No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondents wrap themselves in stare decisis, but ignore this Court's recent decisions applying the First Amendment to agency-fee provisions. In *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), this Court rejected most of what Respondents offer in support of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Yet Respondents hardly mention—let alone distinguish—either decision.

Most glaringly, Respondents fail to address the key aspects of *Harris*. They disregard (1) its holding that "an agency-fee provision … cannot be tolerated unless it passes 'exacting First Amendment scrutiny,'" 134 S. Ct. at 2639, (2) its rejection of the same State "interests" Respondents recycle here, *id.* at 2627, 2640, and (3) its discrediting of *Abood*'s importation of a private-sector constitutional standard into the much-different public-sector context, *id.* at 2627-34. Respondents give no greater respect to *Knox*, ignoring its holding that the "procedures for collecting fees from nonmembers must be carefully tailored to minimize impingement on First Amendment rights," 132 S. Ct. at 2292, and its recognition that "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree," *id.* at 2290.

Respondents brush these opinions aside as mere "dicta." Union.Br.2, 38. But statements are dicta only if they "go beyond the case." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). The *standard of review*—"exacting scrutiny"—certainly did not "go beyond the case." And each decision's detailed

analysis of *Abood* was integral to this Court's refusal to extend *Abood*. *Harris*, 134 S. Ct. at 2638; *Knox*, 132 S. Ct. at 2291, 2296 n.9.

Respondents' inability to reconcile their desired constitutional rule with this Court's recent decisions on the same topic is alone sufficient basis to reject it.

ARGUMENT

I. *Abood* Should Be Overruled.

A. Exacting Scrutiny Applies To Agency-Fee Provisions.

Recognizing they cannot satisfy exacting scrutiny, Respondents argue it does not apply (despite *Knox* and *Harris*). Their arguments fail.

1. There Is No General Exception To Exacting Scrutiny For Governments Acting As Employers.

Respondents claim "exacting" scrutiny never applies when governments compel ideological association as a condition of employment, because government has "broader discretion to restrict speech when it acts in its role as employer." Union.Br.25; Cal.Br.1. Relying chiefly on *Pickering v. Board of Education*, 391 U.S. 563 (1968), Respondents and the Government argue that lesser (or even no) scrutiny applies here. Union.Br.39-42; Cal.Br.32-36; U.S.Br.13-15. That is incorrect. This Court uses less-than-exacting *Pickering* scrutiny only when employers restrict their employees' words to manage the workplace. That reduced scrutiny does not apply to compelled affiliations like agency fees, and would not permit such fees regardless.

a. This Court does not engage in deferential review whenever government burdens constitutional rights "as an employer," rather than as a sovereign regulating the citizenry. Most obviously, the Court applies the same strict scrutiny to actions infringing racial neutrality and religious freedom regardless of whether governments are regulating employees or citizens. This Court has thus applied strict scrutiny to invalidate race-based layoffs of public-school teachers and requirements that public employees pledge belief in God. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

In the specific context of speech and association, this Court applies "exacting scrutiny"—not deferential review—when employment is conditioned on supporting advocacy groups. That is clearest in the Court's patronage decisions, which hold that conditioning public employment on supporting ideological groups "must survive exacting scrutiny," *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality)—scrutiny that extends to monetary contributions, *id.* at 355 ("[A]ny assessment of … salary is tantamount to coerced belief."). The Government denigrates *Elrod* as an "opinion for three Justices," U.S.Br.15, but overlooks subsequent majority opinions applying *Elrod*'s exacting standard to mandatory affiliations. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (patronage practices must be "narrowly tailored to further vital government interests").[1]

[1] The Government claims these cases ask only whether a requirement is "appropriate" or "reasonable," U.S.Br.18, but that lesser standard applies only to the "exception" from (continued)

Indeed, *Abood* itself—decided nearly a decade after *Pickering*—invalidated compelled support for non-bargaining-related ideological activities by invoking decisions like *Buckley v. Valeo*, 424 U.S. 1 (1976), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which involved sovereign restrictions on the citizenry. 431 U.S. at 234-35. *Abood* gave demanding review to such compulsion because it recognized "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 234. Far from invoking *Pickering*, *Abood* characterized it and other cases about restricting employee speech as "not pertinent" to agency fees. *Id.* at 230 & n.27.

As this Court thus explained in *O'Hare Truck Service, Inc. v. City of Northlake*, it applies a different standard to compelled affiliation with ideological groups (exacting scrutiny) than to restrictions on employee speech (*Pickering* review). 518 U.S. 712, 719 (1996). *O'Hare* distinguished between "*Elrod* and *Branti*"—wherein "the raw test of political affiliation sufficed to show a constitutional violation" under exacting scrutiny—and the "different, though related, inquiry" used "where a government employer takes adverse action on account of an employee or service provider's right of free speech." *Id.* The "balancing test from *Pickering*" applies only in the latter category. *Id.*

(continued)

exacting scrutiny for high-level positions where "party affiliation is an appropriate requirement." *Rutan*, 497 U.S. at 71 n.5 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

Even more directly, *Harris* held that this Court has never "seen *Abood* as based on *Pickering* balancing." 134 S. Ct. at 2641. To the contrary, the Court asks, as it did in *Knox*, whether agency fees "serve a 'compelling state interes[t] ... that cannot be achieved through means significantly less restrictive of associational freedoms,'" 132 S. Ct. at 2289—a test *Knox* derived from *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), and other decisions outside the government-as-employer context. *See also Harris*, 134 S. Ct. at 2639 (citing *Knox*, 132 S. Ct at 2288).

b. By contrast, the Court reserves deferential review for governments restricting "employee expression" in order to "manag[e] their offices." *Connick v. Myers*, 461 U.S. 138, 146 (1983). That is because normal exacting scrutiny cannot apply to limitations on workplace-related speech. But such scrutiny can (and thus should) apply to conditioning employment on supporting outside groups.

Deferential review of employee-speech restrictions derives from the "common sense realization that government offices could not function" if exacting scrutiny applied to every silencing of an employee. *Id.* at 143. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). If an employee "who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill,* 511 U.S. 661, 675

(1994) (plurality); *see also Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011) (similar for Petition Clause).

Since the "government employer *must* have some power to restrain" employees' speech beyond what sovereigns can impose on citizens, "constitutional review of [such] government employment decisions *must* rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters*, 511 U.S. at 674-75 (plurality) (emphases added); *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 599 (2008). And because controlling employees' speech is inherent in the employer-employee relationship, such restrictions do not impermissibly "leverage" that relationship to "restrict … liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

By contrast, compelled subsidization of advocacy groups is neither necessary to nor inherent in the hierarchal employment relationship. There is thus no reason to alter normal constitutional standards and treat such compulsion differently in the government-employment context (unless the right-privilege distinction is to be revived). Indeed, sovereign-imposed penalties (like fines) are less coercive sanctions than job termination—particularly in fields like "teach[ing]," where "the Government is a major (or the only) source of employment." *Rutan*, 497 U.S. at 77. And since compelled subsidization is not inherent in the employer-employee relationship, it *does* leverage that relationship to "produce a result which [the government] could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Nor does it matter that the purported "purpose" of compelled subsidization is achieving the employment-related *goal* of "labor peace." The fact that the governmental *interest* relates to employment does not entitle governments to more deferential review than they receive when advancing other important interests (like public safety). The compelled affiliations in *Elrod* and *Rutan* likewise purported to promote "effective and efficient government," *Elrod*, 427 U.S. at 366 (plurality), and to secure "employees who will loyally implement its policies," *Rutan*, 497 U.S. at 74. But this Court nonetheless applied exacting scrutiny.

c. In addition to defying precedent, applying *Pickering* here would not make sense. This Court gives deferential review to restrictions on employee speech to avoid "displacement of managerial discretion by judicial supervision." *Garcetti*, 547 U.S. at 423. Reviewing compelled subsidies for outside groups does not present that risk. This Court can review such compulsion using the same exacting review it gives general enactments without involving the judiciary in *any* oversight of personnel decisions. Indeed, *everyone* rejects *Pickering*'s fact-specific, *ad hoc* approach here; Respondents seek only to retain *Abood*'s *categorical* rule authorizing mandatory fees that fund collective-bargaining speech.

Nor do the specific interests *Pickering* balanced bear any relation to the interests here. There, the employee's interest was in speaking, and the Government's interest was in prohibiting speech to manage the workplace. Here, the employee's interest is in not supporting others' speech, and the employer's interest is in having a single bargaining

counterpart. The *Pickering* test was thus formulated to "balance" completely different interests than those underlying *Abood*, making its test a poor practical fit, as well as a bad doctrinal one.

d. But even assuming *Pickering* did supply the correct framework, California's regime would fail. As *Harris* held: "[E]ven if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering*, that provision could not be upheld." 134 S. Ct. at 2643.

That was correct, particularly given the difficulty of satisfying even *Pickering* review when "widespread" speech restrictions are involved, as compared to a "post hoc analysis of one employee's speech." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 467-68 (1995). Because categorical restrictions "give[] rise to far more serious concerns than could any single supervisory decision," California's "burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action." *Id.* at 468. California must therefore show that the "interests" of "a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* But California offers only speculation. *Infra* at I.B.

Finally, no *employment*-based deference is due to California's regime. Petitioners' *employers* do not impose agency fees. California's legislature mandates fees statewide through a sovereign enactment that binds all public employers *regardless* of their specific views.

2. California's Ability To Control Unions' Bargaining Speech Does Not Include The Power To Impose Fees On Dissenting Employees.

Apparently recognizing that agency fees for collective bargaining cannot survive any level of scrutiny, Respondents make the incredible claim that such fees receive "no First Amendment protection" and thus require *no* justification. Union.Br.21. Though they acknowledge public-sector bargaining's "public-policy consequences," Union.Br.25, Respondents claim bargaining constitutes unprotected "*employee* speech"—rather than protected "*citizen* speech"—because it "fall[s] within the State's internal personnel administration process for dealing with employment … and thus fall[s] squarely within the State's prerogative to manage its workplace." Union.Br.25; Cal.Br.3, 17. That is both irrelevant and wrong.

a. Even assuming *unions'* collective-bargaining speech is constitutionally unprotected, that does not strip *Petitioners* of their right to not support that speech. Those are two different deprivations and two distinct questions. The fact that governments can *restrict* employees' political activities, *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973), does not mean they can *compel support for* such activities, *Rutan*, 497 U.S. at 75-76. And the fact that speech "within the scope of an employee's duties" is unprotected, *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014), does not mean governments can make others subsidize such speech.

Respondents disagree, observing that the right to not subsidize speech is the constitutional equivalent

of the right to speak or not speak. Union.Br.24; Cal.Br.24-25. But all that means is that *Petitioners'* right to not subsidize union speech is co-extensive with *Petitioners'* well-established right to not praise, or to affirmatively criticize, the unions' bargaining. *E.g.*, *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n,* 429 U.S. 167, 175-76 (1976). It does not support the much-different proposition that *Petitioners'* right to not subsidize union speech (or speak against the union) depends on whether *the union* has a right to speak.

Suggesting the First Amendment is inapplicable to agency fees also contradicts *Abood* itself. *Abood* recognized that agency fees for bargaining interfere with dissenting employees' "First Amendment interests." 431 U.S. at 222. It simply deemed that "interference … constitutionally justified." *Id.*

b. Even if the union's rights were relevant, collective-bargaining speech *is* protected (and Respondent Unions cannot truly believe otherwise). It is well established that "public employee speech … falls within the core of [the] First Amendment" when it "relat[es] to any matter of political, social, or other concern to the community." *Engquist*, 553 U.S. at 600. The test for whether speech is "employee speech" exempt from that protection is straightforward: The "critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 134 S. Ct. at 2379; *id.* at 2383 (Thomas, J., concurring) ("Because petitioner did not testify to 'fulfil[l] a [work] responsibility,' he spoke 'as a citizen,' not as an employee.").

Negotiating *against* the employer *about* the scope of employee duties is obviously not "*within* the scope" of those duties. Collective bargaining involves "*conflict between* labor and management." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (emphasis added). Bargaining is thus not unprotected "employee speech."

Respondents offer two erroneous responses. *First*, they suggest that negotiating unions have an "official position" in the government's "internal operations." Union.Br.22; *see also* Cal.Br.3, 17. But unions engaged in adversarial bargaining are not speaking *for* the employer or otherwise analogous to subordinate employees carrying out their duties. If they were, employers could prohibit unions from advocating pay raises, just as the employer could control Mr. Garcetti's speech in fulfilling his work responsibilities. Unions are adverse to employers—*not* "equal partner[s] in the running of the business enterprise," *First Nat'l Maint.*, 452 U.S. at 676—which is why federal law prophylactically prohibits employers from even *influencing* unions. *See, e.g.*, AFL-CIO.Br.24 (noting it is a felony for employers to "provide financial support to employees' union representative" (citing 29 U.S.C. § 186(a))).

Second, Respondents try to redefine unprotected "employee speech" as all speech uttered in "private" about "workplace matters," even if the topic is of public concern. Union.Br.21-22, 48; Cal.Br.22-23. But that conflicts with precedent and common sense.

This Court's *Pickering* decisions have long rejected the notion that only speech in a "public forum" constitutes protected "citizen speech." The Court thus held in *Givhan v. Western Line*

Consolidated School District that a teacher spoke as a citizen on matters of public concern when she "*privately*" criticized her school district's alleged racial discrimination. 439 U.S. 410, 414 (1979) (emphasis added). Ms. Givhan "sp[oke] out as a citizen" and received constitutional protection, *Connick*, 461 U.S. at 148 n.8, even though she spoke in "private," with "management" as the "principal audience," Cal.Br.23; *see also, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 386 (1987) (private comment on "matter of public concern" protected). *Connick* likewise held that private workplace speech about political pressure at work was of "public concern" and thus received protection. 461 U.S. at 149. The *Connick* plaintiff's other private complaints were unprotected only because the topics were not "matter[s] of public concern"—not because they were unprotected "employee" speech. *Id.* at 148.

These decisions make sense. Since "'a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs,'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011), speech *to* the officials who *decide* such affairs is at the Amendment's core, whether that speech occurs publicly or privately. *See*, *e.g.*, *Madison*, 429 U.S. at 176 n.10 ("It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate [their] views directly to the decisionmaking body charged by law [to resolve] the contract renewal demands."). Were it otherwise, union lobbying in private meetings on workplace matters (like pensions) would constitute unprotected "employee speech."

Private advocacy is also more effective than public agitation, which is why "influence peddlers" prefer it. *McConnell v. F.E.C.*, 540 U.S. 93, 95-96 (2003). That is especially true of collective bargaining since—unlike lobbying—public officials are *required* to listen and "negotiate in good faith." Cal. Gov't Code § 3543.5(c).

Anyway, collective bargaining is not even "private." In California, the "union and the employer must present initial [collective-bargaining] proposals to the public" at a hearing where citizens have "an opportunity [to] comment," and all "major provisions" of the finalized agreement must be "disclosed" at another hearing. Cal.Br.4. California thus recognizes bargaining's public import.

c. Respondents likely advocate this "employee speech" exception to constitutional scrutiny because even they recognize public-sector bargaining involves matters of deep public concern. Union.Br.25; Cal.Br.29-30. That is clear as a financial matter: While "a single public employee's pay is usually not a matter of public concern," salaries for an entire "collective-bargaining unit involving millions of dollars … affect[] statewide budgeting decisions." *Harris*, 134 S. Ct. at 2642 n.28.

And it is clear as an education-policy matter. *See* Carolyn Doggett, Executive Director, CTA, Address to CTA State Council: It's Always Been Politics (Jan. 27, 2013) ("[W]e [CTA] must remember that we were founded for one reason … and one reason only, … and that was to engage in politics … in order to create an organized system of public instruction…." (first two ellipses in original)), http://goo.gl/f6Iazt. Respondents' amici confirm the breadth of policies

that bargaining resolves—noting that "[t]he exclusive representative … has the right to consult on … the determination of the content of courses and curriculum," U.S.Br.8a (quoting Cal. Gov't Code § 3543.2(a)(3)), and that agency fees "fund every step of the [education] reform implementation process," AFT.Am.Br.8, including "supporting and developing struggling teachers and other staff," Sch.Dists.Am.Br.4, and designing programs to "improve student performance and teacher quality," Labor.Law.Profs.Am.Br.16. This is also true outside education, where bargaining determines issues like appropriate "staffing levels" for firefighters. Intl.Assn.Firefighters.Am.Br.8. If "a memorandum relating to teacher dress and appearance" is a "matter[] of public concern," *Connick*, 461 U.S. at 145-46 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)), these topics certainly are too.

In all events, even if bargaining involved only speech of a "mundane commercial nature," mandatory "subsidies" would nonetheless be "subject to exacting First Amendment scrutiny." *Knox*, 132 S. Ct. at 2289.

3. Agency Fees Are Not Incidental To A Non-Speech Association.

In another assault on *Abood*'s recognition that agency fees burden "First Amendment interests," 431 U.S. at 222, Respondents claim that agency fees escape *any* scrutiny because they are "part of a broader mandatory association." Cal.Br.21. To be sure, the Court has held that when there is a "'broader regulatory system in place' that collectivizes aspects of [a] market *unrelated to*

speech," tangential speech restrictions essential to that "broader regulatory system" are permissible. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 n.3 (2005) (discussing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), and quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2011)) (emphasis added); *see also, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (regulating legal profession). But here, "the mandated assessments for speech" are not "ancillary to a more comprehensive program restricting marketing autonomy." *United Foods*, 533 U.S. at 411.

To the contrary, speaking with a single bargaining voice "is the principal object of the regulatory scheme." *Id.* at 412. All agree that creating the "collective voice to influence" employers, *Order of R.R. Telegraphers v. Chi. & Nw. R. Co.*, 362 U.S. 330, 338 (1960), is the very "cause which justified bringing the group together," *Abood*, 431 U.S. at 223; *see* Union.Br.18; Cal.Br.2. And "[a]lmost all of the funds collected under the mandatory assessments are for [that] purpose." *United Foods*, 533 U.S. at 412. This Court has not "upheld compelled subsidies for speech in the context of a program"—like California's—designed "to generate the very speech to which some [individuals] object." *Id.* at 415; *see also Harris*, 134 S. Ct. at 2643-44 (distinguishing *Keller* on this basis).

Moreover, *Glickman* is limited to commercial speech. It does not govern where objections "rest[] on political or ideological disagreement with the content of the message." *Glickman*, 521 U.S. at 472.

B. California's Agency-Fee Law Fails First Amendment Scrutiny.

Most States and the federal government run effective workforces without agency fees. This alone shows that California's regime is not sufficiently essential to satisfy First Amendment scrutiny. Reviewing Respondents' proffered "interests" confirms it.

1. California's Interest In Labor Peace Does Not Justify Agency Fees.

Respondents tout the virtues of exclusive representation, Union.Br.15-18; Cal.Br.13-16, but the relevant issue is not the employer's interest in *having* one union; it is whether mandatory fees are *necessary to protect* that interest. The only link between mandatory fees and exclusive representation is the remote possibility that eliminating fees would eliminate the exclusive representative. That attenuated link is too speculative to satisfy Respondents' demanding burden, particularly since Respondents do not even *allege* it might occur.

a. "[H]ighly speculative" interests and "conditional and remote eventualities simply cannot justify" restrictions on even lesser-protected *commercial* speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980). Yet Respondents (and their amici) fall short of even speculation; they never allege that unions will stop serving as exclusive representatives without agency fees.

Real-world experience confirms it would never happen. *First*, most States and the federal

government function effectively without agency fees. *Second*, neither Congress nor California has legislatively found that unions need agency fees to be effective.[2] *Third*, Respondents and their *amici* cannot identify any union that has failed because agency fees were eliminated.[3]

Claiming unions would fail without mandatory fees is, moreover, irreconcilable with asserting that exclusive representatives *benefit* employees. If employees do benefit, it would be irrational for them to let exclusive representatives disappear. "[B]asic rules of economics" thus dictate that teachers *will* pay to keep afloat unions that serve their interests. Cal.Br.19. And unions would thrive regardless. In the federal workforce, for example, "only one-third" of covered employees "actually belong to the union

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[2] Respondents' and the Government's authorities do not say otherwise. Cal.Br.19; U.S.Br.19-20. And *Abood* merely asserted a linkage without support. 431 U.S. at 221-22, 225.

[3] This makes sense given the relatively small amounts at stake. For example, although unions typically do not make fee-payer or total-membership statistics available, NEA had 28,323 California fee-payers in 2014-2015. Michael Antonucci, *EIA Exclusive: NEA Agency Fee-Payers by State & Financial Consequences of Friedrichs Case* (Aug. 24, 2015), http://goo.gl/Z2vlN5. This represents *9.7%* of the 291,889 covered employees in 2013-2014. EIA, *NEA Membership 2013-14*, http://goo.gl/fMhGkh; *accord* Nat.Labor.Policy.Am.Br.9 (3.9% of NEA teachers opt-out); Cato.Am.Br.23-24 (8% of employees opt-out). Even if *all* these employees ceased paying chargeable and nonchargeable expenses, that 9.7% loss translates to $17.3 million out of CTA's $178 million in 2012-2013 dues, and $34.3 million out of NEA's $354 million. JA367, JA449. Given that CTA's and NEA's *total* revenues were *$191 million* and *$413 million* (JA367, JA450), eliminating fees would hardly threaten their vitality.

and pay dues," *Harris*, 134 S. Ct. at 2657 n.7 (Kagan, J., dissenting), yet federal-employee unions effectively discharge the fair-representation duty (as do unions in most States).

b. Recognizing agency fees are unnecessary to ensure union solvency, Respondents conjure three other supposed interests justifying them. Cal.Br.1; Union.Br.5-6, 49-50. But none of these interests are legitimate. That is doubtless why neither *Abood* nor any Justice has ever invoked them.

First, Respondents suggest California has an interest in fostering a well-funded, and thus "effective[,] bargaining partner." Union.Br.46. But the exclusive representative is *adverse* to the employer. California has no interest in making that representative *more* powerful and *more* capable of draining the public treasury or wresting control over education policy away from local officials. Neither Congress nor California's legislature has ever embraced that self-defeating "interest."

And besides, Respondents do not even *allege* that eliminating agency fees will render California's unions "ineffective," making this hypothetical irrelevant. Nor do Respondents explain *how much* money would make unions "effective." Respondents thus seek to justify a serious speech infringement with an interest that cannot be quantified, let alone implemented using any principled standard.

Second, California claims an interest in ensuring "the financial burden of representation is spread fairly among all those represented." Cal.Br.9. But promoting fairness to unions is not an "interest[] that the government has in its capacity as an

employer." *Rutan*, 497 U.S. at 70 n.4. The *union* obviously has an interest in increased contributions, but it is "the *State's* interests, not the union's" that matter. Union.Br.49. And California has no more interest in spreading the cost of unionism than it has in requiring university professors to support an "association … pressur[ing] … universities to observe standards of tenure and academic freedom." *Knox*, 132 S. Ct. at 2289. That California "attempts to use public employment to further such interests does not render those interests employment related." *Rutan*, 497 U.S. at 70 n.4.

Third, Respondents claim agency fees reduce "discord among employees." Union.Br.5. But it is counterintuitive speculation that forcing unwilling employees to subsidize ideological speech they oppose will *foster* harmonious relationships. And it is equally counterintuitive that "discord" will erupt from eliminating agency fees when union-supporting employees have long tolerated dissenting employees' refusal to join the union or pay nonchargeable fees. Moreover, "discord among employees" cannot be a sufficient interest; otherwise patronage and compelled subsidization of union lobbying would have been upheld. *But see Elrod*, 427 U.S. at 364 (plurality); *Abood*, 431 U.S. at 235-36.

c. Finally, California does not actually think it is important to have well- and fairly-funded exclusive representatives, because it does not require exclusive representatives *at all*. Rather, it authorizes—indeed, creates a "right" to—members-only bargaining. Cal. Gov't Code § 3543.1(a). That negates any compelling interest in having an exclusive representative, much less a well-funded one.

2. California Has No Free-Standing Interest In Preventing "Free-Riding."

Respondents also invoke an anti-free-riding interest, Union.Br.47-49, but, as explained above, California has no interest in preventing free-riding unless it will bankrupt the union. That is why "free-riding" cannot justify compelled subsidization of other groups or union lobbying. *See* Pet.Br.33-34. Preventing free-riding is, indeed, contrary to "the heart of the First Amendment." *Abood*, 431 U.S. at 234. Allowing the government to decide for citizens which advocacy groups they will support because it deems those groups beneficial contravenes the basic principle that "in a free society one's beliefs should be shaped by his mind and conscience, rather than coerced by the State." *Id*. at 235.

Nor does it matter whether a non-member is a "true objector" or merely a penny-pinching true believer. U.S.Br.20. The Government concedes it is "impossible" to differentiate between principled dissenters and opportunists, *id.*; indeed, any such effort would be unconstitutional, *see O'Hare*, 518 U.S. at 719 ("[O]ne's beliefs and allegiances ought not to be subject to probing or testing by the government."). All non-members thus have the right to withhold support; just as every student had the right to refuse the pledge of allegiance in *Barnette*.

3. The Duty Of Fair Representation Does Not Justify Agency Fees.

Respondents also suggest unions are entitled to charge dissenters because unions—unlike other groups—are barred from seeking facially

discriminatory preferences for union members in bargaining. Union.Br.48-50; Cal.Br.15-16. But Respondents acknowledge this "duty" is something unions voluntarily accept in exchange for the power of exclusive representation. Union.Br.49. Since that "duty" is voluntary, the "*State*[]" has no greater interest, Union.Br.49, in preventing union "free-riding" than it does for other advocacy groups, or for unions voluntarily publishing a "magazine." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 559 (1991) (Scalia, J., dissenting in part).

Nor do Respondents provide any examples of how the unions' "approach to negotiations on wages or benefits would be any different if [they] were not required to negotiate on behalf of … nonmembers." *Harris*, 134 S. Ct. at 2637 n.18. None exist. Confirming as much, the nondiscrimination "duty" does not apply to lobbying, yet Respondent Unions have never lobbied to treat union-backing teachers better than their peers. That is because "generic" promotion, *Knox*, 132 S. Ct. at 2289, is simply the norm for advocacy groups.

Moreover, even a State-*imposed* "duty" could not justify compelled subsidization. Otherwise, California could require nonmembers to subsidize union lobbying by imposing a nondiscrimination "duty" on lobbying.

Nor can the "duty to represent non-members in grievances" justify agency fees. Union.Br.52; Cal.Br.41 n.9. California could avoid uncompensated grievance representation by providing or clarifying that unions' duty of fair representation does not preclude them from declining representation they would not otherwise pursue absent that duty, much

as unions currently decline to represent nonmembers in termination proceedings. Pet.Br.44-47. California cannot reject this non-speech-restrictive solution in favor of speech-restricting, mandatory, upfront fees from all nonmembers in amounts exponentially greater than what (hypothetical) grievance representation actually costs.[4]

C. Reconsidering *Abood* Does Not Require An "Evidentiary Record."

Respondents claim that this Court should not reconsider *Abood* without an "evidentiary record." Union.Br.52-53. But *Abood* had no evidentiary record—it arose from Michigan's "equivalent to dismissal under [Rule] 12(b)(6)." 431 U.S. at 213 n.4. And this Court has made many other important decisions on the basis of allegations in contexts identical to this one. *E.g.*, *Harris*, 134 S. Ct. at 2627; *O'Hare*, 518 U.S. at 716; *Rutan*, 497 U.S. at 67; *Elrod*, 427 U.S. at 350 (plurality). Reconsidering *Abood* in the same posture is entirely appropriate. It is also inevitable, since no busy district court would ever make factual findings that are immaterial under currently binding Supreme Court precedent.

Anyway, Respondents do not dispute the essential facts. For example, they do not dispute that unions survive without agency fees, voluntarily assume the nondiscrimination duty, and advocate

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[4] Finally, exacting scrutiny is not satisfied whenever speakers are free to engage in counter-speech. Union.Br.17, 24; Cal.Br.24, 37; Govt.Am.Br.9. The Government could not constitutionally force people to fund NRA ads by simply allowing them to criticize guns elsewhere. *United Foods*, 533 U.S. at 411-12.

neutrally in contexts (like lobbying) where that duty is inapplicable. Their silence is dispositive, because it is *California's* burden to justify restricting speech. California cannot carry that burden if it cannot even *articulate* what facts would do so.

And regardless, Petitioners seek only reversal of the dismissal below. If Respondents eventually identify a disputed material fact, they are welcome to litigate it on remand.

D. This Court's Traditional Stare Decisis Factors Support Overturning *Abood*.

1. Respondents cite no instance of this Court deferring to prior precedent that erroneously eradicated a fundamental right. That is because this Court does not tolerate ongoing deprivations of fundamental rights simply because it previously denied them incorrectly. Pet.Br.52-53. Offensiveness to the First Amendment *is* a "special justification" that warrants overturning precedent. *Contra* Union.Br.31; Cal.Br.43; U.S.Br.30-33.

Respondents claim otherwise, citing the dissenting opinion in *Arizona v. Gant*, 556 U.S. 332 (2009). Union.Br.36-37. But that dissent argued the majority's constitutional construction was *wrong*, *id.* at 355-56, while *also* urging its rejection on stare decisis grounds. And besides, the *majority* rejected the dissent's view, holding that stare decisis cannot "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id.* at 349.

2. As Petitioners have demonstrated, retaining *Abood* will do far more to "destabilize First Amendment law," U.S.Br.31-32, than discarding it

would. In addition to *Abood*'s general outlier status, Pet.Br.53-56, that decision cannot be reconciled with this Court's decisions in *Knox* and *Harris*. *See Harris*, 134 S. Ct. at 2644-45 (Kagan, J., dissenting) (recognizing as much); *Knox*, 132 S. Ct. at 2303 (Breyer, J., dissenting) (same). The Court can thus harmonize its jurisprudence only by either overturning *Abood* or discarding its most recent decisions in this context.

The Government's concerns about destabilizing First Amendment law are unpersuasive. Foremost, the Government notes that overturning *Abood* would "require the Court also to overrule" decisions relying on it to allow agency fees. U.S.Br.31. Of course. Overturning *Abood*'s *progeny* is inherent in eliminating the jurisprudential discord *Abood* created. Beyond that, the Government claims overturning *Abood* would undermine *Keller* and *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 230-31 (2000). U.S.Br.31. But this Court correctly rejected those arguments in *Harris*. 134 S. Ct. at 2643-44. The Government also invokes this Court's agricultural-marketing decisions, U.S.Br.31-32, but those decisions *support* overturning *Abood*—as outlined above and as *Harris* explained. 134 S. Ct. at 2639.

3. Finally, Respondents invent non-existent reliance interests. Invalidating agency fees would not "call into question thousands of public-sector union contracts governing 9.5 million public employees and affecting scores of critical services." Union.Br.33. It would merely discontinue agency fees, with all contracts remaining in force. To the extent union-negotiated contracts include fee

provisions, those provisions would be severed. *See* JA184 (severability clause); JA237-38 (same). Respondents have not identified any contractual provision that any union would have bargained any differently absent agency fees.

II. The State Cannot Default Its Employees Into Donating Money To Particular Political Causes.

Respondents defend California's opt-out regime by claiming the Constitution only prohibits "coercion." Union.Br.14. But Respondents never seriously dispute that their "coercion" rule would permit California to make public employees contribute 1% of their wages to the Republican Party unless they annually opt out of doing so. Union.Br.58. Respondents' inability to distinguish that blatant viewpoint discrimination from the almost-as-blatant viewpoint discrimination here resolves this issue in Petitioners' favor.

Respondents invoke an eclectic mix of cases for the proposition that individuals sometimes have to affirmatively invoke constitutional rights. Union.Br.55-56; Cal.Br.52-53; U.S.Br.34-36. But those cases involve either requirements inherent in adversarial proceedings, or situations where the State is providing some benefit—like license plates—and has no reason to suppose the recipient objects to the requested benefit. Union.Br.55-56; Cal.Br.50-53.

Here, in contrast, California is *taking* its employees' *money*. The normal presumption is that people want to *retain* their property. There is thus no cognizable basis for "presum[ing] acquiescence in the loss of fundamental rights," *Knox*, 132 S. Ct. at

2290—particularly since non-members have already foregone union membership (and thus valuable benefits like paid maternity leave, Pet.Br.41 n.11). Respondents identify no legitimate reason for creating the "risk" that dissenters' money will go to "political" activity they oppose, *Knox*, 132 S. Ct. at 2290. All they offer is California's half-hearted complaint that an opt-in system will somehow generate more paperwork. Cal.Br.54.

Respondents' inability to provide any plausible justification for their opt-out regime confirms what Respondents Unions' lavish spending to preserve that regime suggests: The sole purpose of requiring "opt out" is to *create* the "risk" of inadvertent contributions to highly partisan speech.

CONCLUSION

The judgment below should be reversed.[5]

[5] Petitioner Peggy Searcy has retired. Her retirement does not affect the viability of this dispute. Pet.Br.8 n.2.

Respectfully submitted,

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