No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

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

BRIEF OF AMERICAN FEDERATION OF TEACHERS AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Federation of Teachers (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.6 million members in more than 3,500 locals nationwide. Many AFT affiliates represent members in states where, either by statute or through collective bargaining agreements, there are clauses that require represented employees to pay fair share fees to cover the costs of collective bargaining and contract administration. The AFT has had a long term commitment to striking the appropriate balance under the First Amendment between members' and fee payers' rights. Indeed, it was an AFT affiliate that was involved in the original *Abood* decision which is at issue in this case.

The American Association of University Professors (AAUP) represents the interests of over 40,000 faculty, librarians, graduate students, and academic professionals, including a significant number in public sector collective bargaining units. AAUP defends academic freedom and the free exchange of ideas in higher education. In cases that raise legal issues important to higher education or faculty members, the AAUP frequently submits *amicus* briefs in the Supreme Court.

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Blanket consent letters on behalf of all the parties are on file with this Court.

SUMMARY OF ARGUMENT

Whether public employees should be allowed to avoid paying for the representation state law requires unions to provide them is a question that has been debated in the political sphere for many years. Petitioners ask this Court to end that debate by imposing petitioners' preferred position as a matter of constitutional law. To do so, this Court must overrule longstanding precedent that extends substantial protections to employees who may disagree with some union positions on political matters, while at the same time respecting states' authority to accommodate their own compelling interest in efficient management of their institutions and the competing First Amendment interests of unions and their members.

I. Petitioners focus on the use of fair share agency fees to support collective bargaining on a handful of controversial issues. But fair share fees are also used to fund a wide range of other activities that promote the state's compelling interest in providing students a high quality education and directly benefit nonmembers like petitioners.

For example, fair share fees are used to help implement educational reforms as part of the collective bargaining process. Unions spend substantial resources working with local administrators to flesh out and operationalize reforms mandated by federal or state law, or developed by local school districts. In doing so, unions bring their members' informed insights to the project and promote educator buy-in. Fair share fees also help support union-provided training to implement the reforms, for example, by training

union representatives and members who participate in new teacher mentoring and evaluation programs. And unions, using fair share fees, also play a central role in ensuring proper implementation of such reforms on an ongoing basis, both in bargaining and through the grievance process.

Fair share fees also support union participation on school health and safety committees that identify school hazards (from leaking roofs to asbestos), design and implement programs to improve students' health (such as training school employees in CPR or how to respond to asthma attacks), and help plan for emergencies (such as natural disasters or incidents of school violence).

While nonmembers like petitioners may not always agree with their union, they cannot claim that they disagree with *everything* their union does or says, or deny that they benefit substantially from union activities that improve school safety and other working conditions, as well as the bargaining and grievance services unions are compelled by law to provide them.

II. Accordingly, providing petitioners a constitutional right to a free ride will be far more disruptive to state educational systems than petitioners are willing to acknowledge. With reduced funds, unions will have fewer resources to devote to implementing school reform measures, participating in health and safety committees, or other collaborative projects.

Petitioners suggest unions should make up the difference by trying harder to recruit dues-paying members. But that shift in priorities is itself harmful

to states' interests in promoting collaborative working relationships with their unions. Through amici's experience in right-to-work states, they have found, for example, that recruiting new members requires a much greater focus on pursuing individualized grievances and taking a more confrontational approach with administrators.

Moreover, ruling in petitioners' favor could have even more destabilizing effects: requiring unions to represent the interests of nonmembers in bargaining and grievances – a mandate that comes with its own serious First Amendment costs – becomes dramatically less defensible if nonmembers cannot be compelled to pay their fair share. States may be forced to reconsider laws imposing that obligation if petitioners have their way, which may lead to an even further unraveling of the careful balance of interests struck by the exclusive bargaining systems many states have deemed essential to maintaining labor peace and promoting effective school management.

States like California could reasonably view the experience of right-to-work states as confirming the educational benefits of fair share systems. Studies have regularly shown that educational attainment in right-to-work states lags behind the rest of the nation, and that there is a statistically significant correlation between the degree of unionization in schools and student achievement.

III. Petitioners vehemently disagree about the benefits and costs of their proposed judicial re-engineering of state labor-management practices. But they can cite nothing in the record to support their claims because they successfully prevented the

creation of any record. On the basis of the empty record, they make an all-or-nothing challenge to being compelled to pay a single penny in fair share fees in support of *any* union activity regardless of its nature, or the extent of the First Amendment or government interests implicated by that activity.

Particularly in the absence of any record, that astonishingly broad facial challenge should be rejected on its face. This Court has repeatedly analyzed constitutional challenges to the assessment of fees on a category-by-category basis, weighing the competing constitutional and governmental interests implicated by particular types of expenditures. Having forgone this restrained approach, petitioners' all-or-nothing claim can be accepted only if they can show that the First Amendment interest affected by *every* use to which fair share fees are put will *always* outweigh *any* conceivable countervailing state interest. This they have not attempted, and cannot do, particularly in the absence of any record establishing the full range of uses to which fair share fees are put.

As a result, although some members of the Court may think that the established line between chargeable and non-chargeable expenses should be revised, this case presents no vehicle for exploring that question.

Departing from the Court's traditional restrained approach would be particularly regrettable in such a politically charged case, where it is all too easy for the public to perceive the Court's willingness to rule broadly, and in the absence of a record, as proof that its decision is in furtherance of a broader policy

agenda that is premised on individual Justices' world views.

IV. If the Court does entertain petitioners' facial challenge, it should hold petitioners to their strategic decision not to challenge the underlying system of exclusive representation. That decision is what they believe allows them have their cake and eat it too, maintaining the benefits of union representation without having to pay for it. The Court should preclude petitioners from relying on any burden to their First Amendment interests that is inherent in the exclusive bargaining system they have elected not to challenge. Their failure to even attempt that disaggregation is yet another reason to reject petitioners' broad claims in this case.

ARGUMENT

Petitioners ask this Court to overrule precedent and upend school management practices that have been settled for decades, based on a critically incomplete description of what fair share agency fees are used for and how eliminating them will affect states' ability to maximize educational opportunities for their students. The Court's ability to judge the practical consequences of ruling in petitioners' favor is hampered both by lack of institutional expertise (which resides instead in the hands of states and school districts) and the complete absence of any record in this case. Because the consequences of accepting petitioners' constitutional claim matter – to the constitutional analysis and to the Court's legitimacy in the eyes of the nation – this Court should reject petitioners' literally baseless all-or-nothing gambit to avoid paying even a penny in fair share fees for the services they receive from their schools' unions.

I. Fair Share Fees Are An Essential Component Of States' Management Of One Of Their Most Important Institutions.

Resolving petitioners' constitutional challenge requires a clear understanding of the diversity of uses to which fair share fees are put in the educational setting. Petitioners' account is misleadingly incomplete. For example, petitioners largely ignore that in the decades since *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), was decided, teacher unions increasingly have become active partners with school administrators in implementing school reforms aimed at improving

education, student health and safety, and the effective management of one of the government's most important public programs. States have a compelling interest in maintaining that arrangement, which depends materially on the unions' ability to obtain adequate funding from all employees who benefit from the unions' work.

A. Fair Share Fees Fund A Wide Range Of Union Activities That Improve The Quality Of Education And The Wellbeing Of Students.

Fair share fees are used for a wide range of activities that are critical to states' compelling interest in improving education and protecting students.

1. Implementing Education Reform Through Collective Bargaining And Contract Enforcement

Public education is going through a period of major reform. Unions play a critical role in the successful implementation of these reforms by working with school districts to operationalize reform mandates through the collective bargaining process, providing reform-related training to union members and other school employees under collective bargaining agreements, and by helping ensure the reforms are actually implemented through informal communications and, when necessary, formal grievances.

Regardless of the specific reform – whether it be an initiative developed in a local district, a state, or the federal government – fair share fees help fund every step of the reform implementation process.

Every significant reform requires working out innumerable operational details at the local level in bargaining, adapting broader principles to the specific circumstances of individual schools. Much of that implementation work is carried out through the collective bargaining process because most reforms implicate significant terms and conditions of employment, such as the length of the school day, training, teacher evaluations, job security, class size, etc.[2]

Thus, for example, unions have used fair share fees to collaborate in implementing Peer Assistance and Review (PAR) programs in which expert teachers mentor, support, and partner with school administrators to evaluate both new and struggling teachers.[3] The programs are designed to support, improve, and retain good teachers – which thereby helps recruit new teachers – while also facilitating removal of ineffective instructors. The programs are

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[2] *See, e.g.*, 20 U.S.C. § 6316(d) (savings clause of No Child Left Behind statute, providing that "[n]othing in this section shall be construed to alter or otherwise affect the rights, remedies and procedures afforded school or school district employees under . . . the terms of collective bargaining agreements").

[3] *See, e.g.*, U.S. Dep't of Educ., *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* 11-13 (2012), http://www2.ed.gov/documents/labor-management-collaboration/white-paper-labor-management-collaboration.pdf; Jennifer Goldstein, *Taking the Lead: With Peer Assistance and Review, the Teaching Profession Can Be in Teachers' Hands*, AM. EDUCATOR, Fall 2008, at 4.

often part of a broader collaborative evaluation process in which teachers, union representatives, and school officials jointly design and oversee the system, as well as participate in a standards-based evaluation of individual teachers.[4] PAR programs have proven highly effective and have been promoted by the U.S. Department of Education as an example of what can be achieved through labor-management collaboration. *See* U.S. Dep't of Educ., *Advancing Student Achievement Through Labor-Management Collaboration* 11-12 (2011).[5] They have reduced teacher turnover, particularly among new teachers, [6] while at the same time facilitating dismissal of ineffective tenured teachers.[7]

Unions have likewise used fair share fees to fund bargaining and contract enforcement activities as part of collaborative efforts to revitalize underperforming schools. In the mid-1990s, for example, a California teachers' union got together with local administrators of the ABC Unified School

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[4] *See id*.

[5] Http://www.ed.gov/sites/default/files/labor-management-collaboration-program.pdf.

[6] *See, e.g.*, Harvard Graduate School of Education, Project on the Next Generation of Teachers, *A User's Guide to Peer Assistance and Review* 11-13, http://www.gse.harvard.edu/~ngt/par/resources/users_guide_to_par.pdf [hereinafter *A User's Guide*]; Alliance for Excellent Education, *On the Path to Equity: Improving the Effectiveness of Beginning Teachers* (2014), http://all4ed.org/wp-content/uploads/2014/07/PathToEquity.pdf.

[7] *A User's Guide*, *supra*, at 11.

District outside of Los Angeles to address the special problems facing a number of low performing schools with mostly poor students, a majority of whom were English language learners. In addition to implementing a peer assistance program, the union worked with the school to develop a new recruitment and teacher training system, even to the point of using union funds to hire substitute teachers that would allow faculty to attend improved professional development training. Over time, the school agreed to involve union representatives in a broad range of joint governance projects addressing nearly every aspect of the schools. Throughout, the educators' national union, AFT, provided extensive technical assistance, including through its training, school improvement, and leadership institutes. The result has been a dramatic improvement in academic achievement and graduation rates, making the district a nationally recognized success story.[8]

Unions have engaged in similar joint efforts to turn around struggling schools, from California's ABC Unified School District to the Chancellor's Districts established to reform New York City's most disadvantaged and struggling schools.[9]

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[8] *See generally* Saul A. Rubinstein & John E. McCarthy, *Public School Reform Through Union-Management Collaboration*, in 20 ADVANCES IN INDUS. & LABOR RELATIONS 1, 19 (David Lewin & Paul J. Gollan eds. 2012).

[9] *See, e.g.*, Julia E. Koppich, *Using Well-Qualified Teachers Well: The Right Teachers in the Right Places with the Right Support Bring Success to Troubled New York City Schools*, AM. EDUCATOR, Winter 2002, at 22.

Whatever the nature of the reform, by working with the union to operationalize and tailor a new program, the school district is able to benefit from the experience of those workers who are in the best position to anticipate how changes can be implemented on the ground given the particular constraints and opportunities at a given school, and how changes may affect other aspects of the school program. At the same time, by memorializing the changes as part of the collective bargaining agreement, the schools and the unions then institutionalize the reforms.[10]

The unions also play a critical role in implementing reforms memorialized in the management-labor contract. To start, because the union has been deeply involved in the reform process, it is able to promote educator buy-in, which is essential to any reform's success.

Fair share fees also help fund extensive collectively bargained training programs. For example, successful implementation of a PAR program requires substantial training and oversight for expert teachers and mentors. The integrity of any new evaluation system likewise demands extensive training and oversight to ensure that all evaluators are engaged in the same process, and using the same metrics. Fair share fees help fund unions'

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[10] *See* David Lewin et al., *The New Great Debate About Unionism and Collective Bargaining in U.S. State and Local Governments*, 65 ILR REV. 749, 766 (2012).

participation in these training and oversight efforts.[11] National and local unions, for example, use fair share fees as part of extensive train-the-trainer programs on a wide range of professional development topics, including training for PAR and mentoring programs, innovative programs for teaching reading and math, managing student behavior, and general instructional strategies.[12]

At the same time, through their constant contact with the teachers directly involved in implementing these programs, unions can provide information to administrators about how the reforms are being executed on the ground, their impact on students' learning outcomes, what problems are being encountered, and advice on how to fix them. Often, that communication occurs through formal committees upon which both administrators and teachers selected by the union serve, sometimes with direct participation by union officials themselves.[13]

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[11] *See, e.g.*, Boston Schools Collective Bargaining Agreement for 2010-2016, at 86-87, http://btu.org/wp-content/uploads/Final_BTU_Contract_No_Index.pdf [hereinafter Boston CBA]; Los Angeles Schools Collective Bargaining Agreement for 2008-2011, at 77-78, http://www.utla.net/system/files/Final_2008-2011_contract.pdf [hereinafter LA CBA].

[12] *See, e.g.*, AFT, *ER&D: Twenty-Five Years of Union-Sponsored, Research-Based Professional Development*, Am. Educator, Winter 2006-2007, http://www.aft.org/periodical/american-educator/winter-2006-2007/erd-twenty-five-years-union-sponsored.

[13] *See, e.g.*, Montgomery County, Maryland, Schools Collective Bargaining Agreement for 2015-2017, at 14-20,

Other times, the feedback is provided through the various levels of the collective bargaining agreement's grievance system.

Importantly, the resources unions devote to planning, training, and implementation for such reforms are often a critical supplement to inadequate school budgets.

2. Protecting Health And Safety

Fair share fees also fund unions' important contributions to promoting health and safety within our educational institutions through collective bargaining and contract enforcement.

Because union members have the most direct and immediate knowledge of school hazards and student safety needs, they provide an important resource in identifying health and safety issues. These issues run the gamut from physical conditions that interfere with learning and compromise student safety (*e.g.*, leaking roofs, heating and cooling issues, mold, asbestos, lead paint, indoor air quality, etc.), to student and staff health concerns (*e.g.*, protocols for dealing with children with asthma, diabetes, and other chronic illnesses, or minimizing the risks of blood-borne pathogens), to security concerns (*e.g.*, school violence and property theft), to emergency preparedness (*e.g.*, for floods, earthquakes, fires, and tornadoes).

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http://www.montgomeryschoolsmd.org/uploadedFiles/departments/associationrelations/refresh2014/MCEA%20Contract%20FY15-FY17%20.pdf [hereinafter Montgomery County CBA].

Unions use fair share fees not only to help identify particular problems, but also to develop and implement solutions through collective bargaining and grievance adjustment. Some issues are addressed directly in collective bargaining agreements.[14] Unions have also been instrumental in bargaining for, staffing, and training school health and safety committees that identify and respond to problems.[15] Union representatives, supported in part by fair share fees, generally are responsible for recruiting other union members to participate and providing training and support for their duties, and sometimes sit on the committees themselves.

Unions also devote resources to implementing bargained safety improvements. For example, unions provide employee training on safety issues addressed in the collective bargaining agreements (*e.g.*, First Aid, CPR, blood borne pathogen safety, emergency

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[14] *See, e.g.*, New York City Schools Collective Bargaining Agreement for 2007-2009, at 54-57, http://www.uft.org/files/contract_pdfs/teachers-contract-2007-2009.pdf [hereinafter NYC CBA]; Boston CBA, *supra*, at 93; LA CBA, *supra*, at 287-90; Montgomery County CBA, *supra*, at 35-38; Minneapolis Schools Collective Bargaining Agreement for 2013-2015, at 159, http://humanresources.mpls.k12.mn.us/uploads/2013-15_teacher_s_contract_final_08-05-2014.pdf [hereinafter Minneapolis CBA].

[15] *See, e.g.*, NYC CBA, *supra*, at 55-56; Montgomery County CBA, *supra*, at 36; LA CBA, *supra*, at 289; Minneapolis CBA, *supra*, at 159.

preparedness).[16] Those efforts are supported by national unions that provide training materials, research, and best practices information from other schools.[17]

Unions also devote fair share fees to enforcing these requirements. For example, unions in some larger school districts have industrial hygienists on staff to monitor safety compliance. Unions also spend considerable resources researching safety complaints from employees (members and nonmembers alike) and bringing informal and formal grievances when appropriate.

In post-secondary education, unions in public universities likewise play an important role in addressing health and safety concerns, for example, through collective bargaining agreement provisions creating joint administration-faculty environmental committees charged with oversight of university efforts to remove hazardous and unhealthy conditions from the work environment.[18]

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[16] *See, e.g.*, UFT, *Environmental Safety*, N.Y. Teacher (June 4, 2015), http://www.uft.org/know-your-rights/environmental-safety; AFT, *Member Uses Union CPR Training to Save a Life*, PSRP Reporter, Spring 2015, at 6, http://www.aft.org/sites/default/files/periodicals/rep_spring2015.pdf.

[17] *See, e.g.*, *Health & Safety for All*, AFT http://www.aft.org/health-safety-all (last visited Nov. 11, 2015) (collecting resources).

[18] *See, e.g.*, University of Cincinnati Collective Bargaining Agreement for 2013-2016, at 176, https://www.uc.edu/content/dam/uc/hr/labor_and_employee_relations/collective_barg

3. Other Labor-Management Cooperative Activities

PAR programs and health and safety committees are but two of many ways in which unions, using fair share fees, have increased collaboration between school officials and teachers to improve education in hundreds of public schools and universities across the nation. For example, increasing numbers of public schools rely on joint labor-management committees to address a wide range of issues affecting both conditions of employment and quality of education, including teacher recruitment and retention, professional development, and overall strategic planning.[19] Similarly, collective bargaining

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aining/lrpd-aaup-cba.pdf [hereinafter University of Cincinnati CBA]; Los Rios Community College Collective Bargaining Agreement for 2014-2017, at 165-66, http://www.lrcft.org/wp-content/uploads/2012/07/2014-2017LRCFTContract1.pdf [hereinafter Los Rios College CBA]; Rutgers University Collective Bargaining Agreement for 2014-2016, at 69, http://www.rutgersaaup.org/sites/default/files/images/2014-2018-FT-Faculty-TA-GA-Contract-10-6-15-FINAL.pdf [hereinafter Rutgers University CBA].

[19] *See, e.g.*, Boston CBA, *supra*, at 34-38, 72, 87; LA CBA, *supra*, at 58-59; Baltimore City Schools Collective Bargaining Agreement for 2013-2016, at 57, http://www.baltimoreteachers.org/wp-content/uploads/2015/01/Balt-City-BTU-2013-2016-Teacher-Agreement-03-10-14-kjz1.pdf; Chicago Schools Collective Bargaining Agreement for 2012-2015, at 104, http://www.ctunet.com/for-members/text/CTU_Contract_As_Printed_2012_2015.pdf; Minneapolis CBA, *supra*, at 23-54; San Francisco United School District Collective Bargaining Agreement for 2014-2017, at 67-69, http://www.sfusd.edu/en/assets/sfusd-staff/contract%20and%20

agreements in public universities provide for joint labor-management committees on issues such as environmental safety, paid parental leave policy, workload, and professional development.[20]

The infrastructure for partnership created by such collaborative programs also provides a ready framework for quickly and effectively addressing new or unexpected challenges, such as natural disasters, financial crises, sudden changes in student enrollment, or public health emergencies.

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salary%20schedules/Certificated%20Collective%20Bargaining%20Agreement%207-1-14%20thru%206-30-17150106_20020.pdf.

[20] University of Cincinnati CBA, *supra*, at 176, 178; Los Rios College CBA, *supra*, at 165-66; Rutgers University CBA, *supra*, at 69; Minnesota State Colleges Collective Bargaining Agreement for 2013-2015, at 9-10, http://www.hr.mnscu.edu/contract_plans/documents/MSCF_Final_2013_2015.pdf; California State University Collective Bargaining Agreement for 2014-2017, at 249, http://www.calfac.org/sites/main/files/file-attachments/cfa_cba_2014-17_final_1.23.2015.pdf; Portland State University Collective Bargaining Agreement for 2013-2015, at 65, 67, http://www.pdx.edu/academic-affairs/sites/www.pdx.edu.oaa/files/AAUP%20CBA%202013-2015_revised%20with%20A30%20-%20new%20ranks_final_1.pdf; University of Connecticut Collective Bargaining Agreement for 2007-2016, at 33, 56, http://www.uconnaaup.org/wp-content/uploads/sites/5/2014/07/AAUP-integrated-agreement1.pdf.

B. Fair Share Fees Are Spent On Services That Directly And Substantially Benefit Nonmembers.

Petitioners are also being deliberately obtuse when they claim that "it borders on the oxymoronic to conclude that teachers who *oppose* union policies are 'free riding' on those policies." Petr. Br. 34. Quite to the contrary, nonmembers benefit enormously from a variety of union activities funded by the fair share fees petitioners are attempting to avoid.

Most obviously, petitioners benefit from the union's pursuit of important objectives petitioners *do* support. For example, those who oppose tenure or due process protections for teachers may well support the union's effort to secure adequate planning time or maternity leave. And few employees can honestly say they would prefer to work in schools with asbestos flaking off the pipes, leaking roofs, measles outbreaks, broken fire detectors, or rampant violence.

Even when employees do not completely agree with a union's position on an issue, they may benefit when the union avoids an outcome that is even worse from the dissenters' perspective. For example, while petitioners might prefer their union to advocate for a compensation scheme under which they believe they will receive the most money, *see* Petr. Br. 35, they would nonetheless benefit if their union successfully opposed across-the-board pay cuts, or obtained across-the-board raises, particularly in a school district that would not even consider the dissenters' preferred compensation system.

At the same time, employees who pay no fair share fees are often all too happy to rely on free

union representation in grievances when they find themselves wrongly accused of breaking school or district policy or practice, or denied basic rights negotiated on their behalf by the union. While unions are not compelled to pursue every grievance raised by an employee, they are barred from discriminating against nonmembers (and, in right to work states, even nonmembers who refuse to pay fair share fees). *See, e.g.*, *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). In fact, many unions generally advance most grievances to the first stage of the grievance process, regardless of who brought them. And they regularly press nonmembers' grievances all the way through arbitration, usually at substantial cost – in our experience, an average arbitration can cost $5,000-$10,000 or more, depending on the complexity. That can be more than many educators will pay in fair share fees over the course of their careers.

II. Overruling *Abood* Would Seriously Disrupt The Management Of Thousands Of School Districts, To The Detriment Of Education Nationwide.

Petitioners' cavalier attitude toward the likely consequences of allowing nonmembers to avoid paying their fair share of chargeable union expenses is unsupported. In fact, there is every reason to believe that ruling in petitioners' favor will seriously disrupt the mangement of the nation's schools in many states and undermine education nationwide.

A. Denying Unions Fair Share Fees Would Degrade Their Ability To Act As Effective Partners In Improving Education And Impair States' Ability To Effectively Manage Their Schools.

Petitioners claim that denying unions fair share fees will not destroy them, Petr. Br. 30-31, as if states' only cognizable interest in the First Amendment balance is preserving unions' existence. In fact, states have a compelling interest in preserving the wide range of improvements to education, efficient workplace management, and school safety made possible by the union activities funded through fair share fees.

1. Petitioners claim that overruling *Abood* will have only a modest effect on union revenues. Petr. Br. 31-33. But they cite nothing in the record to support that assertion (there being no record at all), even though they admit the question is important to the constitutional analysis, *see id*. at 30.

If the Court is willing to resolve this question without a record and on the basis of speculation, it requires no leap of imagination to predict that a declaration from this Court that public sector workers are entitled to a free pass on paying their fair share of union expenses will result in a substantial decrease in revenue. Petitioners' supporters certainly hope so – they have already organized "aggressive campaign[s]" to persuade workers to opt out of fair share fees or leave their unions through "emails, direct mail, phone calls, social media and cable TV advertising, and even [going] door to door" with "paid canvassers and

volunteers."[21] In *King v. Burwell*, 135 S. Ct. 2480 (2015), this Court accepted the premise that removing an obligation to purchase health insurance could dramatically reduce the number of insured. *Id.* at 2493. The same assumption is even more sensible here – in *King*, those who refused to pay for insurance would lose their insurance; here, employees who refuse to pay for union benefits would still get to keep them.

The common-sense conclusion that making fair share fees voluntary will lead to a substantial reduction in union revenues is borne out by the experience in states that have recently enacted right-to-work legislation.[22] There can be no question that unions' ability to provide important benefits to states and students would likewise be substantially diminished by loss of fair share fees. Because unions must continue to provide basic contract negotiation and grievance services, reduced revenue will predictably require cuts to other programs and

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[21] Brian Minnich, *Our Battle with SEIU Gets a Thumbs Up in Wall Street Journal*, Freedom Foundation (Nov. 4, 2015), http://www.myfreedomfoundation.com/blogs/liberty-live/our-battle-with-seiu-gets-a-thumbs-up-in-wall-street-journal.

[22] *See* Sean Higgins, *Wisconsin Public Sector Unions Still Losing Members*, Wash. Examiner (Aug. 12, 2014), http://www.washingtonexaminer.com/wisconsin-public-sector-unions-still-losing-members/article/2551945; David Shepardson, *Michigan Union Membership Falls Sharply in '14*, DETROIT NEWS (Jan. 23, 2015), http://www.detroitnews.com/story/business/2015/01/23/michigan-union-membership/22214357/.

services, like teacher training, peer assistance and review, and school safety programs.

Unions will also have to be more selective in pursuing broad-based grievances – *e.g.*, regarding implementation of initiatives that are important to the functioning of the school, like reductions in class size – diminishing one of the most important instruments for communicating to administrators about critical educational issues.

Reducing fair share fees also risks imposing greater costs on taxpayers. As noted, unions use fair share fees to fund a variety of activities that states have a compelling interest in having performed, *e.g.*, evaluating teacher performance, monitoring and addressing school safety issues, training staff on emergency preparedness, etc. Were unions to reduce their participation in these activities, states may have to shoulder more of the cost of these programs themselves. [23]

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[23] Of course, petitioners have no First Amendment right to avoid paying for such activities when the state funds them directly through taxes or by reductions in staff salaries. *See, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562-63 (2005). Petitioners therefore could raise no constitutional objection if, instead of deducting fair share fees from nonmembers' paychecks, a school simply reduced all teachers' salaries by the amount of the fair share fees and used the savings to reimburse the union for its activities that directly benefit the school. That being so, it is difficult to see why a difference in accounting mechanisms should be determinative to the constitutional question.

2. Eliminating fair share fees also predictably strains workplace relations and undermines effective management of schools.

In *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012), the Court noted that the government generally has no weighty interest in preventing the general public from free riding on the benefits obtained from general advocacy. *Id*. at 2289-90. But states *do* have a compelling interest in maintaining an effective workplace, particularly in their schools. And few things are more corrosive to a close-knit workplace than the perception that some employees are getting a free lunch, paid for by their colleagues. Accordingly, it is no answer to say that unions should just try harder to raise more money from their members to replace the lost fair share fees. *See* Petr. Br. 31-33. Charging members more because of the need to support free riders would only make matters worse.

The need to generate additional revenue through membership dues can impair the collaborative relationship with school administrators in other ways as well. Aggressive union recruitment can itself be distracting and sometimes divisive. For example, unions in right-to-work states have found that to attract members, they must focus more heavily on individualized grievances that are more visible to employees and generate more dues-paying members. It is also more difficult for a union seeking to maximize its membership to decline to pursue marginal grievances. The resulting change in grievance practices detracts from other more collaborative activities and diverts resources from grievances that are more likely to improve overall

education and safety. The result is often a more confrontational, less cooperative relationship between the union and the school districts.

B. Eliminating Fair Share Fees Would Threaten To Upend The Present System That Attempts To Balance Union, Nonmember, And Employer Rights.

Accepting petitioners' plea to overrule *Abood* would also disrupt the reliance interests of thousands of school districts across the nation that have reasonably balanced the competing interests of union members and nonmembers, along with the states' overwhelmingly important need to provide a quality education to its children.

For understandable reasons, school districts in states like California prefer to negotiate with a single union, rather than conduct negotiations with multiple unions or each employee. Such a system, however, gives rise to a very serious risk of labor unrest if the union negotiated only on behalf of its own members' interests. The school district either would run the risk of alienating nonmember employees whose interests were given inadequate attention in the bargaining or would be forced to conduct additional discussions with other unions or individual employees, thereby eliminating the efficiencies of the exclusive bargaining arrangement. Accordingly, the process only works effectively if the union can be required to fairly represent all the employees in the district without discriminating against nonmembers.

The imposition of that duty of fair representation – which even petitioners acknowledge

is important – works only if nonmembers pay their fair share of the cost of providing that benefit. Preventing states from prohibiting free-riding could well lead some to conclude that the duty of fair representation must be re-examined. For example, a state could justifiably conclude that unions should be excused from providing expensive arbitration representation to nonmembers who elect not to pay fair share fees. *See, e.g.*, Benjamin Sachs & Catherine Fisk, Opinion, *Why Should Unions Negotiate For Workers Who Don't Pay Their Fair Share?*, L.A. TIMES, July 9, 2014. Indeed, ending nonmembers' obligation to pay fair share fees could lead to the elimination of the duty of fair representation altogether. *Id*. (proposing just that).

Petitioners do not contest the burden such a change would impose on school administration. But they say these fears are unfounded because duty of fair representation is constitutionally required to protect the First Amendment rights of nonmembers. Petr. Br. 39-40. That is not correct,[24] but even if it

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[24] Petitioners' argument depends on the false premise that exclusive representation laws give "a union fiduciary powers over nonmembers." Petr. Br. 39 (emphasis omitted). But a union cannot bind nonmembers to a contract – it simply negotiates the terms of a deal that is then offered to each teacher on a take-it-or-leave-it basis. If a teacher does not like the deal, she is not bound to it, but can seek employment elsewhere. Exclusive bargaining without a duty of fair representation would therefore leave nonmember teachers in exactly the same position they would be in if their schools were not unionized at all: they have the option to accept or reject their contracts, but have no say in their formulation.

were, it would only demonstrate how unreasonable petitioners' position is. Petitioners would allow states to impinge on unions' speech and association rights (by imposing the duty of fair representation)[25] in order to achieve a desirable bargaining system, but claim that states have no similar leeway to intrude upon nonmembers' speech interests to achieve the same end.

The reality is that in the complex context of government employment relations, where there are multiple competing First Amendment interests as well as countervailing governmental interests, states must be afforded flexibility to strike an appropriate balance. While petitioners may prefer a balance under which they are entitled to union representation without having to pay for it, the Constitution does not compel that manifestly unfair result.

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[25] In exclusive bargaining states, a union's ability to negotiate on behalf of its own members is conditioned on the union's accepting the obligation to speak on behalf of nonmembers as well, a form of compelled speech that implicates core associational rights. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573-74 (1995). The current constitutional framework allowing for a nuanced balancing of the rights and interests of the union, individual employees, and government employers permits this tension, but it is difficult to see how this basic framework would survive if petitioners' view of the scrutiny required for compelled speech were to prevail.

C. The Experience Of Right-To-Work States Shows The Risks Accepting Petitioners' Position Will Impose On Millions Of Students.

Petitioners point to the experience of right-to-work states as demonstrating that unions can survive without fair share fees. *See* Petr. Br. 12. But states have broader interests than simply ensuring the survival of a bargaining partner. And although there are debates among academics about the data (as there almost always are), there is ample ground for states to believe that working with unions adequately funded through fair share fees improves education and student outcomes.

Multiple studies have found that most students perform better in schools with greater union participation. *See, e.g.*, Robert M. Carini, *Teacher Unions and Student Achievement*, *in School Reform Proposals: The Research Evidence* 10.1, 10.4-10.5 (Alex Molnar et al. eds. 2002) (concluding that "there is an emerging consensus in the literature that teacher unionism favorably influences achievement for most students, as measured by a variety of standardized tests").[26]

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[26] Http://nepc.colorado.edu/files/Chapter10-Carini-Final.pdf; *see also, e.g.*, Robert M. Carini et al., *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. ED. REV. 437, 437 (2000) (finding statistically significant positive relationship between interstate teacher unionization rates and standardized test scores after controlling for selectivity of the test-taking populations and other sociodemographic factors); F. Howard

For example, comparing the twenty-five right-to-work states' performances on the National Assessment of Educational Progress (NAEP, commonly called the nation's report card) from 2013 to the other twenty-five states reveals that:

- 4th grade math proficiency is 9% higher in states that permit fair share fees;
- 4th grade reading proficiency is 13% higher in states that permit fair share fees.[27]

The data also suggest that the longer students are in right-to-work schools, the more pronounced the negative effects become:

- 8th grade math proficiency is 16% higher in states that permit fair share fees;
- 8th grade reading proficiency is 16% higher in states that permit fair share fees.[28]

Nelson & Michael Rosen, *Are Teachers' Unions Hurting American Education? A State-by-State Analysis of the Impact of Collective Bargaining Among Teachers on Student Performance* (Oct. 1996), http://files.eric.ed.gov/fulltext/ED404746.pdf (same); Morris M. Kleiner & Daniel L. Petree, *Unionism and Licensing of Public School Teachers: Impact on Wages and Educational Output*, *in When Public Sectors Unionize* 305, 306 (Richard B. Freeman & Casey Ichniowski eds., 1988), http://www.nber.org/chapters/c7914.pdf (same).

[27] *See infra*, Appendix.

[28] *See id*.

Studies also suggest some of the reasons *why* students do better in schools with robust unions. At the broadest level, data suggest that "the quality of union-management partnerships between teachers and administrators at the school level has an important and significant positive association with student performance as well as performance improvement."[29] Certainly, there is strong support for many school districts' conclusions that PAR programs, for example, contribute to teacher and, therefore, student success.[30] But as noted, the loss of fair share fees would predictably impair unions' ability to engage in such collaboration. Moreover, teacher experience is an important factor in student achievement,[31] and teachers represented by unions tend to experience less turnover, likely in part because they earn more.[32] Of particular importance,

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[29] Saul A. Rubinstein & John E. McCarthy, *Teachers Unions and Management Partnerships: How Working Together Improves Student Achievement* 13 (2014), https://www.americanprogress.org/wp-content/uploads/2014/03/Rubinstein-EduReform-report.pdf.

[30] *See, e.g.*, John P. Papay et al., *Is PAR a Good Investment? Understanding the Costs and Benefits of Teacher Peer Assistance and Review Programs* 16-17 (2011), http://www.nysut.org/~/media/files/nysut/resources/2013/april/ted/par_costs_benefits_01.pdf?la=en.

[31] *See, e.g.*, Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 AM. ECON. REV. 247 (2004).

[32] *See, e.g.*, John E. Delery et al, *Unionization, Compensation, and Voice Effects on Quits and Retention*, 39

the rate of teacher transfers out of high-poverty schools is substantially lower in districts with collective bargaining agreements.[33]

In fact, the difference in outcomes is hardly surprising. Collective bargaining agreements that improve teachers' working conditions also tend to enhance students' learning conditions. For example, contract provisions that stipulate class size requirements help students receive more individual instruction from their teachers. Access to professional development ensures teachers are well-prepared. Provisions ensuring teachers have proper support for special needs students is crucial for those children's success. Constructive school discipline provisions help create a safe and orderly environment for learning. And effective teacher appraisal systems help ensure teachers are accountable not only to the system, but to the students in their classes.

INDUS. REL. 625 (2000); Randall W. Eberts, *Teachers Unions and Student Performance: Help or Hindrance?*, 17 FUTURE CHILD. 175, 181 (2007) (teachers covered by collective bargaining agreements earn between five and twelve percent more than teachers who are not covered). The fact that states like California, despite their relatively higher pay, are still facing dramatic teacher shortages undermines any suggestions that teachers are being paid substantially more than their market value. *See, e.g.*, Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. TIMES, Aug. 9, 2015.

[33] *See* F. Howard Nelson, *The Impact of Collective Bargaining on Teacher Transfer Rates in Urban High-Poverty Schools* 3 (2006), http://files.eric.ed.gov/fulltext/ED497891.pdf.

III. Petitioners' Facial, All-Or-Nothing Challenge To All Aspects Of Every Fair Share Fee Ever Charged Anywhere, On The Basis Of No Record At All, Is Itself Facially Defective.

Petitioners and their amici strenuously disagree about the benefits unions and fair share fees confer on nonmembers and on education more generally. But they can point to nothing in the record to support their contrary claims because petitioners successfully fought respondents' attempts to establish any record at all in this case. Instead, petitioners have brought an all-or-nothing facial challenge that runs in the teeth of not just *Abood*, but of multiple long-standing principles of constitutional adjudication that serve to protect the quality of judicial decision-making and enforce essential principles of judicial restraint.

A. Petitioners' Bare-Record Facial Challenge Ignores The Substantial Variation In The Uses Of Fair Share Fees And The Resulting First Amendment And Government Interests At Stake.

Petitioners rushed to this Court on a bare record with an argument that, of necessity, requires the Court to decide the constitutionality of every aspect of every fair share fee ever charged in the past, or to be charged in the future, by any school anywhere in the country. That challenge disregards the substantial variation in the uses of fair share fees and the diverse First Amendment implications of those uses.

1. Under any standard of constitutional review, the Court must consider the nature of the First Amendment infringement and the government's countervailing interests. *See, e.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2639, 2641-43 (2014). When the challenge is to the extraction of money, the analysis turns critically on what the money is spent on. Here, as discussed, unions spend money on many different things. Many of those expenses involve matters of little conceivable public interest or First Amendment value.

For example, petitioners cannot sensibly claim that weighty First Amendment interests are at stake when a union negotiates over the schedule for in-service days or the paperwork required for obtaining sick leave. Similarly, no lofty constitutional interests are at stake when a union uses fair share fees to allow a union official to sit on a school committee to select a student uniform, allocate teacher parking spaces, or prioritize school maintenance projects.

Nor are significant First Amendment interests implicated when a union represents an individual teacher in most disciplinary and grievance proceedings. The subject of discipline and grievances can run the gamut, but vast numbers concern the mundane stuff of ordinary personnel administration that this Court has repeatedly held outside the purview of the First Amendment. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983). This includes disputes over whether:

- a teacher's particular absences should be excused;
- a teacher had accrued a certain number of days of sick leave;

- a particular classroom has been too hot or too cold;
- the staff bathroom is being adequately cleaned and maintained;
- the school has been forcing an employee to supervise the lunchroom during her planning or lunch hour;
- administrators have failed to provide adequate accommodations for a disability;
- the gym teacher has been given adequate equipment or a classroom teacher's books are in need of replacement;
- the union has been given adequate space to hold meetings;
- a particular teacher was being actionably disrespectful to a supervisor, or simply firmly expressing a view;
- the school is taking adequate steps to protect employee property from theft or vandalism;
- a specific teacher qualifies for any of a number of employment benefits (*e.g.*, tuition assistance, training, time off for professional development or to attend a conference, etc.);
- a particular classroom has adequate supplies;
- a given teacher should have been granted a request for a personal leave without pay;
- a particular teacher should be assigned to teach American history instead of global studies.

At the very least, even if petitioners could credibly claim that *every* activity supported by fair

share fees implicated matters of public concern protected by the First Amendment, they cannot deny that the *degree* of public interest, First Amendment value, and countervailing government interests varies considerably, depending on the nature of the activity.

Moreover, the mix of interests will necessarily vary from state-to-state and even school-to-school, depending on the particular uses of fair share fees in that jurisdiction. Even looking just at collective bargaining alone, the scope of permissible bargaining varies considerably, often excluding some of the most controversial topics (like tenure and pensions) that petitioners repeatedly rely upon to establish the allegedly political nature of the activities funded by fair share fees. *See* Union Resp. Br. 7.

2. Because this variation is relevant under any conceivable standard of review, the Court has never considered the constitutionality of fair share fees as an all-or-nothing proposition; instead, it has determined constitutional challenges to classes of expenditures. *See Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 235-36 (1977); *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 447-48 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *id*. at 556-58 (Scalia, J., concurring in the judgment in part and dissenting in part).[34] And petitioners have not

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[34] The Court did not depart from these precedents in *Harris*. There, in addition to applying a level of scrutiny that is inapplicable to the public employment context, the Court was able to take into account all of the relevant uses of fair share fees because the union's representation was "largely limited to

even attempted to show why *that* aspect of *Abood* and its progeny is not entitled to *stare decisis* effect.

In fact, the Court has proceeded on the same understanding in other compelled subsidization cases, never doubting that regardless of the Court's First Amendment ruling, states could still impose any portion of a fee used for purposes consistent with the First Amendment. For example, in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court considered a challenge to a student activity fee. It noted that a large portion of the fee funded activities like health services and sports that had little First Amendment implication. *Id*. at 223. Rather than ask whether the fee as a whole was nonetheless unconstitutional because it also funded some political advocacy, the Court segregated the potentially problematic portion of the fee for separate consideration. *Id.*; *see also, e.g., Keller v. State Bar of Cal*., 496 U.S. 1, 15-16 (1990) (requiring use-by-use analysis of compulsory bar dues). That is the same approach this Court has taken with respect to fair share fees.

To the extent petitioners try to suggest that narrow tailoring principles support an exception to this rule, *see* Petr. Br. 45, they are wrong. The only case they cite, *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012), simply observed that *Chicago Teachers Union v. Hudson*,

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petitioning the State for greater pay and benefits." 134 S. Ct. at 2673; *see also id*. at 2637 (union had no grievance responsibilities).

475 U.S. 292 (1986), requires that the process for distinguishing between chargeable and nonchargeable fees must be "carefully tailored." *Knox*, S. Ct. at 2291. But in so doing, the Court reaffirmed that the distinction must be made and that a plaintiff may not avoid paying *any* fees simply by identifying one component of the proposed fee that falls on the non-chargeable side of the line.

That only makes sense. Nothing in the Constitution would prevent a state from allowing unions to charge a dozen separate fees for specific purposes. And no one could reasonably claim that collecting one fee is unconstitutional simply because collection of another is forbidden.

B. Petitioners' Facial Challenge Defies Ordinary Principles Of Sound Judicial Administration And Restraint.

In asking this Court nonetheless to declare that all fair share fees are always unconstitutional, petitioners bring a facial challenge of the most disfavored kind.

Even in the First Amendment context, "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). For one thing, while some facial challenges may arise on appropriately developed records, "[c]laims of facial invalidity often rest on speculation." *Id*. at 450. "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the

precise facts to which it is to be applied.'" *Id*. "Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id*. at 451.

Petitioners' unseemly rush to this Court, seeking a constitutional declaration of breathtaking scope on the basis of no record at all, flies in the face of each of these basic principles of constitutional adjudication. Although their argument depends on multiple highly contested assertions of fact regarding complex questions – *e.g.,* predicting the extent to which adopting their free-rider protection will diminish union revenues and membership, how the reduction in resources will affect the exclusive bargaining system, and how a fundamental alteration in states' management of their schools will affect the education of millions of schoolchildren – petitioners successfully resisted the creation of any record. *Compare, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 332 (2010) (considering facial challenge that "was facilitated by the extensive record, which was over 100,000 pages long"), *with Keller*, 496 U.S. at 17 (declining to rule on First Amendment challenge to method for segregating chargeable and non-chargeable portions of bar dues because of lack of a "fully developed record").

Second, abandoning any pretense of respect for judicial restraint, petitioners urge the Court to overrule a longstanding precedent in order to hold that no union may ever charge an unwilling nonmember a penny for *any* kind of activity benefiting her, no matter how weak the First

Amendment implications of the charge or how strong the Government's countervailing interests.

Third, petitioners give the democratic process in the states that provide fair share fees – which have been open and responsive to anti-union complaints and initiatives[35] – no opportunity to fine-tune public labor relations in a way that could respond to any legitimate, specific concerns they may have.

C. Petitioners Do Not Satisfy The Established Requirements For A Facial First Amendment Challenge.

Petitioners thus make an all-or-nothing claim that can succeed only if petitioners show that every conceivable expenditure funded by such fees is used to support speech of such First Amendment significance that no state interest could overcome it. Petitioners have not even attempted to make this showing. That should be the end of their case. *See, e.g.*, *Locke v. Karass*, 555 U.S. 207, 221 (2009) (Alito, J., concurring) (because Court had rejected petitioners' "all-or-nothing position, contending that nonmembers of a local may *never* be assessed for *any* portion of the national's extraunit litigation expenses," petitioners appropriately got nothing).

In any event, no such attempt could be successful. Petitioners focus on the use of fees to

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[35] *See, e.g.*, Steven Elbow, *Indiana and Michigan, a Tale of Two New Right to Work States*, Cap. Times (Feb. 27, 2015), http://host.madison.com/ct/news/local/writers/steven_elbow/indiana-and-michigan-a-tale-of-two-new-right-to/article_dae6b5d3-e85b-5f14-ad5b-0602624e0c66.html.

engage in speech relating to matters such as teacher pay and tenure. Petr. Br. 24-27. As respondents have shown, to the extent those topics are bargained at all, they do not constitute speech on matters of public concern within the meaning of this Court's First Amendment employment cases. *See* Union Resp. Br. 21-25. And even if they did, states have a more than adequate justification for the modest burden imposed on employees' First Amendment interests. *See* Cal. Br. 31-42.

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Adherence to the usual rules of constitutional adjudication and judicial restraint is particularly important when the Court confronts a question as politically charged as this one. Whether public sector unions are good or bad for public institutions is a matter of deep, partisan divide in this country. It is too easy for the public to perceive a sweeping decision, lacking any foundation in the record of the case, as simply implementing the political convictions and world view of individual Justices.

To the extent some members of this Court have expressed doubts about whether *Abood* and its progeny have drawn the right line between chargeable and non-chargeable expenses, the Court can consider redrawing that line in an appropriate case in the future. One need not deny the importance of the constitutional questions raised here, or the Court's vital role in resolving them, to recognize that this case presents an inappropriate vehicle for deciding any far-reaching constitutional question.

IV. To The Extent The Court Entertains Petitioners' Facial Claim, It Must Account For Petitioners' Acceptance Of The Underlying System Of Exclusive Representation In Collective Bargaining.

If the Court does undertake to weigh the relevant governmental and First Amendment interests, it must do so in a way that holds petitioners to their strategic decision not to challenge the underlying collective bargaining system, but only their obligation to pay for the benefits they receive from it.

Petitioners have decided that – unlike their predecessors in *Harris* – they will not challenge the constitutionality of the exclusive bargaining system under which unions are compelled to represent the interests of nonmembers at the bargaining table. *See* J.A. 74. The consequence is that if successful, petitioners will get to have their cake and eat it too: their interests will be protected in collective bargaining, the union will be forced to provide them nondiscriminatory grievance assistance, but they will not have to pay a dime for any of it.

The Court should not countenance such gamesmanship. Instead, petitioners should not be heard to object to any infringement on their First Amendment interests that is necessarily attendant to the unchallenged system of exclusive representation. Instead, the Court should adhere its precedent requiring plaintiffs to show that the challenged portion of a fair share fee "significantly add[s] to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Air Line*

Pilots Ass'n v. Miller, 523 U.S. 866, 874 (1998) (quoting *Lehnert*, 500 U.S. at 519); *see also Glickman v. Wileman Bros. & Elliot, Inc*, 521 U.S. 457, 485 (1997) (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia & Thomas, JJ.). Because petitioners have not attempted to make that showing, their claims should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

I. Right to Work States: Percent of Students Proficient in Math and Reading[36]

State	2013 Math 4th Grade	2013 Math 8th Grade	2013 Reading 4th Grade	2013 Reading 8th Grade
Ala.	29.8	19.7	30.7	25.1
Ariz.	39.6	30.6	27.6	27.8
Ark.	39.3	27.7	31.6	30.3
Fla.	40.7	30.8	39.0	33.3
Ga.	39.4	29.4	33.9	31.5
Idaho	39.7	36.5	33.0	38.3
Ind.	51.8	38.1	37.8	34.7
Iowa	47.7	35.8	38.0	36.7
Kansas	47.6	40.5	37.6	35.8
La.	26.3	20.8	23.0	23.9
Mich.	36.9	30.5	30.5	32.8
Miss.	26.1	21.3	21.3	20.2
Neb.	44.7	35.6	37.1	36.7
Nev.	34.0	28.3	27.3	30.3
NC	45.2	36.3	35.2	32.6
ND	48.0	40.6	34.0	34.2
Okl.	36.4	25.0	29.7	28.7

[36] Data from National Assessment of Educational Progress database available at National Center for Education Statistics website: http://nces.ed.gov/nationsreportcard/naepdata/dataset.aspx.

State	2013 Math 4th Grade	2013 Math 8th Grade	2013 Reading 4th Grade	2013 Reading 8th Grade
SC	35.1	30.8	28.2	29.3
SD	40.4	38.4	32.0	35.5
Tenn.	40.2	27.5	33.6	33.1
Tex.	41.1	37.9	28.5	30.8
Utah	44.0	36.2	37.0	39.2
Virg.	47.2	38.1	43.2	36.3
Wis.	47.2	39.8	34.7	36.5
Wyo.	47.8	37.8	37.1	37.6
Ave.	**40.6**	**32.6**	**32.9**	**32.4**

II. Non-Right to Work States: Percent of Students Proficient in Math and Reading

State	2013 Math 4th Grade	2013 Math 8th Grade	2013 Reading 4th Grade	2013 Reading 8th Grade
Alaska	36.7	33.0	27.5	31.1
Cal.	32.6	41.9	40.6	39.8
Colo.	49.9	41.9	40.6	39.8
Conn.	45.1	37.1	42.6	45.1
Del.	42.1	32.7	38.0	33.3
D.C.	27.9	18.8	23.0	17.4
Haw.	46.0	32.3	29.8	28.4
Ill.	39.1	36.5	33.5	36.2
Ky.	41.5	30.0	36.4	37.8
Me.	47.5	39.5	36.9	38.2
Md.	46.5	37.4	44.7	42.2

State	2013 Math 4th Grade	2013 Math 8th Grade	2013 Reading 4th Grade	2013 Reading 8th Grade
Mass.	58.4	54.6	47.5	48.2
Minn.	59.4	47.2	41.5	40.5
Mo.	38.7	32.6	35.1	35.8
Mont.	45.0	39.6	34.7	40.3
NH	58.7	46.8	44.6	43.7
NJ	49.4	48.9	41.9	46.3
NM	30.6	22.7	21.5	22.2
NY	39.7	32.3	37.0	35.0
Ohio	48.0	40.2	37.4	38.6
Or.	40.2	34.3	33.4	36.7
Pa.	44.5	41.9	40.1	42.0
RI	42.5	36.0	37.6	36.0
Vt.	51.5	46.9	42.1	44.8
Wash.	48.4	41.9	39.7	41.7
W. Va.	35.2	23.5	27.3	25.3
Ave.	**44.4**	**37.9**	**37.1**	**37.6**