NO. 14-915

In the
Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* STATE PUBLIC POLICY RESEARCH ORGANIZATIONS IN SUPPORT OF PETITIONERS

JEFFREY M. HARRIS
Counsel of Record
ANDREW N. FERGUSON
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
jharris@bancroftpllc.com

Counsel for Amici Curiae

September 11, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Amici are state public policy research organizations that seek to promote limited and effective government and individual freedom. *Amici* have extensive experience with issues involving public-sector unions and education reform, and believe that unions should be supported through employees' free choice rather than government coercion. A full list of *amici* and their interest in this case is set forth in Appendix A.

SUMMARY OF ARGUMENT

Central to the reasoning of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—and to Respondents' argument here—is the notion that agency fees are justified because unions perform a "service" that "benefits" all members of the bargaining unit, even those who do not support the union. Under that theory, the government may compel nonmembers to financially support the union to compensate it for services rendered and prevent "free-riding."

Those arguments fail as a matter of both law and fact. Since their inception, labor unions have been among our nation's most powerful political organizations, maintaining strongly held views on countless politically charged issues, including taxing and spending policy, international trade, minimum

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

wages, climate change, and many other issues. Forcing an individual to financially support a union against his or her will is every bit as unconstitutional as compelling that individual to support a church, political party, or private advocacy group. And that is true regardless of whether the union is engaged in express political advocacy (such as lobbying) or collective bargaining. Especially in the education context, collective bargaining is just as "political" as outright lobbying, and inevitably implicates some of the most sensitive areas of education policy, such as merit pay, teacher tenure, school choice, class size, and the length of the school day and school year.

There is no "labor law" exception to the First Amendment. The government cannot bootstrap its way around the First Amendment's prohibition on compelled speech and association merely by claiming that nonmembers are receiving a "service" or "benefit" from the union. Indeed, the dissenting nonmembers *disagree* with the union's positions, which is precisely why they refused to join the union in the first place. From the dissenters' perspective, they are not receiving a "benefit" from the union at all, much less one that would justify a government-coerced payment to that entity. On the contrary, they are being forced to support the most outspoken advocates of public policy positions with which they strongly disagree.

The fact that a union voluntarily assumes a "duty of fair representation" to advance the interests of all members of the bargaining group does not affect the constitutional calculus. All this means is that unions may not bargain for agreements that expressly treat union members better than nonmembers. Far from

being a special "benefit" that can justify coerced dues, the duty of fair representation is needed to avoid constitutional concerns about placing an employee's livelihood in the hands of a private organization that he or she may vehemently oppose. Forcing an employee to be represented by an exclusive bargaining agent while also allowing the bargaining agent to relegate that individual to second-class status would raise grave due process concerns. The duty of fair representation is merely a constitutional *floor* on exclusive bargaining arrangements, not a compensable service that justifies government-compelled payments to the union.

In all events, even assuming that dissenting nonmembers receive a "benefit" from union representation, extracting payments from those employees is not necessary to ensure that the union is able to perform its bargaining functions. There is no need to speculate about how unions would fare in the absence of government-compelled agency fees. Half of all states have "right-to-work" laws that protect employees from being forced to make payments to a union as a condition of employment. Although unions in those states must rely solely on dues paid by their own members, there is no indication whatsoever that they are unable to recoup the costs of collective bargaining. Indeed, some observers—including union officials—have noted that right-to-work laws may ultimately be *beneficial* for unions because they bring market discipline to union functions and force unions to control costs and be more responsive to members' needs. At the very least, however, the fact that unions continue to have a robust presence in right-to-work states makes crystal clear that any purported

concerns about "free-riding" in the absence of government-compelled agency fees are vastly overblown.

Finally, Respondents have attempted to salvage *Abood* by seizing on Justice Scalia's separate opinion in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), which argues that nonmembers may be compelled to pay collective bargaining costs incurred in the performance of the union's "statutory duties." Even setting aside the fact that the *Lehnert* majority rejected that approach, Respondents' reliance on Justice Scalia's opinion is misplaced. No party in *Lehnert* had asked the Court to reconsider *Abood*, and none of the Justices did so. The sole question before the Court was how to distinguish between chargeable and non-chargeable expenses on the assumption that at least *some* costs were constitutionally chargeable to dissenting nonmembers.

Justice Scalia offered the "statutory duties" test as an alternative to the amorphous and unworkable "germaneness" test applied by the majority. But the articulation of a legal test to implement *Abood* is of course distinct from the antecedent question of whether *Abood* was correctly decided in the first place. Indeed, even the "statutory duties" test can be difficult to apply in light of the vague and open-ended delegations of authority in many of the relevant statutes. Far from supporting *Abood*'s ongoing validity, the splintered decision in *Lehnert* only underscores the profound practical difficulties that arise when a union is allowed to bill some, but not all, of its expenses to dissenting nonmembers. The better path forward is for this Court to hold that public

employees may *never* be compelled by the government to financially support a private entity with which they vehemently disagree.

ARGUMENT

I. A State Cannot Justify Agency Fees Merely By Empowering A Private Entity To Serve As Employees' Exclusive Representative In the Bargaining Process.

Central to *Abood*'s holding—and Respondents' argument here—is the notion that it is "fair" to compel nonmembers to financially support a union because unions have a statutory duty to provide collective bargaining "services" to all employees, including nonmembers. *See* CTA Br. in Opp. at 17 (union has a duty to "deliver services" to all employees); *Abood*, 431 U.S. at 222 (agency fee justified in light of the "benefits of union representation that necessarily accrue to all employees"). That argument fails for several independent reasons.

A. Statutory Delegation of Authority to a Private Entity To Provide a "Service" Cannot Justify Coerced Speech or Association.

As a matter of law, a state cannot circumvent bedrock First Amendment rights of speech and association merely by deputizing a private entity to provide an unwanted and ideologically charged "service."

1. The issue of an "agency fee" arises in the first place only because a union that is endorsed by a majority of workers becomes the exclusive bargaining representative for all workers, even those who oppose

the union. The federal Wagner Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. §159(a). The California law at issue here similarly provides that "once an employee organization is recognized or certified as the exclusive representative of an appropriate unit … *only that employee organization* may represent that unit in their employment relations with the public school employer." Cal. Gov't Code §3543.1(a) (emphasis added).

Having an exclusive bargaining representative unquestionably burdens dissenting workers who do not support the union. In particular, even if an employee vehemently opposes the union's policies or negotiating priorities, that worker would be prohibited by law from negotiating her own arrangement with the employer. As this Court has explained, "[t]he minority members of a craft are … deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 200 (1944); *see generally* George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. Pa. L. Rev. 897, 898 (1975) (arguing that "individual

interests have received short shrift" under the exclusive-representation system).

Despite that significant burden on dissenting employees, there may be legitimate, ideologically neutral reasons to have an exclusive bargaining representative. For a large employer with hundreds or thousands of employees who all perform similar job duties, it may not be feasible or desirable to negotiate the terms of employment individually with each employee. It may be more efficient for both the employer and employees to have uniform compensation policies and work rules, even if some employees are unhappy with the bargain struck by the exclusive representative.

2. But the fact that it may be constitutionally permissible to have an exclusive bargaining arrangement hardly suggests that it is constitutional to compel dissenting employees to *financially support* the ideologically charged private entity that is doing the bargaining. *See Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014) (union's "status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked"). Characterizing that bargaining as a "service" being provided to nonmembers does nothing to change this basic fact.

At the outset, it is critical to keep in mind that dissenting nonmembers *do not support the union*. Consider a teacher in California who chooses not to join the union. Perhaps this individual is a recently hired teacher who understandably believes that teacher pay should be based on performance rather than seniority. Or maybe this teacher believes that

the union-negotiated seniority system goes too far in giving preferences to more-senior, less-qualified teachers. Or maybe he or she is opposed more generally to unions' advocacy in favor of higher taxes and government spending. It is bad enough to force this teacher to accept the union as her exclusive representative. But it is absurd, and constitutionally intolerable, for the government to also force this individual to financially support the union as it works towards policies that she strongly opposes. Far from receiving a "service" or "benefit" that would warrant mandatory financial support, this teacher believes that the union is doing an active *disservice* to the interests of both teachers and citizens generally.

In all events, there is nothing talismanic about the provision of a "service" that can override a citizen's paramount First Amendment right not to be compelled by the government to support a private organization against his or her will. This proposition should not be controversial. Imagine a state law that required all parents of 13-year-olds to pay $100 per year to the Boy Scouts or Girl Scouts for outdoor education "services." Or a law that required all newly married couples to pay $200 to the Catholic Church for access to marriage counseling "services." Or a local government that required job seekers to make a $1,000 contribution to the Republican Party in order to be considered for a government job.

These government actions would plainly be unconstitutional because they would require citizens to directly fund and associate with private organizations whose missions they may not support. The fact that citizens receive a "service" or "benefit" in

exchange for their government-mandated financial support would do nothing to change the fact that these are paradigmatic examples of compelled association. "[I]ndividuals should not be compelled to subsidize private groups or private speech," *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2295 (2012), regardless of whether they are deemed to receive a "service" in exchange for their contribution.

Even in the specific context of unions, the suggestion that agency fees merely compensate the union for services rendered proves far too much. This Court has held time and time again that the government cannot compel employees to pay fees to support a union's political advocacy or lobbying activities. *See Lehnert*, 500 U.S. at 522 (state "may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation"); *Abood*, 431 U.S. at 236 (political expenditures must "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will").

Under the "services rendered" theory, however, such fees would be perfectly permissible as long as the union's lobbying and political activities were undertaken for the purported "benefit" of employees in the bargaining unit. Indeed, without a fee to compensate the union for its political and lobbying activities, so-called "free riders" could receive the benefit of the union's advocacy without paying so much as a nickel to support it. *See Lehnert*, 500 U.S. at 538 (Marshall, J., concurring in part and dissenting

in part) (arguing that "free-riding" rationale could support government-compelled agency fees for union lobbying activities).

If a "services rendered" theory is insufficient to allow nonmembers to be charged for a union's lobbying and political activities, it follows *a fortiori* that it is also insufficient to justify compelled fees for collective bargaining activities. From the perspective of a dissenting nonmember, a union's bargaining activities are every bit as ideologically and politically charged as its outright political advocacy. Especially in the context of a school system, collective bargaining by public employees goes to the heart of education policy—the "single largest functional activity of state governments"[2]—and implicates wide-ranging issues such as merit pay, tenure rules, the length of the school day and school year, class size, and the role of charter schools. *See City of Madison v. Wisconsin Employee Relations Comm'n*, 429 U.S. 167, 176 (1976) (noting that "there is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective-bargaining").

Just yesterday, the Seattle teachers' union went on strike, thereby delaying the start of the school year for 53,000 children. The union's demands in the collective bargaining process include, *inter alia*, "more guaranteed recess time for students," "fewer district-administered tests," and "less time to be devoted to

---

[2] Cheryl H. Lee, et al., *U.S. Census Bureau's State Government Finances Summary: 2013*, at 4 (2015), *available at* http://www2.census.gov/govs/state/g13-asfin.pdf.

'drilling' students."[3] The parties are also negotiating over the length of the school day. These are questions of public policy, pure and simple. The collective bargaining process unquestionably implicates sensitive issues that go far beyond the employer-employee relationship and touch on all aspects of education policy.

Moreover, virtually all of these issues can be addressed through *either* legislation *or* collective bargaining. For example, a union may lobby the city council to adopt stronger teacher tenure rules or a shorter school day, or may seek to implement those exact same policies through collective bargaining. It would be nonsensical to have a constitutional rule in which the union can bill nonmembers for collective bargaining but not for lobbying when both activities seek to achieve the same ends. No matter the setting in which the union seeks to achieve its policy goals, the First Amendment protects nonmembers from being compelled to support the union's ideologically charged advocacy efforts.

Compelled payments to a union are also materially indistinguishable from the political patronage system that this court has repeatedly found to be unconstitutional. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Cook County Democratic Party controlled all non-civil-service jobs in the Sheriff's Office, and expected potential job seekers to support the party if they wanted to be hired. In other words, the Party had "exclusive" access to a valuable "benefit," and expected

---

[3] Alejandro Lazo, *Seattle Public School Teachers Strike Over Pay*, Wall Street Journal (Sep. 9, 2015), *available at* http://on.wsj.com/1FytTdi.

employees to compensate it for that benefit by joining and supporting the Party. This Court concluded that the patronage arrangement violates the First Amendment rights of those in the minority party, emphasizing that "[t]he threat of dismissal for failure to provide that support [to the Party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise." *Id.* at 359-60.

There is no material difference between a government workplace controlled by a political party and a government workplace controlled by a union.[4] Indeed, like Respondents here, the Democratic Party in *Elrod* claimed that the patronage system merely involved the Party "*charg*[*ing*] *a price for its services*." 427 U.S. at 368 (emphasis added). That fee-for-service rationale failed in *Elrod* and should fare no better here. Like a government employee in a patronage system, teachers in California can be dismissed from their government jobs for "failure to provide support" to a private entity that is every bit as political as an actual political party. As then-Justice Rehnquist noted in *Abood*, "[h]ad I joined the plurality opinion in [*Elrod*], I would find it virtually impossible to join the Court's opinion in this case." 431 U.S. at 242 (Rehnquist, J., concurring).

---

[4] Government employees' unions overwhelmingly support a single political party. During the 2014 congressional elections, for example, more than 99% of the American Federation of Teachers' political contributions went to Democrats. *See* American Federation of Teachers, Money to congressional candidates: 2014 cycle, OpenSecrets.org, *available at* http://bit.ly/1hvyJ5r.

* * *

The State of California claims the extraordinary power to compel a citizen to support a private advocacy organization as a precondition to receiving government employment. This is the very paragon of unconstitutional coerced speech and association. The fact that the individual may be receiving an (unwanted and ideologically charged) "service" in exchange for her coerced support does nothing to change this. There is no "labor law" exception to the First Amendment. Coercing a citizen to support a union in order to receive public employment is every bit as unconstitutional as coercing her to support a political party, religious group, charity, or any other private entity.

B. The "Nondiscrimination" Obligation That a Union Voluntarily Assumes To Serve as Exclusive Bargaining Representative Does Not Justify Government-Coerced Agency Fees.

Respondents have also relied heavily on the fact that a union certified as exclusive bargaining representative must assume the obligation of representing *all* employees, not just those who join the union. Under that theory, the union is entitled to an agency fee because it assumes a "duty of fair representation" that prohibits it from "favor[ing] members over nonmembers in contract negotiations." CTA Br. in Opp. 17.

The fact that a union assumes a duty of fair representation is plainly insufficient to justify charging government-compelled agency fees to nonmembers. Far from being a compensable benefit,

the nondiscrimination obligation is a constitutional prerequisite to having an exclusive bargaining arrangement at all. Consider the alternative: without a duty of fair representation, a 51% majority of workers could elect an exclusive bargaining representative and then use that representative to negotiate a contract that grants this bare majority better wages, benefits, and work rules by trading away the interests of the minority. And, because the union is the "exclusive" bargaining representative, members of the unlucky 49% would be unable to bring their concerns directly to the employer through separate negotiations.

Needless to say, any such arrangement would raise severe constitutional concerns. If a private entity is granted the extraordinary power to serve as exclusive representative for all employees, then it must at the very least agree not to relegate a minority of employees to second-class status. As this Court has explained in interpreting the Railway Labor Act, it is highly unlikely that Congress would have "confer[red] plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Steele*, 323 U.S. at 199. "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, *at least to the extent of not discriminating against them as such in the contracts which it makes as their representative*, the minority would be left with no means of protecting their interests, or indeed, their right to earn a livelihood by pursuing the occupation in which they are employed." *Id.* at 202 (emphasis added).

The fact that a union—in exchange for the extraordinary power to serve as exclusive bargaining representative—agrees not to throw nonmembers under the proverbial bus hardly justifies government-compelled compensation that further burdens nonmembers' speech and association rights. Indeed, the duty of fair representation does not even impose any *affirmative* obligations on unions that would lead to higher costs; it merely requires the unions not to go out of their way to negotiate a worse deal for nonmembers in the collective bargaining process. That minimal prohibition reflects a constitutional floor on exclusive bargaining arrangements, not a tangible benefit that warrants government-compelled compensation.[5]

C. The Experience in Right-To-Work States Shows That Unions Can Perform Their Statutory Duties Without the Need for Government-Compelled Agency Fees.

Respondents argue that the costs of collective bargaining must be "spread" or "shared" among those who purportedly benefit from the union's efforts. For example, they assert that charging an agency fee to a dissenting nonmember is "simply a requirement that a nonmember teacher who receives the benefit of … the Unions' efforts in collective bargaining must pay a share of the Unions' costs in negotiating those improvements, rather than receiving a free ride." CTA

---

[5] And, as Petitioners explain, *see* Pet. Br. 44-47, the fact that a union may handle grievances on behalf of nonmembers cannot justify an agency fee given that the union is obligated to pursue only grievances that it believes will advance *its own* conception of the collective good.

Br. in Opp. 27; *see also Abood*, 431 U.S. at 221-22 (agency fee needed to "distribute fairly the cost of these [collective bargaining] activities").

That argument fails as a matter of law for the reasons discussed above: a state cannot by statute impose an obligation on a private party to fund an inherently political entity with which she vehemently disagrees merely by claiming that the entity is providing an (unwanted) "service." But the suggestion that agency fees are needed to "spread" the costs of collective bargaining and prevent "free riding" is also simply false.

1. There is no need to speculate about how unions would fare in the absence of a government mandate requiring nonmembers to pay agency fees. Since 1947, the Taft-Hartley Act has allowed states to prohibit "the execution or application of agreements requiring membership in a labor organization as a condition of employment." 29 U.S.C. §164(b). Twenty-five states have accepted that invitation and adopted "right-to-work" laws that protect employees from being compelled to financially support a union, even when the union serves as exclusive bargaining representative and assumes a duty of fair representation.[6]

For example, Texas law provides that "[a] labor union … may not collect, receive, or demand, directly or indirectly, a fee as a work permit or as a condition for the privilege to work from a person who is not a

---

[6] *See* National Right to Work Legal Defense Foundation, List of Right to Work States (2015), *available at* http://perma.cc/X4V2-UUFW.

member of the union." Tex. Lab. Code §101.111(a). Virginia law similarly provides that "[n]o employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization." Va. Code Ann. §40.1-62.

Even though employees in right-to-work states are not compelled to pay *anything* to support a union—and even though unions in right-to-work states still assume a duty of fair representation on behalf of all employees, including nonmembers—there is no indication whatsoever that unions in those states are unable to cover their costs of collective bargaining. This should not be surprising. A union would not assume the responsibility of serving as an exclusive bargaining representative unless it were reasonably certain that it could cover its costs. And a union can be recognized as the exclusive bargaining representative in the first place only if a majority of workers vote for it, *see* 29 U.S.C. §159(a), which strongly suggests that the union should have little difficulty covering its costs through members' contributions alone.

The experience in right-to-work states makes clear that unions are perfectly capable of attracting members (and dues) to cover the costs of collecting bargaining even in the absence of government coercion. Between 2004 and 2013, overall union membership *increased* by 0.5% in right-to-work states but fell by 4.6% in states with government-coerced

union fees.[7] And ten of the eighteen states that experienced an increase in union membership between 2013 and 2014 were right-to-work states.[8]

Alabama has been a right-to-work state since 1954, yet the percentage of its workforce that belongs to a union (10.8%) is roughly equivalent to the national average (11.1%) and has been increasing in recent years. Nevada's rate of union membership (14.4%) is comparable to Connecticut's (14.8%), even though the former has been a right-to-work state since 1952. *Id.* And Indiana added 3,000 union members in 2013—the first full year of the state's new right-to-work law—flatly contradicting the unions' prediction of rampant "free-riding" in the absence of government-compelled dues. *See Right To Work Not Decreasing Union Membership*, Indiana Public Media (July 25, 2014), *available at* http://perma.cc/A6ND-S4KG. According to the president of the Indiana AFL-CIO, unions were able to grow their membership despite the new right-to-work law by increasing their "efforts to serve their members." *Id.*

Moreover, if unions in right-to-work states were having difficulty covering their costs of collective bargaining, one would expect that they would have to charge *higher* fees to dues-paying members to make up for the so-called "free riders." In fact, just the opposite is true. Union dues are on average 10% *lower*

---

[7] *See* Jason Russell, *How Right To Work Helps Unions and Economics Growth*, Economics21 (Aug. 27, 2014), *available at* http://perma.cc/4KQM-6WEL.

[8] *See* News Release, Bureau of Labor Statistics, *Union Members 2014*, USDL-15-0072 (Jan. 23, 2015), Table 5, *available at* http://perma.cc/SHA5-ACSP.

in right-to-work states than in states where employees can be compelled to pay dues or agency fees. *See* James Sherk, *Unions Charge Higher Dues and Pay Their Officers Larger Salaries in Non-Right-to-Work States*, Heritage Foundation Backgrounder No. 2987 at 6-7 (Jan. 26, 2015), *available at* http://perma.cc/9B5A-C9W6. The reason for this disparity is obvious: unions, like any rational monopolist, "tend to raise prices when their customers have no other options." *Id.* Unsurprisingly, dues tend to be more reasonable and reflect the market value of services provided when employees have a real choice about whether to financially support the union.

So, too, with the salaries of union officials. A recent econometric study of union financial reports found that union officials paid themselves an average of $20,000 more in compelled-dues states than in right-to-work states (even after controlling for broader economic conditions in each state). *Id.* at 11. Unions "use their monopoly position the same way corporations do. They raise their prices and pay their employees more." *Id.* at 12. The experience in right-to-work states makes clear that eliminating government-coerced payments may enforce market discipline on union behavior and require them to be more careful with their members' money, but will hardly pose an existential threat to unions' existence.

Indeed, even those sympathetic to unions have recognized that employees, employers, and unions are all better off when a union is funded voluntarily rather than through government coercion. For example, a senior official at the United Autoworkers union has stated:

> This is something I've never understood, that people think right to work hurts unions. To me, it helps them. You don't have to belong if you don't want to. So if I go to an organizing drive, I can tell these workers, "If you don't like this arrangement, you don't have to belong." Versus, "If we get 50 percent of you, then all of you have to belong, whether you like to or not." I don't even like the way that sounds, because it's a voluntary system, and if you don't think the system's earning its keep, then you don't have to pay.[9]

2. Even if—contrary to the experience in right-to-work states—a union had difficulty covering its costs of collective bargaining through members' dues alone, it would still have numerous options at its disposal.

Most notably, in the unlikely event that unions were unable to fund collective bargaining solely through members' dues, they could reallocate a portion of the staggering sums they spend each year on political advocacy. Between 2005 and 2011, unions spent $4.4 billion on political advocacy.[10] The National Education Association spent $40 million in the 2014

---

[9] Lydia DePillis, *Why Harris v. Quinn isn't as bad for workers as it sounds*, Washington Post (July 1, 2014); *see also* Kris LaGrange, *Right to Work Laws are Just What Unions Need?*, Daily Kos (Mar. 12, 2015) (arguing that "unions quickly regain ground" after right-to-work laws are enacted; in Indiana, union membership fell from 14% to 9% the year after right-to-work was enacted but subsequently rebounded to 12%).

[10] *See* Tom McGinty and Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, Wall Street Journal (July 10, 2012).

mid-term election cycle alone, and the American Federation of Teachers spent $20 million.[11] It is certainly unions' prerogative (and First Amendment right) to spend as much on political advocacy as they want, and to direct that spending as they deem appropriate. But in light of the massive sums that government employees' unions spend each year on political advocacy—an expense not chargeable to dissenting employees under *Abood*—any purported difficulties in funding collective bargaining activities would surely ring hollow.

Finally, if unions are having difficulty attracting members or fees in the absence of government coercion, perhaps the lesson is the one learned by every other service-providing organization facing competition: improve and expand the services being offered, or appeal to a broader base of customers. Even though the country is closely divided politically, unions' political advocacy overwhelmingly goes to one political party. During the 2014 congressional elections, more than 99% of the American Federation of Teachers' political contributions went to Democrats.[12] And teachers' unions made millions of dollars in contributions in state races to "unseat[] Republican governors and flip[] control of conservative state legislatures." Camera, *supra* n.11. Again, like any private advocacy group, unions are of course free to support whatever policies and candidates they

---

[11] Lauren Camera, *Teachers' Unions To Spend More Than Ever in State, Local Elections*, Education Week (Oct. 22, 2014).

[12] *See* American Federation of Teachers, Money to congressional candidates: 2014 cycle, OpenSecrets.org, *available at* http://bit.ly/1hvyJ5r.

choose. But if they limit themselves to a narrow set of policies and candidates, they can hardly cry foul if they fail to attract voluntary support from a broader cross-section of individuals. It is not the proper role of the government to artificially broaden a union's base of support by coercing nonmembers into financially supporting it.

* * *

In sum, the experience in right-to-work states makes clear that unions are perfectly capable of funding their collective bargaining activities even without government-compelled payments from dissenting nonmembers. And that is true even though those unions assume a duty of fair representation in exchange for their status as exclusive bargaining representative. Even if "spreading costs" or preventing "free-riding" could justify government-coerced agency fees in the abstract—and it cannot—there is no indication that this severe burden on nonmembers' speech is *actually* necessary to finance unions' bargaining activities.

II. *Abood* Cannot Be Salvaged By Applying A First Amendment Test That Asks Whether The Costs At Issue Were Incurred In The Performance Of The Union's Statutory Duties.

In *Lehnert*, Justice Scalia proposed a "statutory duties" test that would authorize a union to charge nonmembers only for those costs that were, at a minimum, "incurred in performance of the union's statutory duties" as exclusive bargaining representative. 500 U.S. at 558 (Scalia, J., concurring in judgment in part and dissenting in part).

Respondents have cited that opinion extensively in support of their argument that *Abood* should not be overruled. *See* CTA Br. in Opp. 11-12, 14-15, 17, 19-20. That reliance is misplaced. Although Justice Scalia's "statutory duties" test is certainly superior to the amorphous, three-part "germaneness" test applied by the *Lehnert* majority, it provides no basis for preserving *Abood*'s broader holding that dissenting nonmembers can be compelled to financially support a union.

A. *Lehnert* Did Not Address the Constitutionality of Agency Fees More Generally.

In *Lehnert*, this Court considered a question that *Abood* did not fully answer: how to draw a doctrinal line between "collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood*, 431 U.S. at 236. Pursuant to a statutorily authorized agency-shop agreement, the union sought to charge all employees for the costs of "(1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit; (3) public-relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike," the carrying out of which would have violated state law. *Lehnert*, 500 U.S. at 514.

A majority of the Court held that a union may charge dissenting employees only for those activities that (1) are "germane to collective-bargaining"; (2) are "justified by the government's vital policy interest in

labor peace and avoiding 'free riders'"; and (3) do "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519. Applying that test, a four-Justice plurality concluded that the union could charge dissenters for the costs of local union delegates' participation in the parent union's convention, for production of portions of a union newsletter, and for strike preparation. *Id.* at 527, 529, 530-32. The union could not charge, however, for general lobbying in support of public schools, litigation not involving the bargaining unit, the section of the newsletter discussing that litigation, or public relations expenditures. *Id.* at 527-29.

Justice Marshall concurred in part and dissented in part. Although he agreed with the three-part "germaneness" test, he believed that this test allowed the union to charge nonmembers for *all* of the costs at issue in *Lehnert*, including those involving lobbying and public relations. *Id.* at 533-34 (Marshall, J., concurring in part and dissenting in part). Justice Marshall believed that lobbying directed towards "increas[ing] funding of the public sector"—and a public-relations campaign designed to improve the public's view of teachers—were no less germane to the union's collective bargaining duties than any of the other expenditures permitted by the plurality. *Id.*

Justice Scalia also concurred in the judgment in part and dissented in part (joined by Justices Kennedy, O'Connor, and Souter). He rejected the Court's three-part test because it "provide[d] little if any guidance to parties contemplating litigation or to lower courts." *Id.* at 551 (Scalia, J.). Instead of

dispelling confusion over how to draw the constitutional line required by *Abood*, he believed that the "germaneness" test "merely establishes new terminology to which, in the future, the confusion can be assigned." *Id.* Justice Scalia thus would have held that, to be compensable under *Abood* without violating the First Amendment, "a charge must *at least* be incurred in performance of the union's statutory duties." *Id.* at 558. Applying that test, Justice Scalia concluded that the only costs sufficiently related to the union's statutory duties to be compensable were fees paid by the local affiliate to the national union for access to its collective bargaining services. *Id.* at 561.[13]

Critically, however, *Lehnert* did not involve a reconsideration of *Abood*'s core holding that the prevention of "free riding" and the promotion of "labor peace" were state interests sufficiently compelling to require dissenting employees to help cover the costs of the union's collective bargaining activities. *Abood*, 431 U.S. at 221-24. Rather, it addressed only the subsidiary question (left open in *Abood*) of how to "devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237.

Lehnert's limited scope is apparent from both the briefing and the Court's decision. The petitioner

---

[13] Justice Kennedy joined Justice Scalia's dissent, but would have held that strike preparations were also within the scope of the union's statutory duties, and were therefore chargeable to nonmembers. *Lehnert*, 500 U.S. at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part).

conceded that *some* collective bargaining costs may be chargeable under *Abood*, although he disputed the chargeability of the specific costs at issue. *See* Br. of Petitioners at 13, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (No. 89-1217), 1990 WL 505708 (conceding government interest in "eliminat[ing] free riders"). And even the *amicus* briefs filed in support of the petitioner did not challenge *Abood*'s broader holding regarding the scope of the First Amendment.

Because the Court was not asked to reconsider it, all nine Justices accepted *Abood*'s constitutional holding as a given. *See Tenn. Publ'g Co. v. Am. Nat'l Bank*, 299 U.S. 18, 22 (1936) ("It is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it."). Justice Blackmun and four other Justices stated that the Court's only task in *Lehnert* was to decide on which side of *Abood*'s "somewhat haz[y] line between bargaining-related and purely ideological activities" the challenged charges fell. *Lehnert*, 500 U.S. at 520. And Justice Scalia, joined by three other Justices, accepted without question *Abood*'s holding that "the union's role as bargaining agent gave rise to the state interest in compelling dues." *Id.* at 552 (Scalia, J.).

Abood thus formed the accepted framework within which the Court decided *Lehnert*. And, because the ongoing validity of the Court's broader interpretation of the First Amendment was neither presented nor considered in *Lehnert*, none of the opinions in that case can be fairly cited as support for salvaging *Abood*'s core holding.

B. The "Statutory Duties" Test Was Simply a Response to the Unworkable Standard Adopted by the *Lehnert* Plurality.

In his separate opinion, Justice Scalia emphasized that the three-part "germaneness" test announced in *Lehnert* was unworkable because it required courts to make "substantial judgment call[s]" without any meaningful guidance. *Lehnert*, 500 U.S. at 551 (Scalia, J.). That conclusion was unquestionably correct. The *Lehnert* "germaneness" test provides no guidance whatsoever to the lower courts and is little more than a vessel for judges to pick and choose their preferred labor policies under the guise of constitutional adjudication.

Indeed, even the five Justices who endorsed the germaneness test could not agree about how that test applied to the specific charges at issue in *Lehnert*. The plurality, for example, concluded that certain sections of a union-published newsletter were "germane" to collective bargaining, but that other sections of the *very same newsletter* were not chargeable. *Id.* at 527-29 (Blackmun, J.). Justice Marshall, applying the same germaneness test, found this distinction absurd and believed that *all* of the costs of printing the newsletter were chargeable. *Id.* at 545 (Marshall, J.).

Justice Scalia's alternative "statutory duties" test must be viewed in this context: an attempt to develop a standard that was more workable than the plurality's approach *within the confines of existing First Amendment doctrine*, which assumed that at least some union charges may be billed to nonmembers. Under Justice Scalia's approach, a court considering the constitutionality of billing union

expenses to dissenting employees must first ask whether the statute authorized the union to perform the act for which it seeks reimbursement. But that question was not the end of the analysis. As Justice Scalia explained, "a charge must *at least* be incurred in performance of the union's statutory duties." *Id.* at 558 (Scalia, J.). Statutory authorization was a necessary condition, but not a sufficient one. All charges must still survive First Amendment scrutiny as well.

In *Lehnert*, those two inquiries were coextensive. *Abood* held that a union could constitutionally charge dissenting employees for costs it incurred in the performance of its statutory duty as the employees' exclusive bargaining representative. *See id.* at 552-53, 556-57 (Scalia, J.). If the disbursements were authorized by a statute conferring exclusive representative obligations on a union, they were therefore constitutional under *Abood*. And because *Abood* was not challenged in *Lehnert*, Justice Scalia had no reason to consider the constitutional question separately from the statutory one.

But Justice Scalia certainly did not suggest that *any* statutorily authorized task may be billed to nonmembers. If that were the rule, then a legislature could authorize fee-shifting for unions' lobbying and political advocacy merely by expanding the scope of the union's statutory duties, even though these are paradigmatic examples of non-chargeable tasks. Justice Scalia's opinion therefore should not be seen as a complete constitutional test, but rather as the necessary first step in the constitutional analysis: deciding whether the allegedly unconstitutional

conduct was even authorized by the legislature. That approach fits comfortably within established norms of constitutional adjudication. *See, e.g.*, *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444-45 (1984) (holding that, before deciding the constitutionality of a union-shop charge, a court must first decide whether it was authorized by statute).

C. The Inherent Ambiguity of the "Statutory Duties" Test Further Underscores the Need To Overturn *Abood*.

Although the statutory duties test is unquestionably *better* than the test applied by the *Lehnert* plurality, it is hardly a panacea. In fact, it serves only to underscore that the problems with *Abood* are fundamental and cannot be solved simply by adopting a better test for deciding which costs are chargeable.

The *Lehnert* plurality's three-part test is divorced from anything other than the applying judge's intuitions and preferences. Justice Scalia's statutory duties test attempts to resolve this shortcoming by limiting the range of chargeable expenses to those authorized by statute. But statutes authorizing exclusive representation are frequently written broadly and without clear delineation of the scope of the exclusive representative's duties. As Justice Blackmun noted in *Lehnert*, "state labor laws are rarely precise in defining the duties of public-sector unions to their members," and "[t]he furtherance of the common cause leaves some leeway for the leadership of the group." 500 U.S. at 525 (Blackmun, J.). The "broad language" of an authorizing statute

often will "not begin to explain which of the specific activities at issue [] fall within the union's collective-bargaining function." *Id.* at 526.

At bottom, the "statutory duties" test, although an improvement over the hopelessly vague three-part "germaneness" test, is simply too amorphous to give clear guidance to interested parties and protect the critical First Amendment interests at stake. Adopting that test in order to salvage *Abood* would likely fare no better than this Court's attempt to adopt a manageable and constitutionally valid test for "electioneering communications" under section 203 of the Bipartisan Campaign Reform Act. The controlling opinion in *FEC v. Wisconsin Right to Life* ("*WRTL*"), 551 U.S. 449 (2007), attempted to articulate a test for distinguishing between "campaign advocacy" and "issue advocacy," even though the Court acknowledged that this distinction "may often dissolve in practical application." *Id.* at 456. In order to "err on the side of protecting political speech rather than suppressing it," the controlling opinion held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 457, 469-70.

Just three years later, however, the Court concluded that section 203 simply could not be applied in a constitutional manner. *See Citizens United v. FEC*, 558 U.S. 310 (2010). Although the controlling opinion in *WRTL* had attempted to adopt an interpretation of section 203 that was both workable and sufficiently protective of political speech, the

Court subsequently concluded that "substantial time would be required to bring clarity to the application of the statutory provision … in order to avoid any chilling effect caused by some improper interpretation." *Id.* at 333-34. Indeed, the FEC had adopted "a two-part, 11-factor balancing test to implement *WRTL*'s ruling." *Id.* at 335. In other words, even though the controlling opinion in *WRTL* had sought to articulate a clear and workable standard, the FEC had nonetheless "created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests." *Id.* at 336.

Just so here. Like the *WRTL* test, the "statutory duties" test for determining when union expenses are chargeable to nonmembers is far better than the alternatives. But it still suffers from significant ambiguity at the margins and leaves state and local officials (and unions) with wide-ranging discretion to define a union's "statutory duties" broadly in order to allow all manner of expenses to be charged to nonmembers. Like the core political speech at stake in *WRTL* and *Citizens United*, dissenting nonmembers' First Amendment right to abstain from supporting an ideologically charged private entity is simply too important to be left to the vagaries of case-by-case adjudication. *Abood* should be overruled.

CONCLUSION

For the foregoing reasons, and those advanced by Petitioners, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

JEFFREY M. HARRIS
Counsel of Record
ANDREW N. FERGUSON
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
jharris@bancroftpllc.com
Counsel for Amici Curiae

September 11, 2015

APPENDIX

APPENDIX A: *AMICI* ON THIS BRIEF

The *amici* joining this brief are:

Alaska Policy Forum: The Alaska Policy Forum is a free-market organization that provides information and research on government transparency, personal responsibility, fiscal issues, and education reform. It has supported reforms in charter schools, school funding, and maximizing students' education opportunities through an amendment to the Alaska Constitution. It has focused on improving education quality for low-income and minority students. It believes this can only occur if these students have an effective, quality teacher in every classroom, and that teacher tenure detracts from this quality.

Americans for Lawful Unionism: Americans for Lawful Unionism ("ALU") was founded in 2014 in Minnesota by a group of citizens concerned about the enormous power and influence of labor union leaders, which is often used to the detriment of good policy, economic growth, sound public finance, citizen control of government and public education, and often the interests of unions' own members. ALU supports legal action designed to challenge unlawful union actions and improper union influence on public policy.

Beacon Center of Tennessee: The Beacon Center is a Tennessee-based nonprofit that advocates for free-market policy solutions at the state level. Faithful adherence to the Constitution and personal freedom are central to its goals. The Beacon Center believes that union-mandated financial contributions constitute government compulsion of speech that is offensive to both the Tennessee and U.S.

Constitutions. The Beacon Center has consistently advocated for the right of workers to choose whether to join a union, and has been a leading voice for education reform in Tennessee.

Center of the American Experiment: The Center's mission is to build a culture of prosperity for Minnesota and the nation. Through research, publications, op-eds, public forums, and legislative engagement, it seeks to create a new climate in which free-market and conservative ideas are better understood, appreciated, and applied. It is about to launch a new Employee Freedom project that will focus on lifting the public union blockade against common-sense reforms, particularly in education and pensions.

Civitas Institute Center for Law and Freedom: Established in 2005, the Civitas Institute is a Raleigh-based nonprofit corporation organized for the purpose of conducting research, sponsoring educational activities, and upholding the constitutional and legal rights of North Carolinians. The Institute has published a number of articles on workplace freedom and the Right to Work at its website, NCCivitas.org, and seeks to support the First Amendment freedoms of workers nationwide. The Institute considers workplace freedom to be inextricably linked to economic prosperity.

Commonwealth Foundation for Public Policy Alternatives: The Commonwealth Foundation is Pennsylvania's free-market think tank. Its mission is to transform free-market ideas into public policies so that *all* Pennsylvanians can flourish. The Commonwealth Foundation sponsors a

"Free to Teach" project that aims to protect teachers' right to associate professionally as they choose, without being forced to contribute financially to any organization they do not support; to have flexibility to meet the learning needs of students; and to be compensated based on merit and job performance, not just years of experience.

Freedom Foundation of Minnesota: The Freedom Foundation of Minnesota is an independent, non-profit educational and research organization that actively advocates the principles of individual freedom, personal responsibility, economic freedom, and limited government. It seeks to foster greater understanding of the principles of a free society among leaders in government, the media, and the citizenry. The Freedom Foundation has advocated for reform of teacher tenure rules and other education policies that are detrimental to students.

Idaho Freedom Foundation: The Idaho Freedom Foundation is a non-partisan educational research institute and government watchdog. Its goal is to hold public servants and government programs accountable, expose government waste and cronyism, reduce the state's dependency on the federal government, and inject fairness and predictability into the state's tax system.

John Locke Foundation: The John Locke Foundation is an independent, nonprofit think tank dedicated to making North Carolina "First in Freedom." The Foundation is named for John Locke (1632-1704), an English philosopher whose writings inspired Thomas Jefferson and the other Founders. The Foundation seeks a better balance between the

public sector and the private institutions of family, faith, community, and enterprise. It employs research, journalism, and outreach programs to transform government and education through competition, innovation, personal freedom, and personal responsibility.

Kansas Policy Institute: The Kansas Policy Institute advocates for free-market solutions to public policy issues and the protection of personal freedom for all Kansans. The Institute fights for worker freedom; has opposed the collection of dues for political purposes from government employees; and has sought to require equal access for any organization wishing to communicate with public school teachers.

Oklahoma Council of Public Affairs: The Oklahoma Council of Public Affairs is a public policy research organization that applies the principles of limited government, individual liberty, and free markets to state-level issues. The organization's recommendation that Oklahoma become a right-to-work state was adopted in 2001. It continues to advocate for worker freedom and against government tipping the scales in favor of particular private interest groups, including labor unions.

Platte Institute for Economic Research: The Platte Institute for Economic Research is a 501(c)(3) research and education organization with the mission of educating policymakers, media, and the general public on the virtues of limited government, personal responsibility, and free enterprise, and to explain how these principles can be applied to increase economic opportunity for all Nebraskans. It is dedicated to

speaking out against government overreach and it strongly believes in workplace freedom.

Rhode Island Center for Freedom & Prosperity: The Center is the Ocean State's premiere free-market research and advocacy organization. It believes that workers should have the right to choose whether it is in their best interests to join a union and pay dues or fees. In 2016, the Center is planning to expose the high cost of unionization for state and local taxpayers as a prelude to a potential future debate about providing full workplace freedom in Rhode Island.

Rio Grande Foundation: The Rio Grande Foundation is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity. The Foundation believes that government employees in all 50 states should have the right of free association to pay or choose not to pay union dues.

Show-Me Institute: The Show-Me Institute is the only think tank in Missouri devoted to free markets and individual liberty. The Institute advances policies that respect the rights of the individual, encourage creativity and hard work, and nurture independence and social cooperation. The Institute believes that participation in government unions should be voluntary, and it has published extensive research regarding public-sector unions and educational reform.

Stephen Hopkins Center for Civil Rights: The Stephen Hopkins Center for Civil Rights is a non-

profit legal advocacy organization located in Barrington, Rhode Island that litigates in areas such as workplace freedom, fiscal responsibility and transparency, school choice, free speech, and property rights in order to protect those rights that Americans recognize as fundamental. One of the Center's primary purposes is to represent the indigent to enforce their constitutional rights.

Washington Policy Center: The Washington Policy Center is a non-profit, non-partisan research organization dedicated to promoting public policy based on free-market solutions. In recent years, WPC's policy recommendations to improve its state's business climate have increasingly focused on a series of labor reforms, including right-to-work and workplace freedom. WPC has published two comprehensive studies on the benefits of right-to-work laws, and has authored multiple columns and blog posts on this issue.