No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,
Petitioners,
v.
PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* PUBLIC SAFETY EMPLOYEES IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

Amici represent the men and women who serve as police officers, fire fighters, correctional officers, and supporting public safety employees serving communities across the nation. In their capacity as the collective bargaining representatives for these public safety employees, several a*mici* have successfully sought and

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

obtained through the collective bargaining process necessary work-related rights and safeguards for their members that allow them to better serve and protect their communities. *Amici*'s efforts not only improve working conditions for their members, but also undoubtedly benefit the communities they serve by, *e.g.*, ensuring adequate staffing levels and sufficient training. This benefits the public at large with faster response times and public servants ready to respond to emergencies both small and catastrophic.

Accordingly, the organizations representing these public safety employees urge this Court to preserve the existing exclusive representation and agency fee structure for public employees developed under *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977).

The Fraternal Order of Police ("FOP") is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities.

The International Association of Fire Fighters ("IAFF") is an organization representing more than 300,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. More than 3,200 IAFF affiliates protect the lives and property of over 85 percent of the continent's population in nearly 6,000 communities in every state in the United States and in Canada. The IAFF's mission includes improving the working conditions of fire fighters and emergency medical services employees, as well as advancing the general health and well-being of those personnel through collective bargaining, labor agreements and other appropriate means. The IAFF seeks to promote the welfare of fire fighters and other emergency responders with respect

to health and safety, training, protective gear and equipment, and other terms and conditions of employment.

The National Association of Government Employees represents public sector workers in 43 different states from Hawaii to Illinois to Florida, including members in the International Brotherhood of Police Officers ("IBPO") and International Brotherhood of Correctional Officers ("IBCO"). IBPO is one of the largest police unions in the country, representing a significant number of members across the nation. IBCO represents a significant number of members throughout the state of Massachusetts and along the east coast.

The National Association of Police Organizations ("NAPO") is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers. Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 1,000 police unions and associations, 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement. Substantially all of NAPO's member associations are state or local unions and duly authorized collective bargaining agents which bargain on behalf of and represent publicly-employed law enforcement officers.

The National Troopers Coalition, Inc. founded in 1977, is a not-for-profit organization that consists of 42 member associations in 38 states representing over 40,000 state troopers nationwide. The NTC is the only national organization that solely represents the interests of State Trooper and Highway Patrol Associations.

The California Correctional Peace Officers' Association ("CCPOA") is a nonprofit corporation and the union representing approximately 30,000 correctional officers and supervisors ("correctional officers") working in California state prisons. CCPOA represents its members with respect to their terms and conditions of employment. CCPOA has a strong interest in this case to assert and protect the individual rights of its members.

CDF Firefighters is a nonprofit association representing approximately 5,000 to 7,000 state firefighters employed by CAL FIRE, depending on the season. CDF Firefighters' members provide comprehensive fire protection and other related emergency services, including protection of life and property. CDF Firefighters represents its members with respect to their terms and conditions of employment.

Engineers & Architects Association ("EAA") is the recognized representative for approximately 5000 employees working for the City of Los Angeles in numerous bargaining units. Some of its members are in public safety positions, including crime and intelligence analysts, medical assistants and laboratory technicians, police clerks and related representatives, polygraph examiners, as well as other technical investigators. EAA represents its members with respect to their terms and conditions of employment.

International Association of Firefighters Local No. # 1775 (Marin County) is a Local representing approximately 400 fire suppression employees employed by the County of Marin and other municipalities and fire districts within the County of Marin. It represents its members with respect to their terms and conditions of employment.

The Corrections Officers and Forensic Security Assistants of the Michigan Corrections Organization ("MCO") performs a critical service for the state of Michigan: they are directly responsible for the safety of: (1) the public, (2) the prisoners / patients, and (3) all staff in Michigan's prison facilities and hospitals for the criminally insane. Consisting primarily of Corrections Officers, these employees undertake some of the most dangerous job duties, receive a high level of training to perform those duties, and work in an environment where threats to safety are a constant. The MCO represents 7,000 correctional officers and forensic security assistants, and has done so for over 3 decades. MCO believes that the job that is performed by its members is the most dangerous public service job in the state of Michigan.

The San Jose Police Officers' Association ("SJPOA") is a California nonprofit unincorporated labor association representing over 1000 individuals working in police officer classifications employed by the City of San Jose. SJPOA's purposes include advocating for the interests of its members and representing them as to their terms and conditions of employment.

The Santa Clara County Deputy Sheriffs' Association ("DSA") is the exclusive employee representative of approximately 425 individuals working as deputy sheriffs, sergeants, and lieutenants for the County of Santa Clara. The DSA represents these employees on all matters relating to the terms and conditions of their employment.

SUMMARY OF ARGUMENT

The public safety *Amici* agree with Respondents that there is no reason to revisit *Abood* and its

progeny. Under the agency fee system *Abood* established, union members are not forced to subsidize the collective bargaining costs for nonmembers who receive the benefits of a labor contract, and nonmembers are not forced to pay for any union political speech. *Abood*'s distinction between chargeable and nonchargeable expenses provides an adequate safeguard against any intrusion on nonmembers' First Amendment rights, while avoiding the free rider problem that would ensue if nonmembers (who receive all the benefits of a collective bargaining agreement) did not have to pay for any of the union's costs. If Petitioners were correct, moreover, then public employees' First Amendment rights would be harmed not only by mandatory agency fees but also by other compelled, employment-related economic associations with incidental First Amendment impact, such as the common requirement that public employees contribute to mandatory retirement pensions. That is especially true when employees' contributions are given over to corporations (*e.g.*, private pension managers or the invested-in companies) that engage in lobbying and political advocacy. Unlike agency fees, in the pension context public employees have no right to opt out of the use of their funds for political expenditures.

Agency fee agreements are not "forced" on public employees, notwithstanding Petitioners' contentions, because the states merely authorize—*rather than mandate*—such agreements. Indeed, not all states allow collective bargaining, and *Abood* does not require exclusive representation or agency fees for those that do. Instead, this Court has wisely allowed those states that allow public sector bargaining to develop their own rules regarding exclusive representation and agency fee requirements within *Abood*'s

broad outlines. Typically, these states have enacted statutes allowing public employers *and* their employees to freely negotiate and enter into agency fee agreements. This Court should thus reject a rule imposing a single solution for a matter implicating state sovereignty interests, *i.e.*, the conditions under which a state decides to negotiate its labor contracts with its employees.

Abolishing the existing exclusive representation and agency fee system in place in those states allowing such agreements would have devastating consequences for the entire machinery of state-law based collective bargaining and the labor contracts that are their product. States and localities have built labor relations systems and bargaining relationships, including in public safety bargaining units across the country, in reliance upon the rules established by *Abood*. That collective bargaining process—and the labor peace that it engenders—has been used, *e.g.*, to justify withholding the right of public safety employees to strike. States and local governments rely on the exclusive representation system because allowing multiple bargaining agents could lead to inefficient, unstable and disorderly personnel relations, including differences in salaries or employment arrangements—fostering claims of favoritism damaging to employee morale. Abolishing exclusive representation would unwittingly impose burdensome administrative difficulties on government agencies, including public safety agencies, because they would have to expend their already limited time and resources to negotiate and enter into contracts with more than one collective bargaining agent.

ARGUMENT: THIS COURT SHOULD NOT OVERRULE *ABOOD* BECAUSE STATE LAW COLLECTIVE BARGAINING MACHINERY—INCLUDING PUBLIC SAFETY EMPLOYEES' NEGOTIATED CONTRACTS—ARE BUILT ON ITS AGENCY FEE STRUCTURE

For almost 40 years, this Court has repeatedly reaffirmed and expanded on the principles articulated in *Abood* when deciding the constitutional reach of collective bargaining in the public sector. Based on those precedents, half the states have laws authorizing *employees* to choose—but not mandating—exclusive representation and agency fee agreements. Public employers and employees, in turn, have used exclusive representation to negotiate and agree to countless labor contracts, many of which contain agency fee agreements. This includes public safety employees who dutifully serve and protect the people in their local communities.

Petitioners disregard this collective bargaining system and the justified reliance it has engendered, insisting that the First Amendment demands that *Abood* must be overruled outright. *Abood* rests on firm constitutional grounds, however, as Respondents have ably demonstrated. *See* Resp. Br., *generally*.

There is no reason to reconsider decades of precedent that has guided this Court, state legislatures, and labor contracting parties.

1. *Abood* is constitutionally sound, and Petitioners overreach by asking this Court to reconsider exclusive representation and agency fee agreements.

Despite Petitioners' attempts to paint agency fees as a pernicious affront to First Amendment liberties, the

truth is that such fees merely cover nonmembers' fair share of the costs of collective bargaining. Indeed, in California and elsewhere they are known as "fair share fees." *See, e.g.*, Cal. Gov. Code § 3515.7(a).

Abood itself held that fair share fees charged to nonmembers cannot include, "even temporarily," a union's expenses for political speech. 431 U.S. at 244 (Stevens, J., concurring). To further that end, in subsequent cases this Court has broadly outlined the procedural protections for nonmembers, the categories of collective bargaining costs that can be charged to them (*i.e.*, non-political and germane to collective bargaining), as well as those that cannot (*i.e.*, political, non-collective bargaining costs). *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (notice and procedural protections); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 456-457 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 129 S.Ct. 798 (2009) (scope of chargeable and nonchargeable expenses). Petitioners largely ignore the details of this body of law, and certainly do not persuasively demonstrate that system is unworkable or resulted in unwarranted First Amendment impingements.

Nonunion members—like Petitioners here—unquestionably benefit from union expenditures in negotiating and securing a labor contract with their public employers, as well as from expenditures in administering, implementing, and enforcing that contract. That is because unions in both the public and private sector owe a statutorily-imposed duty of fair representation to nonmembers in the same bargaining unit. *See Abood*, 431 U.S. at 221. These benefits are direct and immediate, determining both

the day-to-day working conditions employees encounter and the actual wages they earn. That alone distinguishes collective bargaining from the diffused, policy-based lobbying efforts that Petitioners unpersuasively try to analogize to collective bargaining. *See* Pet. Br. at 49.

Absent agency fees, nonmembers would become "free riders" obtaining collective bargaining benefits without paying their fair share of collective bargaining costs. *Abood*, 431 U.S. at 222. That would unwittingly compel the union, and its members, to subsidize such costs for nonmembers, effectively burdening the associational interests of those members. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in judgment and dissenting in part) ("What is distinctive … about the 'free riders' who are nonunion members of the union's own bargaining unit is that … they are free riders whom the law requires the union to carry—indeed, requires the union to go out of its way to benefit, even at the expense of its other interests…. [T]he source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership"); Fisk, Catherine L. & Chemerinsky, Erwin, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1033 (July, 2013) (in non-agency fee states "employees who wish to form a union are effectively forced to subsidize the provision of the union benefits to coworkers who refuse to support the union").

Given this duty of fair representation, the interests served by the collective bargaining system—including the interests of unions and their members—are substantially weakened without a fair share fee

requirement. Even employees who support the union's goals will have strong incentives to become free riders. That is because their individual decision whether to pay dues towards the union's collective bargaining costs will have little effect, by itself, on the union's functioning; and even if they elect to pay but others do not, such that the union's ability to bargain on their behalf is substantially weakened, then they will enjoy little benefit from their contribution. As explained by noted economist Mancur Olson in relation to large groups organized to achieve public benefits:

> Though all of the members of the group … have a common interest in obtaining this collective benefit, they have no common interest in paying the cost of providing that collective good. Each would prefer that the others pay the entire cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not.

MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 21 (1971) (discussing collective action problems). To solve this collective action problem—*i.e.*, that the most economically rational choice for each individual is not to contribute toward the union, even if he or she supports its goals and will benefit from its efforts—Olson explained that it is necessary to mandate support for large groups that provide collective benefits. *See id*. at 11, 14-16, 67, 76, 85-86.

That workers understand and broadly accept this is clear. By and large, it is *the employees themselves* that agree to mandatory agency fees (*see* Part 2, *infra*), and to the majority selection processes (which they can reject through the decertification processes). Indeed, the history of fair share fees under the National Labor

Relations Act in the private sector vividly illustrates this point. For four years beginning in 1947, in order to authorize agency fees, federal law required that a majority of employees eligible to vote (not just a majority of those voting) cast ballots in favor of agency fees in a secret-ballot election. OLSON, *supra*, at 85. During that time, unions won 97 percent of the elections held (in almost 50,000 workplaces), and by overwhelming margins. *Id*.; Mayer, Erwin S., *Union Security and the Taft-Hartley Act*, 1961 DUKE L.J. 505, 517 (1961). As a result, in 1951, Congress amended federal law so that specific agency fee elections were no longer required. OLSON, *supra*, at 85. Congress' historical experiment with requiring employees in unionized workplaces to vote separately on whether to authorize agency fees shows that workers themselves see these arrangements as being in their collective self-interest and necessary to support a healthy system of collective bargaining.

Although Petitioners deride the free rider problem, it has real world consequences for labor unions and their members, including public safety employees. First, without agency fees a union is forced to spend money paid by members for their own benefit to fund collective bargaining costs for nonmembers. *Robinson v. New Jersey*, 741 F.2d 598, 610 (3d Cir. 1984). Indeed, forcing members to fund collective bargaining costs for nonmembers would (if collective bargaining is viewed as expressive activity) burden the First Amendment rights of the union and its members. Malin, Martin H., *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 868 (1989) ("The statutory duties of an exclusive bargaining representative … can inhibit the union's and its members' exercise of their first amendment rights").

Second, although Petitioners insist that unions' collective bargaining activity "does not … *legally* or *ethically* create an obligation for all [nonmembers] to subsidize" the union (*e.g.*, Pet. Br. in Resp. to *Amicus Curiae* Br. of U.S. at 7, emphases added), that is not quite right. States have enacted statutes authorizing adoption of mandatory agency fee arrangements because unions have *both* a legal and ethical duty of fair representation to nonmembers. Nonmembers greatly benefit from labor contracts. *See e.g.*, *Lehnert*, 500 U.S. at 553 (Scalia, J., concurring in judgment and dissenting in part) ("Mandatory dues allow the cost of ... the union's statutory duties—to be fairly distributed; they compensate the union for benefits which 'necessarily'—that is, by law—accrue to the nonmembers"); *see also* Fisk & Chemerinsky, 98 CORNELL L. REV. at 1032-1033 n.32 ("workers in right-to-work states tend to earn less than workers in other states"; collecting articles).

Further, Petitioners' argument misses the mark because whether to allow exclusive representation and agency fee agreements is fundamentally an issue of public policy best left to the states. *See* Part 2, *infra*. Simply stated, resolving—or not resolving[2]—the free rider problem is quintessentially an economic issue and a governmental personnel policy properly reserved to legislative bodies. States have a right to decide these matters according to the policy

[2] For example, even in many so-called "right-to-work" states some or all public employers may choose an exclusive representation system—likely for its administrative convenience and labor peace benefits acknowledged in *Abood*—but unlike agency fee states they force their unions to shoulder the free rider cost alone. *See* Fisk & Chemerinsky, 98 CORNELL L. REV. at 1033; *see also* n.6, *infra.*

preferences of its citizens. This Court should reject a rule that imposes a single solution for a matter implicating core state sovereignty interests, *i.e.*, the conditions under which a state decides to negotiate its labor contracts with its employees.

Petitioners' argument, moreover, simply proves too much. Their argument would also prohibit mandatory public employee contributions to pension funds because such contributions are managed by or invested in corporations engaging in political speech. "[T]he state's use of mandatory employee contributions to purchase corporate securities raises … compelled speech and association concerns…." Sachs, Benjamin I., *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUMB. L. REV. 800, 868 (May 2012). Agency fees and pension contributions share similar characteristics because both are funded by mandatory deductions from public employees' salaries in exchange for a statutorily-defined benefit.[3]

Almost all states make public employee contributions to pension funds a mandatory condition of

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[3] To be sure, this Court has distinguished the dissenting shareholder who wishes to dissociate from a corporation, from the dissenting bargaining unit member who wishes to dissociate from a union. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) ("the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time"; "no shareholder has been 'compelled' to contribute anything"); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 709-710 (1990) (Kennedy, J., dissenting) (noting that "the disincentives to dissociate are not comparable"). That rationale does not apply in the mandatory pension contribution context, because of the compulsory nature of the contributions *and* because employees have no control over where their salaries are invested.

employment *without even allowing employees to opt out*—a right guaranteed under *Abood* for agency fees.

> Legislation in forty-four states establishes that public employee participation in the state's pension plan is "a condition of employment," "mandatory," or "compulsory." Of all state and local workers who participated in a public pension plan in 2010 … seventy-nine percent were required by law to make financial contributions from their salaries to the plan. Because public pensions are defined benefit plans … the contributing employees do not determine how their contributions are invested. Instead, the trustee of the plan—or some other fiduciary—makes these decisions. Not surprisingly, public pension funds invest heavily in corporate securities: In 2008, $1.15 trillion of the $3.19 trillion in assets held by public pensions—or thirty-six percent—was invested in corporate stock.

See id. at 867 (footnotes omitted); *see also* Bodie, M., *Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 208 (2012) (arguing against opt out because mandatory contributions are "part and parcel of operating in a modern economy").

Some public employers go even further and directly require their employees to participate in privately-managed retirement plans. *See, e.g*., Alaska Stat. §§ 14.25.345, 39.35.740; R.I. Gen. Laws § 36-10.3-4(1); Va. Code Ann. § 51.1-169(C)(1); 29 Del. C. 1953 § 5543; K.S.A. § 74-4925(1)(b); Minn. Stat. § 354C.12(1)(a); N.J. Stat. § 18A:66-174(a). As a result, many public employees are required to pay fees directly to

government-selected private corporations managing their retirement plans, and those corporations are free to use these fees to finance a wide range of political and expressive activities. If a government employer may lawfully select a service provider for public pension services and then mandate its employees pay fees to that provider, there is no reason a government employer should not similarly be permitted to allow its employees themselves to select a collective bargaining services provider and to require those employees to pay the costs in a manner that ensures that such costs are fairly distributed across the benefited workforce.

In short, if a public employer can require its employees to contribute to pension funds (including privately-managed pension plans) without any assurances those contributions will not be used for political purposes, it should also be able to require agency fee agreements—which *Abood* and its progeny have ensured will *not* be used for political purposes.

2. Exclusive representation and fair share fees are not "forced" on public employees by the states because states merely authorize these options for employees, rather than mandate them. Public employees may choose to unionize, and, if so, public employers and employees may freely negotiate contracts with agency fee agreements.

Petitioners assert throughout their brief that states impose exclusive representation arrangements and agency fees on public employees. *See* Pet. Br. at 35 and *generally*. That is incorrect. Quite simply, not all states allow public sector collective bargaining, and *Abood* does not mandate exclusive bargaining or agency fees for those that do. *Abood* merely allowed

those states that made the policy choice to allow public sector bargaining to develop their own rules regarding exclusive representation and agency fee requirements within its broad outlines.

State collective bargaining statutes themselves *authorize* but do *not mandate* exclusive representation and agency fee agreements. "[N]either federal nor state law requires that anyone pay agency fees; no statute requires that nonmembers of a union pay funds to support the collective bargaining activity of a union. Agency fees are collected only if a majority of employees vote to unionize, and only then if the union and the employer agree to a contract requiring the payment of fees." *See* Fisk & Chemerinsky, 98 CORNELL L. REV. at 1084 (footnotes omitted). Exclusive representation is unquestionably a decision made by public employees themselves. Indeed, the Disabilities Program Petitioners in this case voted to reject exclusive representation under Illinois' statutes. *See* Pet. Br. at 11.

If public employees decide to unionize, states like California allow public employers and employees to freely negotiate inclusion of agency fee terms during labor contract negotiations. *See* Cal. Gov. Code §§ 3502.5 (local public employees), § 3515.7 (state employees). These statutes reflect the discretionary nature of agency fee agreements, *i.e.*, that the parties "may" bargain over them. *See, e.g.*, Cal. Gov. Code §§ 3502.5 ("an agency shop agreement *may* be negotiated between a public agency and a recognized public employee organization"), § 3515.7(a) ("Once an employee organization is recognized as the exclusive representative … it *may* enter into an agreement with the state employer providing for … [a] membership or fair share fee deduction") (emphasis added).

Public employers ultimately do not have to agree to any agency fee arrangement, even if it is requested by a union. *See id*. And even after such agreements are finalized, some of these statutes provide for rescission of agency fee agreements by employees, including nonmembers. *See* Cal. Gov. Code §§ 3515.7(d) ("A fair share fee provision in a memorandum of understanding … may be rescinded by a majority vote of all the employees in the unit…."), § 3502.5 (similar).[4]

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[4] To be sure, at least one state allows some public employees to adopt fair share fees by majority vote of the entire bargaining unit—*i.e*., union members *and* nonmembers—outside of a negotiated agreement. *See* Cal. Gov. Code § 3502.5(b)(1) (authorizing local government employees to adopt agency fees by majority vote). This provision has rarely been invoked, but when it has a majority of *all* employees themselves agreed to agency fee agreements in four of the five such elections held since the statute was enacted in 2000. *See* 2000-2013 Cal. Public Employees Relations Board Annual Reports, Appendix, III. Elections Conducted, "Organizational Security – Approval" and "Fair Share Fee – Reinstatement" found at http://www.perb.ca.gov/AnnualReports.aspx (last visited Dec. 24, 2013); *cf*. OLSON, *supra*, at 85. In any event, regardless of whether fair share fees are adopted through agreement with a public employer or a workplace election, they exist only when authorized by a state legislature, and even then by majority vote of the employees themselves.

As noted in the text, public employees can still vote to rescind such fees. Cal. Gov. Code § 3502.5(d) provides, in relevant part:

> (d) An agency shop provision … *may be rescinded* by a majority vote of all the employees in the unit … provided that: (1) a request for that type of vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit, (2) the vote is by secret ballot, and (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more

Numerous other states have analogous statutory schemes allowing public employers and their employees to negotiate agency fee agreements.[5] Based

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> than one vote taken during that term.… The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

(emphasis added); *see also* Cal. Gov. Code § 3515.7(d) (similar).

[5] Twenty-six states and the District of Columbia generally allow employers and employees to negotiate, and agree to agency fee agreements. See, e.g., Alaska Stat. §§ 23.40.110(b) and 42.40.760(b)(2); Cal. Gov. Code §§ 3502.5, 3515.7; Conn. Gen. Stat. § 5-280; 14 Del. C. 1953 § 1319; D.C. Code § 1-617.07; Ill. Comp. Stat. 5 § 315/6; Ky. Rev. Stat. § 337.060; Maine Rev. Stat. tit. 26 § 979-B; Md. Code, Health – General § 15-904; Mass. Gen. Laws 150E, § 2; Mich. Comp. Laws Ann. §423.210(3)-(4)(2013) (only for police officers, fire fighters, and state police troopers and sergeants); Minn. Stat. § 179A.06; Mo. Stat. §§ 105.510 and 105.520, *Schaffer v. Bd. of Educ. of City of St. Louis*, 869 S.W.2d 163 (Mo. Ct. App. 1993) (construing 105.520 to authorize fair share provisions); Mont. Code § 39-32-109; N.H. Rev. Stat. § 273-A:11, *Nashua Teachers Union v. Nashua Sch. Dist.*, 142 N.H. 683 (1998) (construing § 273-A.11 to authorize fair share provisions); N.J. Stat. § 34:13A-5.5; N.M. Stat. 1978 § 10-7E-9; N.Y. Civ. Serv. Law § 208(3)(a); Oh. Rev. Code § 4117.09; Ore. Rev. Stat. § 243.666; Penn. Stat. § 1102.3; Vt. Stat. § 1621(b); Wash. Rev. Code § 49.39.090; Wis. Stat. § 111.06; cf. *Nickolls v. City of Longmont*, 2013 WL 393331 (D. Colo. Jan. 30, 2013); *Town of North Kingstown v. North Kingstown Teachers Ass'n*, 110 R.I. 698 (1972). West Virginia does not appear to have affirmative authority on the matter, but it does not forbid agency fee agreements.

Twenty-four states have so-called "right to work" laws prohibiting such agreements. Pet. Br. at 36; e.g., *State, Cnty. & Mun. Emp. Local 2384 v. City of Phoenix*, 142 P.3d 234, 235 (Ariz. 2006) (fair share fees violate Arizona right-to-work law); *United Ass'n of Journeymen Local Union No. 141 v. NLRB*, 675 F.2d 1257, 1258-62 (D.C. Cir. 1982) (fair share fees violate right-to-work laws of Arkansas, Florida, Louisiana and Mississippi); *see*

on such collective bargaining statutory schemes, public employers and employees throughout the country have negotiated in good faith and entered into binding and often multi-year labor contracts that include agency fee agreements. *See* Part 3, *infra*.

There are sound reasons for an exclusive representation regime. In contrast to the fractured system that would result if a government employer were forced to contend with multiple unions representing the same collective bargaining unit, exclusive representation is straightforward. Even many "right-to-work" states still recognize the benefits of exclusive representation for some or all of their public employees, reinforcing *Abood*'s point that nonexclusive representation imposes burdensome administrative difficulties forcing employers to expend time and resources to negotiate and enter into contracts with more than one collective bargaining agent.[6]

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also National Right to Work Legal Defense Foundation, Inc., Right to Work States, http://www.nrtw.org/rtws.htm (last visited Dec. 24, 2013).

[6] *See, e.g.*, Ark. Code Ann. § 6-17-202 (authorizing exclusive representation system for school district employees); Fla. Stat. § 447.307(1)(a) (same, for all public employees); Ga. Code Ann. § 25-5-5 (firefighters); Idaho Code Ann. §§ 33-1273, 44-1803 (school districts and firefighters); Ind. Code §§ 11-10-5-5(a)(2), 12-24-3-5(a)(2), 16-33-4-23(a)(2), 20-21-4-4(a)(2), 20-22-4-4(a)(2), 20-26-5-32.2(a)(2), 20-28-9-11, 20-28-9-19, 20-29-5-2, 36-8-22-9 (various public safety and school employees); Iowa Code § 20.16 (public employees); Kan. Stat. Ann. §§ 75-4327, 72-5415 (public employees); Mich. Comp. Laws Ann. §§ 423.26, 423.211, 423.234, 423.274 (public employees); Neb. Rev. Stat. §§ 48-816(4), 81-1373(2) (public employees including supervisors); Nev. Rev. Stat. § 288.027 (local government employees); Okla. Stat. Ann. tit. 11 § 51-103, tit. 19 § 901.30-2, tit. 70 § 509.2 (school employees,

Further, subjecting a state's decision to allow exclusive representation to strict scrutiny, as Petitioners advance (*e.g.*, Pet. Br. in Resp. to *Amicus Curiae* Br. of U.S. at 5), is frankly unworkable—especially if it is implemented on the case-by-case basis they seemingly advocate. It would place government in the position of intruding and second-guessing its employees' desire to speak with one voice every time a collective voted for exclusive representation.

The existing regime under *Abood* is the preferable one. It allows the states to continue to authorize—rather than mandate—collective bargaining and exclusive representation pursuant to the policy preferences of its citizens. And it also allows public employees to decide whether to bind themselves to such agreements, in accordance with their own preferences. *Cf., e.g.*, Pet. Br. at 10-11 (acknowledging that homecare providers voted for unionization and that disability care providers rejected it).

More broadly, exclusive representation is of particular importance in public safety bargaining

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municipal fire fighters and police officers); S.D. Codified Laws §§ 3-18-3, 60-9A-3 (public employees); Tex. Local Gov't Code §§ 142.058, 142.108, 142.155, 149.009 (municipal police officers, fire fighters, emergency medical services personnel, municipal employees), Tex. Transp. Code § 451.754 (metropolitan rapid transit authority); Utah Code Ann. §§ 34-20-9(1)(a), 34-20a-4 (firefighters and other public employees); Wyo. Stat. § 27-10-103 (fire fighters).

Some "right-to-work" states even allow fair share fees for certain public employees. *See, e.g.*, Mich. Comp. Laws Ann. § 423.210(3)-(4) (2013) (police and fire, state police troopers and sergeants); *Cone v. Nev. SEIU/SEIU Local 1107*, 998 P.2d 1178 (Nev. 2000) (Nevada law does not prohibit union from charging fees for individual representation).

units, where the paramount need for high discipline and morale militate against allowing multiple bargaining agents. That is because allowing multiple bargaining agents in this context will mean that public safety employees working in the same jobs and in the same unit may be paid different salaries and benefits for the same work, and they may believe such differences are the product of unwarranted favoritism or not otherwise based on legitimate grounds. That arrangement would undoubtedly damage morale among police officers, firefighters, and indeed any group of public employees who provide important services to the public. It would also, of course, needlessly but substantially complicate and increase the costs associated with the design and administration of personnel and benefit systems. There can be no doubt that avoiding such consequences is a legitimate legislative goal reserved to the states.

3. The reliance interests of public employers and their employees—particularly in the public safety context—counsel against overruling *Abood*.

The states and local governments have enacted comprehensive collective bargaining schemes authorizing exclusive representation and agency fees based on *Abood*. Public employers and employees have negotiated and entered into binding, multi-year contracts based on those statutes and *Abood*. These reliance interests caution against overturning *Abood*. "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision" *Hilton v. S. Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). The demands of the doctrine of *stare*

decisis "are at their acme … where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

When legislative and private reliance interests are at stake, this Court has repeatedly adhered to *stare decisis* because wantonly overruling established precedent "would dislodge settled rights and expectations or require an extended legislative response." *Hilton*, 502 U.S. at 202. Indeed, "*stare decisis* protects the legitimate expectations of those who live under the law, and … is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) (quoting THE FEDERALIST NO. 78, p. 471 (C. Rossiter ed. 1961).)

As summarized in *Randall v. Sorrell*, 548 U.S. 230, 243-244 (2006):

> The Court has often recognized the "fundamental importance" of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. *See Harris v. United States*, 536 U.S. 545, 556–557 (2002) (plurality opinion) (citing numerous cases). The Court has pointed out that stare decisis " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (quoting

> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

For almost 40 years, this Court has repeatedly adhered to *Abood* in considering the constitutionality of exclusive representation and agency fees, and related agreements. *See Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983) (exclusive representative may have exclusive access to interschool mail system under *Abood*); *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 291 (1984) (nonmembers may be excluded from policy meetings on questions relating to employment but outside scope of mandatory bargaining); *Ellis*, 466 U.S. at 457, *Lehnert*, 500 U.S. 507, and *Locke*, 129 S.Ct. 798 (deciding scope of chargeable and non-chargeable expenses); *Hudson*, 475 U.S. 292 (notice and procedural protections to fair share members under *Abood*); *Davenport v. Washington Education Ass'n*, 127 S.Ct. 2372 (2007) (states may implement *Abood* using opt-in procedure for agency fees); *see also Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (*Abood*'s exclusive representation and agency fee regime applies to private sector employees under NLRA); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1988) (applying *Abood* to agency fee dispute in private sector). In short, this Court does not "write on

a clean slate" and "overrul[ing] the long and unbroken series of precedents reaffirming … principle[s]" developed under *Abood* would require that "a number of other major decisions also would have to be reconsidered." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494-495 (1987).[7]

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[7] Outside the agency fee context, *Abood* is central to this Court's "compelled speech" and "compelled association" jurisprudence in a number of important areas, such as: compulsory assessments for advertising (*e.g., Johanns v. Livestock Marketing Ass'n*, 125 S.Ct. 2055 (2005); *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997)); compulsory assessments for student fees in public universities (*Bd. of Regents of Univ. of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. University of Virginia*, 515 U.S. 819, 839 (1995)); compelled assessments by state bar organizations (*Keller v. State Bar of California*, 496 U.S. 1 (1990)).

More broadly, this Court has drawn on the principles in *Abood* in a number of other areas with potential First Amendment concerns, including: dissenting shareholder rights (*Bellotti*, 435 U.S. at 794 n.34; *McConnell v. FEC*, 540 U.S. 93, 325 (2003) (Kennedy, J., concurring and dissenting); compelled subsidization of speech on private property (*Pruneyard v. Robins*, 447 U.S. 74, 99 n.2 (1980)); compulsory inserts for utility bills (*Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 543 n.13 (1980); *PG&E v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986)); compelled association concerns vis-à-vis private associations (*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)); regulation of speech of publicly-funded abortion counselors (*Rust v. Sullivan*, 500 U.S. 173, 212-213 (1991) (Blackmun, J., dissent)); and prohibitions against retaliation in renewal of public contracts (*Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668 (1996)); *see also Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (protections available to political speech); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988) (charitable fundraising disclosures); *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (right to petition government); *Brown v. Legal Foundation of Washington*,

Legislative reliance counsels in favor of adherence to precedent. *See, e.g., Randall*, 548 U.S. at 244 (where precedent has been used in drafting legislation and has continued to be used over time, it would dramatically undermine this reliance to overturn it); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (adhering to tax precedent because "[s]tate legislatures have relied upon our precedents by enacting tax codes … Were we to adopt New Jersey's theory, we would be required … to invalidate those statutes …. New Jersey's proposal would disrupt settled expectations in an area of the law in which the demands of the national economy require stability").

Further, *stare decisis* is particularly favored where parties have entered into contractual agreements relying on existing precedent. *See, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272 (1995) (refusing to overrule case because "private parties have likely written contracts relying upon [prior precedent] as authority"); *Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S., 298, 316 (1992) (refusing to overrule case because precedent "has engendered substantial reliance and has become part of the basic framework of a sizeable industry"); *Citizens United v. F.E.C.*, 558 U.S. 310, 365 (2010) ("reliance interests are important considerations in … contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions"); *see also The Genesee Chief*, 53 U.S. 443, 458 (1851) ("one would suppose that after the decision of this court … he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is

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538 U.S. 216, 253 (2003) (Kennedy, J., dissent) (use of interest on lawyer trust accounts to pay for indigent legal services).

the safe and established rule of judicial policy"); *cf. Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissent) ("reliance by law enforcement officers is also entitled to weight").

There is no question that the states have legislated and parties have negotiated and entered into contracts based on the validity of *Abood* and its progeny. As outlined above, the California Legislature expressly allows public employers at the state and local level to negotiate and enter into contracts allowing exclusive representation and agency fee agreements. *See* Part 2, *supra*. Countless other state legislatures and local governing agencies have similarly legislated and negotiated and ratified collective bargaining agreements with public employees. *Id*. These agreements include the labor contracts governing relations with public safety employees, such as police officers, correctional officers, and firefighters.[8]

The collective bargaining process—and the peaceful labor relations that it engenders—has been used, *e.g*., to justify withholding the right of public employees to strike. *See* Hanslowe, K. & Acierno, J., *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1076-1077 and n.85 (1982) (prohibition on strikes by "policemen and firefighters" justified by "a system of compulsory binding arbitration" because "as a matter of public policy" these public employees are "denied the usual right to

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[8] Dictum in *Knox v. SEIU*, 132 S.Ct. 2277 (2012) questioning certain aspects of *Abood* does not defeat this longstanding reliance interest. As explained by Justice Scalia, "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance…." *Quill*, 504 U.S. at, 320 (Scalia, J., concurring) (internal quotation, citation and brackets omitted; emphasis original).

strike") (quoting *School Comm. v. Westerly Teachers Ass'n*, 111 R.I. 96, 105-10 (1973) (Roberts, C.J., dissenting)); Malin, M., *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 873 (1989) ("Most jurisdictions prohibit public employee strikes and many of these substitute interest arbitration or factfinding as a method for resolving negotiation impasses"); *see e.g.*, Cal. Lab. Code § 1962 (firefighters prohibited from striking); *City of Santa Ana v. Santa Ana Police Benevolent Assn.*, 207 Cal.App.3d 1568 (Cal. Ct. of Appeal 1989) (police officers prohibited from striking); *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.*, 38 Cal.3d 564, 586 (Cal. 1985) (recognizing general "prohibition against firefighters and law enforcement personnel" strikes).

Public employee unions, of course, rely on fair share fees to pay for the costs of collective bargaining and grievance processing for nonmembers. And they have negotiated and entered into binding multi-year labor contracts with their employers that contain agency fee requirements. They have developed and made budgetary decisions relying on such contracts and agreements. Overruling *Abood* would effectively strike those mutually-agreed-upon agency fee provisions from labor contracts and greatly weaken those collective bargaining and grievance processing systems upon which countless public employees and employers rely.

Abolishing the agency fee system freely negotiated under the auspices of state law would be detrimental not only for state-law based collective bargaining and the labor contracts that are their product, but also for the public employees who labor under such contracts, for the public employers who rely on the stability and

productivity ensured by such contracts, and for the public they both ultimately serve.

CONCLUSION

For all these reasons, the public safety *Amici* urge this Court to affirm the judgment of the Seventh Circuit and to decline Petitioner's invitation to upend labor relations across the country by overruling *Abood*. More than half the states have collective bargaining laws grounded in *Abood*'s continuing validity. And countless public safety employees serving the states and their local communities have negotiated and entered into labor contracts dependent on *Abood*.

Respectfully submitted,

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