY: I just want to make
5 sure that if I want to write something down to
6 get -- the amount of wages paid to government
7 employees, the size of the work force, the
8 amount of overtime, and the existence of tenure
9 do not affect the amount of the state budget?
10 That's what I have got down.

11 MR. FREDERICK: No. What I'm saying,
12 Your Honor --

13 JUSTICE KENNEDY: Isn't that what you
14 just said?

15 MR. FREDERICK: What I said is that in
16 different states the system works differently.
17 Sometimes the budget is set first and then the
18 bargaining happens and sometimes the bargaining
19 happens and, if the legislature doesn't think
20 it fits within the budget, they say we're not
21 going to ratify this or we're going to ratify
22 the budget, you go back and renegotiate this to
23 make it fit.

24 JUSTICE KAGAN: Mr. Frederick, if I
25 understood General Francisco's argument, it is

1 that speech as to matters of pay and benefits
2 and employment conditions and so forth are
3 matters of public concern when they are
4 addressed in a collective bargaining framework,
5 but are not matters of public concern when they
6 are addressed outside of a collective
7 bargaining framework by individual employees.

8 Tell -- tell me about that. What do
9 you think of that?

10 MR. FREDERICK: I don't know any case
11 of this Court that hinges the First Amendment
12 prerogatives of the government on the scope or
13 manner of the speech with respect to that.

14 And in fact, as my colleague said,
15 when this Court upheld the Hatch Act, that
16 applied to all workers. And the -- and the
17 Court applied Pickering balancing to say that
18 the government interest was sufficient to
19 outweigh the restrictions on the employee's
20 speech.

21 And the Court also did the same thing.
22 It applied the same Pickering balance when it
23 decided that it was constitutional to have
24 exclusive representation. That quelled the
25 speech of the minority to the exclusion of the

1 majority.

2 So these are all broad-sweep,
3 broad-scope principles where this Court has
4 applied Pickering.

5 JUSTICE ALITO: Well, if one employee
6 says I deserve a 5 percent raise, is that a
7 matter of public concern or private concern?

8 MR. FREDERICK: Well, it depends on
9 whether it affects the morale of the workplace,
10 as Justice White's opinion in Connick said.
11 There may be a circumstance, you look at the
12 balancing, and you look at the content and the
13 context in which that speech arises.

14 So that, for instance, in Connick,
15 what the Court said, the only thing that was a
16 matter of public concern there was whether it
17 affected the morale of the workplace. And the
18 Court said on the basis of that, it could be a
19 matter of public concern, but an individual
20 worker's agitation ordinarily for pay would not
21 raise a matter of public concern. That would
22 be classic government workplace speech.

23 JUSTICE ALITO: All right. So if
24 that's a matter of private concern, if the
25 union demands a 5 percent wage increase for all

1 of the employees it represents, can that be a
2 matter of public concern?

3 MR. FREDERICK: I don't think so
4 because --

5 JUSTICE ALITO: It can't? No?

6 MR. FREDERICK: No, because what the
7 -- what is happening in a negotiation, of
8 course this is a closed universe, your
9 hypothetical posits the opening bid by the
10 union.

11 And -- and it's important to keep in
12 mind the content and context of that speech.
13 All negotiations between workers and management
14 do not take place in a public forum.

15 JUSTICE ALITO: So what -- what if the
16 effect of the 5 percent wage increase across
17 the board would push a city to the brink and
18 perhaps over the brink into bankruptcy. Would
19 it then become a matter of public concern?

20 MR. FREDERICK: Well, I think that you
21 would look at that in terms of the context of
22 the particular scenario. I would say -- and
23 there are briefs on our side that make this
24 very clear -- that that particular
25 hypothetical, in fact, is an unfair smearing of

1 the -- of the collective bargaining process.

2 But what I would also point out is
3 that if management says we cannot pay for this,
4 and, therefore, there is no agreement, there
5 are state-mandated procedures to determine
6 whether one side is bargaining in good faith or
7 not.

8 And if the union is taking a position
9 that is not a good-faith position, it can be
10 subject to a state penalty.

11 JUSTICE BREYER: So I don't see how
12 you can say, if one person asks for more money,
13 that affects the budget. If one person in the
14 railroads asks for more money, that affects the
15 rates that a public body, the Interstate
16 Commerce Commission, used to have to set.

17 If one person in a public utility, an
18 electricity company, asks for money, that
19 affects the electricity rate.

20 So the line can't be, I would think,
21 whether or not you are asking for higher wages,
22 whether collectively or individually, because
23 they all affect the budget.

24 So then what is the line? I had
25 thought the line was wages, hours, working

1 conditions is okay, and if it is not okay, then
2 that goes way beyond just public employees,
3 doesn't it?

4 MR. FREDERICK: Yes. And I would note
5 that Justice Powell even had no problem in
6 Abood with the wages/hours formulation and he
7 was the one who disagreed with the basic
8 formulation.

9 CHIEF JUSTICE ROBERTS: Well,
10 hypotheticals are asked to address a principle
11 that can then be expanded. If one employee
12 doesn't affect wages, do -- does 20 percent of
13 the work force affect wages -- I mean,
14 negotiate or demands with respect to wages
15 affect the public policy concerns that go into
16 how much of a budget, as to which there are
17 many competing demands, is allocated to
18 employees?

19 MR. FREDERICK: Your Honor, the
20 question -- I'll -- I'll concede you that there
21 are certain matters in collective bargaining
22 that might raise matters of public concern.
23 But what the Court's cases say is that, even if
24 there is a matter of public concern, the
25 government has the adequate power to restrict

1 that speech if it can show there's
2 justification.

3 And Justice Scalia's opinion in
4 Lehnert provides the compelling interest by
5 saying that the state is mandated that the
6 union be the exclusive representative and must
7 conduct itself through a duty of fair
8 representation.

9 And that's where you get the
10 compelling interest in agency fees.

11 JUSTICE ALITO: Well, the germaneness
12 rule came out of Abood itself and it was
13 fleshed out in Lehnert. So do you -- are you
14 asking -- you're suggesting we should overrule
15 Abood in part?

16 MR. FREDERICK: No. What I'm
17 suggesting is that if you were to go to this
18 line, you should consider revisiting Lehnert.
19 That's not a question of Abood's basic
20 correctness.

21 Abood has been foundational precedent
22 --

23 JUSTICE ALITO: And didn't Abood talk
24 --

25 MR. FREDERICK: -- in a lot of

1 different areas.

2 JUSTICE ALITO: Didn't Abood draw --
3 talk about germaneness?

4 MR. FREDERICK: I think Abood used the
5 word germaneness. But what Lehnert did was to
6 give content to that because what Abood simply
7 said was it is constitutional for this to
8 happen.

9 Now, I'd like to turn to the reliance
10 interest because, if the other side succeeds in
11 persuading a majority of you to overrule Abood,
12 it will affect thousands of contracts and, more
13 importantly, it is going to affect the work of
14 state legislatures, city councils, school
15 districts, who are going to have to go back to
16 the drawing board in deciding what are the
17 rules for negotiating and how that works.

18 And what that means is that the key
19 thing that has been bargained for in this
20 contract for agency fees is a -- a limitation
21 on striking. And that is true in many
22 collective bargaining agreements.

23 The fees are the tradeoff. Union
24 security is the tradeoff for no strikes. And
25 so if you were to overrule Abood, you can raise

1 an untold specter of labor unrest throughout
2 the country.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Two minutes remaining, Mr. Messenger.

7 REBUTTAL ARGUMENT OF WILLIAM L. MESSENGER

8 ON BEHALF OF THE PETITIONERS

9 MR. MESSENGER: Mr. Chief Justice:
10 Just to pick up on the last point made, the
11 proposition that agency fees are the costs
12 employees have to pay to prevent unions from
13 striking, I submit is not only extremely
14 attenuated but also would make agency fees
15 effectively a form of protection money, the
16 idea that the government needs to force its
17 employees to subsidize unions or otherwise the
18 unions will disrupt the government, and I
19 submit that's not an interest that this Court
20 can accept as a compelling one for infringing
21 on individuals' First Amendment rights.

22 I would also like to make a brief
23 point about the grievance process. And we've
24 talked a lot about collective bargaining today.
25 But grievance processing is equally an

1 expressive activity, and in the aggregate can't
2 have an effect upon the public fisc.

3 Now, in terms of expressive activity,
4 a grievance is, by definition, the union is
5 trying to influence what the government is --
6 wants to do and, if it's a grievance, it is
7 something the government is resistant to
8 actually doing.

9 And advocacy to enforce a policy is
10 tied into advocacy to adopt that process.

11 JUSTICE SOTOMAYOR: You're basically
12 arguing do away with unions, because you are
13 really taking, in essence, and saying every
14 single employee decision is really a public
15 policy decision.

16 I have an individual person I want to
17 fire or discipline. You just said it's a
18 public policy question.

19 MR. MESSENGER: No, where I was going
20 with that, Your Honor, is that grievance as a
21 whole is a public -- a matter of public
22 concern.

23 JUSTICE SOTOMAYOR: But grievances
24 don't deal with one issue. Every grievance has
25 a different issue. Some people are disciplined

1 for being late. Some people are disciplined
2 for a workplace disruption. Some for --

3 MR. MESSENGER: Yes, Your Honor, but
4 nonmembers --

5 JUSTICE SOTOMAYOR: -- violating a
6 dozen other workplace rules.

7 MR. MESSENGER: But under the statute
8 nonmembers are charged for contract
9 administration an a whole. They're charged for
10 an entire year's worth of AFSCME grievance
11 processing, some of which are very significant,
12 like the grievance AFSCME recently filed to
13 compel the state to expend 75 million dollars
14 to pay for a 2 percent wage increase. That
15 went to the Illinois Supreme Court. Maybe some
16 other grievances are more minor matters, as you
17 mentioned, but as a whole, in the aggregate,
18 they affect matters of public concern.

19 JUSTICE SOTOMAYOR: As Justice --

20 MR. MESSENGER: That is what --

21 JUSTICE SOTOMAYOR: -- Breyer said,
22 every single decision affects the public fisc.
23 Every time you lose something, you -- the
24 public fisc is affected.

25 You are talking --

1 CHIEF JUSTICE ROBERTS: Care to
2 comment?

3 MR. MESSENGER: Again, to go back, I
4 think it's the scale that makes the
5 distinction, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:08 a.m., the case
9 was submitted.)

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Official - Subject to Final Review

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