No. 14-915

In the Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL., PETITIONERS

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), which held that public employers may require their employees to pay a union selected as their exclusive representative an "agency fee" to cover a proportionate share of the union's costs of collective bargaining, contract administration, and grievance adjustment, should be overruled.

2. Whether it violates the First Amendment for a public employer to require employees to indicate annually whether they object to paying the portion of an agency fee that is not constitutionally chargeable.

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INTEREST OF THE UNITED STATES

The principal question in this case is whether *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled. *Abood* held that the First Amendment permits public employers to require their employees to pay a fee to a union selected as their exclusive representative to cover the costs of collective bargaining, contract administration, and grievance adjustment. Although the United States does not require its employees to pay fees to their exclusive representatives, the National Labor Relations Act and the Railway Labor Act permit agency-fee arrangements for covered employees.

STATEMENT

1. In the early twentieth century, the Nation experienced substantial "industrial unrest engendered * * * by the denial of the right of employees to or-

ganize and by the refusal of employers to accept the procedure of collective bargaining." H.R. Rep. No. 972, 74th Cong., 1st Sess. 6 (1935) (NLRA House Report). In response to that problem, Congress enacted the National Labor Relations Act (NLRA) in 1935 to stabilize the Nation's private-sector labor relations. Ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*).

Under the NLRA, a majority of employees in a unit may select a union to serve as their exclusive representative to bargain in good faith with the employer "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a). The exclusive representative must fairly represent all employees in the unit. *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 739, 743 (1988); NLRA House Report 18-19. Congress determined that this framework would "safeguard[] commerce from injury, impairment, or interruption, and promote[] the flow of commerce by removing certain recognized sources of industrial strife and unrest." 29 U.S.C. 151.

The NLRA originally allowed employers to agree to a "closed shop"—that is, to hire only union members. 29 U.S.C. 158(3) (1940); see NLRA House Report 17. In 1947, Congress amended the NLRA to prohibit the closed shop. Taft-Hartley Act, ch. 120, § 101, 61 Stat. 140-141. But Congress was concerned that with that change, "many employees sharing the benefits of what unions are able to accomplish by collective bargaining [would] refuse to pay their share of the cost." S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947); see *Beck*, 487 U.S. at 748-750 & n.5. To address that "free rider" problem, Congress permitted an employer and a union to enter into a "union shop"

agreement (if not prohibited by state law) requiring all employees to join a union after being hired, but barring their discharge for expulsion from the union on a ground other than failing to pay dues. See 29 U.S.C. 158(a)(3), 164(b); see also *Beck*, 487 U.S. at 745. And four years later, again recognizing the free-rider problem, Congress amended the Railway Labor Act (RLA) to authorize railroads to enter into such agreements even where state law prohibits them. 45 U.S.C. 152 (Eleventh); see *Beck*, 487 U.S. at 750-751.

In *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961), this Court considered First Amendment challenges to the RLA provision. In *Hanson*, the Court first held that RLA union-shop agreements are imbued with governmental action when they displace state-law prohibitions on such agreements. 351 U.S. at 232. The Court then held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work" does not violate the First Amendment. *Id.* at 238. Subsequently, in *Street*, the Court construed the RLA provision to avoid a serious constitutional question by holding that dues collected from objecting employees may be used to "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes," but not "to support candidates for public office, and advance political programs." 367 U.S. at 750, 768. The Court later interpreted the NLRA to embody the same limitation. *Beck*, 487 U.S. at 762-763.

2. The NLRA excludes public employees from coverage. 29 U.S.C. 152(2). For decades after its enact-

ment, governments generally did not permit their employees to bargain collectively. That prohibition could produce volatile labor relations that threatened disruptions of government services. See, *e.g.*, N.Y. Governor's Comm. on Pub. Emp. Relations, *Final Report* 9 (1966); Att'y Gen. of Cal. Br. 2. But beginning in 1959, many States adopted labor-relations frameworks for public employees modeled on the NLRA, including the right of workers to democratically select an exclusive representative, and the representative's corresponding duty to fairly represent all employees in a unit. See Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962*, at 71-72 (2004). Certain States also authorized public employers to enter into "agency shop" agreements requiring employees who choose not to join the union selected as their exclusive representative to pay the union "agency fees."

In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), public employees challenged an agency-shop agreement on the ground that it violated the "line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights." *Id.* at 226. Agreeing with the challengers in part, the Court held that the First Amendment permits public employers to authorize fees only to the same extent as private-sector employers may do under the RLA and NLRA: to cover the costs of the union's activities "germane to its duties as collective-bargaining representative," including "collective bargaining, contract administration, and grievance adjustment," but not to subsidize "the expression of political views" or activities "on behalf of political candidates, or toward the advancement of other ideo-

logical causes" unrelated to its bargaining duties. *Id.* at 225-226, 235-236. That distinction, the Court held, followed from the Court's precedents addressing the speech and expressive-association rights of public employees. See *id.* at 234 (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967)).

The Court later distilled from *Abood* and other precedents a three-part standard for determining which union expenditures are "chargeable" to non-members. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). Chargeable activities "must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Ibid.* Four Justices would have defined "germane" activities to encompass only activities "reasonably necessary" to fulfillment of the union's statutory duties as a bargaining agent, see *id.* at 557 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 564 (Kennedy, J., concurring in the judgment in part and dissenting in part), while four other Justices would have concluded that a somewhat broader set of activities related "to the ratification or implementation" of the union's collective-bargaining agreement are included in that term, *id.* at 520 (opinion of Blackmun, J.). But eight Justices agreed, for example, that lobbying expenses are not chargeable if they do not relate exclusively to "the ratification or implementation of [the relevant] collective-bargaining agreement." *Ibid.*

3. California permits its public-school employees to bargain collectively over wages and other terms of employment. Cal. Gov't Code § 3540 (West 2010). As under the NLRA, a majority of employees in a bargaining unit may select an "employee organization" as their exclusive representative, which then must fairly represent every employee in the unit. *Id.* §§ 3543.1(a), 3544, 3544.9. The scope of the exclusive representation includes "matters relating to wages, hours of employment, and other terms and conditions of employment," such as certain benefits, leave and transfer policies, safety concerns, class-size issues, and evaluation and grievance procedures. *Id.* § 3543.2(a)(1) (West Supp. 2015).

California law provides that if an employee organization selected as an exclusive representative furnishes notice to a public employer, each employee within a bargaining unit who has not joined the employee organization must, "as a condition of continued employment, * * * pay [a] fair share service fee" (*i.e.*, an agency fee), unless a majority of employees vote to rescind the fee. Cal. Gov't Code § 3546(a) and (d) (West 2010). The fee "shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." *Id.* § 3546(a). Although the fee may cover other expenses, nonmember employees "have the right * * * to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative," *ibid.* An exclusive representative must

furnish annual notice to each nonmember of the amount of the agency fee, the percentage attributable to chargeable expenses, and the procedure for objecting to payment of the nonchargeable portion or challenging the union's calculations. Cal. Code Regs. tit. 8, § 32992(a) (2015). The objection procedure requires that employees have at least 30 days to file written objections to paying the nonchargeable portion. *Id.* § 32993.

4. Petitioners include California public-school teachers who have elected in the past not to pay the nonchargeable portion of the agency fees. Pet. App. 46a-51a. They object to many of the unions' public-policy positions, as well as to positions taken in collective bargaining. *Id.* at 46a-49a. Petitioners filed suit against the unions, the unions' state and national affiliates, and the executive officers of their school districts. *Id.* at 41a, 52a-55a. They allege that the agency-fee requirement violates the First Amendment both by requiring nonunion employees to pay even the chargeable portion of the fees and by requiring nonunion employees to object annually if they decide not to pay the nonchargeable portion. *Id.* at 69a-73a; see J.A. 663. Respondent State of California intervened to defend the constitutionality of its laws. Pet. App. 4a.

Petitioners moved for judgment to be entered against them on the pleadings, acknowledging that their claims were foreclosed by controlling precedent. Pet. App. 7a. The district court granted the motion. *Id.* at 8a. On petitioners' motion, the court of appeals summarily affirmed. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

I. This Court held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), that a public employer may require its employees to pay fees to an exclusive representative to cover a proportionate share of the costs of collective bargaining, contract administration, and grievance adjustment. The Court should reaffirm that holding because it is correct.

A. Petitioners' attack on *Abood* rests on a fundamental legal error: that conditions of public employment that advance a public agency's interest as an employer are subject to "exacting" scrutiny under the First Amendment. This Court has never so held. To the contrary, in an array of contexts, including the political-affiliation cases on which petitioners rely, this Court has afforded public employers broad leeway to establish "reasonable" or "appropriate" conditions that advance the government's interest *as an employer*, while remaining vigilant to ensure that the government does not leverage the employment relationship to stifle employees' broader expressive activities as citizens. Petitioners' attempt to demolish this Court's settled framework for analyzing conditions of public employment would astonish the Founding generation and would stamp out the State-by-State variation in public-employment structures that has been the hallmark of this Court's First Amendment jurisprudence for decades.

B. Considered in light of the principles that this Court invariably employs to evaluate conditions on public employment, *Abood* reached the right result, for the right reasons. The time-tested collective-bargaining framework instituted by the NLRA relies crucially on the designation of a single, democratically

elected employee representative that is duty-bound to fairly represent all employees in a unit. As Congress has determined, and as this Court has explained on numerous occasions, that framework inevitably produces a serious "free rider" problem—a problem that petitioners fundamentally misunderstand. The problem is not merely that employees who *object* to the union's bargaining positions will "free ride" on the union's efforts. Rather, even the employees who *favor* the union's positions will have no incentive to fund the union if they can reap the benefits of the union's work without spending a dime.

The consequence is that those who remain members of the union—based on their own associational choice—are *statutorily obligated* to subsidize the free riders for the union's work on their behalf. *Abood* correctly held that public employers may reasonably conclude that, by eliminating the moral hazard inherent in exclusive representation, agency-shop agreements significantly promote their vital interest in productive collective-bargaining relationships, ameliorate the workplace resentments that could arise if union members are required to shoulder the costs of attaining benefits for other employees, and foster a productive and effective public workforce.

Abood also correctly recognized that the burden on the expressive activities of public employees who truly object to the union's bargaining positions—as opposed to employees who simply want to free ride—is not so substantial as to render the condition of employment unreasonable or inappropriate. No public employee is prohibited from speaking out against the union and its positions in the workplace or in the public arena. And *Abood* ensures that mandatory fees can never support

political campaigns, legislative lobbying outside of the ratification or funding of a collective-bargaining agreement, or other classically ideological activities—*i.e.*, those activities that have no connection to the government's concrete interest as an employer. As a result, the *Abood* rule places both public employers and public employees in the same position as their private-sector counterparts who operate under agency-shop agreements.

C. Petitioners have identified no special justification to discard a precedent that has governed public-sector labor relations for nearly four decades, has been repeatedly applied by this Court, and has helped form the foundation for other First Amendment doctrines. Overruling the *Abood* line of cases would disrupt the many state and local government agencies that have structured their labor relations in reliance on this Court's constitutional pronouncements.

II. Requiring public employees to indicate their objection to paying nonchargeable expenses on an annual form—a procedure this Court has repeatedly approved—does not violate the First Amendment. Contrary to petitioners' unsupported supposition, it is often true that an individual must object to invoke a constitutional right. An employee who is unwilling to exert even the minimal effort necessary to check a box and mail in a form suffers no cognizable First Amendment harm.

ARGUMENT

I. *ABOOD* WAS CORRECTLY DECIDED AND SHOULD BE REAFFIRMED

This Court held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), that a public employer may require its employees to pay a proportionate share of an exclusive representative's costs of collective bargaining, contract administration, and grievance adjustment, but that it may not require employees to subsidize the representative's political or ideological activities. That holding should be reaffirmed because it is correct.

A. Conditions Of Public Employment Are Valid If They Are Reasonably Related To The Government's Interest As An Employer

Petitioners' attack on *Abood* rests on a fundamentally mistaken premise: that a condition of public employment that advances the government's legitimate interests *as an employer*, rather than as a sovereign or regulator, is subject to "exacting" scrutiny under the First Amendment. See Pet. Br. 10, 15-20. That view has no support in the original understanding of the First Amendment, and it conflicts with this Court's long line of precedents addressing the rights of public employees. Far from the "jurisprudential outlier" that petitioners portray (Br. 2), *Abood* fits comfortably within the broader constellation of constitutional precedents governing conditions of public employment. Indeed, what petitioners seek is an exception to the general rule.

1. The First Amendment proscribes laws "abridging the freedom of speech." A condition on public employment related to an employee's expressive

activities was not originally understood to be an "abridg[ment]" of the freedom of speech at all. For over a century and a half after the First Amendment was adopted, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006) (quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983)). As Justice Holmes famously put it, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor*, 29 N.E. 517, 517 (Mass. 1892). Thus, for example, the requirement that an employee be a member of a particular political party "was, without any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic." *Rutan* v. *Republican Party*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

This Court departed from that understanding of the First Amendment "in the 1950's and early 1960's," in cases involving requirements that "public employees * * * swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144. The Court in those cases sought to address the emerging fear that the government could "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419. The Court has therefore drawn a sharp distinction between conditions of public employment reflecting the sorts of interests and concerns ordinarily held by private-sector employers and employees, for which public employers receive broad

deference, and conditions by which a public employer might exploit the employment relationship to curtail the exercise of public employees' constitutional rights as private citizens, outside the employment relationship.

2. That basic distinction forms the foundation for a number of well-settled constitutional rules.

a. In the line of cases beginning with *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), this Court has set out a framework for analyzing claims that a public employer unconstitutionally penalized an employee for her expressive activities. Under that framework, if an employee did not speak "as a citizen on a matter of public concern," the "employee has no First Amendment cause of action" at all. *Garcetti*, 547 U.S. at 418. But as the Court explained in *Garcetti*, even if the speech related to a matter of public concern, the employee's claim fails if "the relevant government entity had an *adequate justification* for treating the employee differently from any other member of the general public." *Ibid.* (emphasis added); see *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488, 2500 (2011) (applying same framework to Petition Clause claim).

In applying *Pickering*'s adequate-justification standard, a court may not impose "an unduly onerous burden on the State." *Connick*, 461 U.S. at 149. Rather, it must "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. That framework is necessary because "[t]he government's interest in achieving its

goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (citation omitted).

b. This Court has articulated a parallel set of principles for assessing claims that a public employee suffered adverse employment consequences on account of membership in a political party. In those cases, this Court held that, while party affiliation in many circumstances would relate only to an employee's role as a private citizen, it may be considered in making employment decisions if the government "can demonstrate that party affiliation is an *appropriate requirement* for the effective performance of the public office involved," as with many policymaking jobs. *Branti* v. *Finkel*, 445 U.S. 507, 518 (1980) (emphasis added); see *Rutan*, 497 U.S. at 64-65, 70-71 nn.4-5.

That rule embodies the same solicitude for the government's interests as an employer as does the *Pickering* standard. Indeed, the political-affiliation cases expressly relied on a *Pickering* case, *Perry* v. *Sindermann*, 408 U.S. 593, 597-598 (1972). See *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 718 (1996); *Branti*, 445 U.S. at 514-516; see also *Elrod* v. *Burns*, 427 U.S. 347, 375 (1976) (Stewart, J., concurring in the judgment). And in its most recent decision in this area, the Court explained that the ultimate inquiry is simply "whether the affiliation requirement is a reasonable one." *O'Hare*, 518 U.S. at 719; cf. *Rutan*, 497 U.S. at 101-102 (Scalia, J., dissenting). Petitioners' insistence (Br. 18-19) that "exacting scrutiny" applies to all political-affiliation employment requirements—which is apparently drawn from Jus-

tice Brennan's opinion for three Justices in *Elrod*, 427 U.S. at 362—is therefore incorrect.

c. This Court has also afforded public employers a broad range of discretion to advance legitimate employment-related interests with respect to other constitutional rights. In the Fourth Amendment context, for example, the Court has held that a public employer may conduct a search of its employees' employer-issued pagers without a warrant so long as the search is "motivated by a legitimate work-related purpose" and is "not excessive in scope." *City of Ontario* v. *Quon*, 560 U.S. 746, 764 (2010). The Court further concluded that such a search by a public employer "would be regarded as reasonable and normal in the private-employer context" and therefore would be permissible under the approach of Justice Scalia's opinion concurring in the judgment in *O'Connor* v. *Ortega*, 480 U.S. 709, 732 (1987). See 560 U.S. at 764-765 (citation and internal quotation marks omitted).

The Court has also held that, in light of the "unique considerations applicable when the government acts as employer as opposed to sovereign," the "class-of-one theory of equal protection does not apply in the public employment context." *Engquist*, 553 U.S. at 598. And most recently, the Court held that a federal-government background-check form does not violate any assumed right to informational privacy, given the government's "much freer hand in dealing with citizen employees than * * * when it brings its sovereign power to bear on citizens at large." *NASA* v. *Nelson*, 562 U.S. 134, 138, 148-149 (2011) (citations and internal quotation marks omitted).

3. *Abood* reflects the application of these general constitutional principles to the specific context of

agency fees required "as a condition of employment." 431 U.S. at 211. That is clear on the face of the opinion. The primary First Amendment argument that *Abood* considered was that public-sector agency fees violated the "line of decisions holding that public employment cannot be conditioned upon the surrender of First Amendment rights," *id.* at 226, and the challengers had expressly relied on *Pickering* and *Sindermann*, see Appellants Br. 35, *Abood*, *supra* (No. 75-1153). The Court drew the central distinction between activities germane to collective bargaining within the employment relationship and political or ideological activities from its public-employee cases, citing *Sindermann* and *Elrod*. 431 U.S. at 233-235. This Court has thus long grouped the *Abood* rule with other First Amendment doctrines protecting government workers from "unconstitutional conditions" of employment, including the rules of *Pickering* and *Branti*. See *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-675 (1996).

In the course of its analysis, *Abood* found that "[t]he same governmental interests recognized in * * * *Hanson* and *Street*" supporting RLA fee arrangements presumptively supported public-sector agency-fee arrangements. 431 U.S. at 225. That was because the RLA decisions rested on the premise that an RLA union-shop agreement is also imbued with governmental action, *id.* at 226-227 & n.23, and because the Court concluded that public employees do not have weightier First Amendment interests than private employees in not being required to pay their fair share of their exclusive representative's expenses, *id.* at 229-230. See *Locke* v. *Karass*, 555 U.S. 207, 213-214 (2009); see also *Lehnert* v. *Ferris Faculty Ass'n*,

500 U.S. 507, 516 (1991). Differences in collective bargaining between the public and private sectors, the Court explained, result from the external incentives and political accountability of the public *employer*, not from any differences regarding the public *employee*, who remains free as a citizen to express his disagreement with the union's actions. See *Abood*, 431 U.S. at 230-232.

In any event, even if the Court were to conclude that *Abood*'s analysis was less than pellucid, petitioners have identified no good reason as an original matter to review agency fees differently from any other condition of public employment. Petitioners rely on the Court's application of a higher standard of scrutiny in *Knox* v. *Service Employees International Union*, 132 S. Ct. 2277 (2012), and *Harris* v. *Quinn*, 134 S. Ct. 2618 (2014). Those decisions, however, involved fees that did *not* advance the government's interest as an employer—a one-time exaction to fund a "union's political and ideological activities," *Knox*, 132 S. Ct. at 2284, and fees imposed on individuals that the Court held not to be full-fledged public employees at all, which would have required "a very significant expansion of *Abood*" to uphold, *Harris*, 134 S. Ct. at 2637.

In *Harris*, the Court, in discussing *Pickering*, held only that, given the particular "features of the [state-law] scheme" governing the home health workers in that case, under which the union had a "very restricted role," the governmental interests ordinarily justifying agency fees were not sufficiently implicated to sustain the fees. 134 S. Ct. at 2640, 2643. In contrast, for true public employees, positions taken by their exclusive representative in the course of agency-fee-supported contract negotiation and administration

within the employment relationship are directly analogous to other employee expression within the employment relationship, which under *Pickering* and *Garcetti* is subject to reasonable regulation.

Accordingly, because "the Constitution's prohibition against laws 'abridging the freedom of speech' does not apply to laws enacted in the government's capacity as employer in the same way that it does to laws enacted in the government's capacity as regulator of private conduct," *Rutan*, 497 U.S. at 95 (Scalia, J., dissenting), petitioners' central premise that "exacting" scrutiny applies to all agency fees, even those that fund only activities that advance the government's bona fide interests *as an employer*, is out of step with the original understanding of the First Amendment and this Court's decisions from *Pickering* to *O'Hare* to *Guarnieri*. This Court has always counseled a "cautious and restrained approach" to reviewing conditions of public employment, *Guarnieri*, 131 S. Ct. at 2495, 2500, asking whether the public employer had an "adequate justification" for the challenged action, *Garcetti*, 547 U.S. at 418, or whether a job requirement was "appropriate," *Branti*, 445 U.S. at 518, or "reasonable," *O'Hare*, 518 U.S. at 719. The types of agency fees approved in *Abood* plainly satisfy those standards.

B. The Line That *Abood* Drew Reflects A Reasonable Accommodation Of The Government's Interests As An Employer With Public Employees' First Amendment Rights

Abood reached the right First Amendment result, for the right reasons. Like their private-sector counterparts, public employers can reasonably determine that agency fees covering the cost of matters germane

to collective bargaining, contract administration, and grievance adjustment advance the "vital [governmental] interests in preserving industrial peace," *Keller* v. *State Bar*, 496 U.S. 1, 13 (1990), by ensuring a robust and fairly representative counterparty in bargaining over the terms of employment and ensuring compliance with agreed-upon terms, avoiding the resentment that could arise if some employees were required to subsidize benefits for other employees, and fostering a productive and effective public workforce.

1. A public employer has a legitimate interest in permitting agency fees to solve the free-rider problem inherent in exclusive representation

a. Like private-sector employers, a public employer has a legitimate—indeed, "vital"—interest in good labor relations. *Keller*, 496 U.S. at 13. If employees lack an agreed-upon outlet for their preferences, concerns, and grievances about the terms and conditions of employment, public agencies could experience crippling disruptions that would bring government services to a halt and could find themselves unable to attract and retain the most talented workers.

The modern labor-relations framework that Congress instituted in the NLRA—an elected exclusive representative with a duty to fairly represent all employees—promotes that interest. By allowing employees to express their views through a single, democratically selected representative that can serve as an effective bargaining counterparty, public employers can achieve more stable labor relations and a more satisfied and productive workforce.

Congress, however, has found that exclusive representation can give rise to a serious free-rider problem, because employees will realize that they can attain the

benefits of exclusive representation without paying for them. See pp. 2-3, *supra*. This Court has on numerous occasions recognized the validity of Congress's judgment in that respect. See, *e.g.*, *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866, 872-873 (1998); *Keller*, 496 U.S. at 12; *Abood*, 431 U.S. at 224; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 765-766 (1961). And Congress, like many States, further determined that requiring each employee in a bargaining unit to defray a representative's costs is one appropriate means of solving that problem. 29 U.S.C. 158(a)(3); 45 U.S.C. 152 (Eleventh); see *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 755-756 (1988).

Throughout their brief, petitioners mischaracterize the nature of the free-rider problem. The free riders that this Court's decisions have discussed are not only those employees "who *oppose* union policies" advanced in collective bargaining and who are therefore in some sense "compelled by the government to 'free ride' on unions." Pet. Br. 34, 36-37 (emphasis omitted). The free-rider problem also, and more broadly, stems from "the employee who is *happy* to be represented by a union but won't pay any more for that representation than he is forced to," and who therefore "wants merely to shift as much of the cost of representation as possible to other workers, *i.e.*, union members." *Gilpin* v. *American Fed'n of State, County, & Mun. Emps., AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir.) (Posner, J.) (emphasis added), cert. denied, 493 U.S. 917 (1989). But once a fair-representation requirement is imposed, it is impossible to tell who is a true objector and who just wants a free ride.

Ignoring Congress's express judgment to the contrary, petitioners declare it "implausible" (Br. 33) that many employees who favor the union's bargaining positions would not "voluntarily" support the union financially. It is undoubtedly true that many employees, out of affinity with the union's overall goals or for other reasons, will join the union even without the agency-fee requirement. And the rates of voluntary union membership may vary from State to State and from profession to profession. But in no other context could it be defensibly maintained that those who benefit from something available for free—be it public infrastructure, police protection, or music downloads from the Internet—must invariably be counted on to voluntarily pay for it. Cf. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 928-929 (2005).

b. For at least two reasons, a public agency has a legitimate interest, *as an employer*, in solving the free-rider problem through agency fees. See *Abood*, 431 U.S. at 224-226.

First, the traditional collective-bargaining framework requires vigorous, "coequal" advocates on both sides. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 317 (1965). But depending on the composition and preferences of the workforce and what other services or benefits a union is able to offer members, the free-rider problem can undermine the effectiveness of the employee representative. Bargaining, after all, is not a matter of just showing up to a negotiation session. As *Abood* explained, "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are

continuing and difficult ones" that can require "[t]he services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." 431 U.S. at 221.

Petitioners' assert (Br. 30) that the government's only interest is ensuring that the elected union does not "go bankrupt." But the whole idea of the collective-bargaining framework—the basic reason that it helps resolve the most intractable and difficult problems that confront a workplace—is that employee interests are soundly represented at the bargaining table and in other settings within the employment relationship. An exclusive representative that is hovering just above bankruptcy may be hard-pressed to fulfill its responsibilities effectively.

Second, a public employer can reasonably conclude that requiring union members to bear the potentially significant costs of a bargaining agent's efforts on behalf of *other* employees—even those who welcome free union representation—is fundamentally unfair because it effectively penalizes union members. See *Abood*, 431 U.S. at 221-222. Absent agency fees for collective-bargaining expenses, an exclusive representative may be forced to "increase the net price that union members must pay in order to obtain union services for *themselves*," since those members must subsidize the cost of bargaining, contract administration, and grievance adjustment for nonmembers. Casey Ichniowski & Jeffrey S. Zax, *Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. Lab. Econ. 255, 257 (July 1991) (emphasis added). In effect, union members end up with lower take-home pay than nonmembers based solely on their own choice to affiliate with a union. It

is perfectly reasonable for a public employer to determine that such unequal distribution of costs will spawn resentment that will hamper the fulfillment of its public mission. See *Beck*, 487 U.S. at 749-750; cf. NLRA House Report 18 ("[I]f better terms were given to nonmembers, this would give rise to bitterness and strife.").

c. Petitioners liken (Br. 34) the endemic free-rider problem in collective bargaining to the moral hazard created by any organization that advocates policies favored by nonmembers. But as Justice Scalia has explained, that analogy overlooks "[w]hat is distinctive * * * about the 'free riders' who are nonunion members of the union's own bargaining unit." *Lehnert*, 500 U.S. at 556 (concurring in the judgment in part and dissenting in part). "[T]hey are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Ibid.* (emphasis omitted); accord *id.* at 562-564 (Kennedy, J., concurring in the judgment in part and dissenting in part); see *Abood*, 431 U.S. at 224. Put another way, the public employer refuses to bargain at all unless it can bargain with a representative statutorily bound to represent—and reach an agreement on behalf of—all employees.

That policy of exclusive representation serves the government's basic interest as an employer in bargaining with a single employee representative. See pp. 19-23, *supra*. But it also gives rise to the free-rider problem that could, paradoxically, render the elected union a less effective bargaining counterparty and foster resentment among employees forced to bear the costs of supporting benefits for others. It is

for that reason—to ensure that collective bargaining achieves its basic purposes—that when "the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them" from nonmembers. *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part).

Petitioners disagree (Br. 37-44) with that analysis of the governmental interests justifying agency fees. But their three critiques do not hold up.

Petitioners first argue (Br. 37-38) that "unions voluntarily assume the nondiscrimination 'duty' in order to obtain the extraordinary power of exclusive representation." That misses the point. Although it is trivially true that no union is required to step forward to serve as the exclusive representative, the premise of American labor law is that employers and employees alike have a vital interest in the benefits that flow from an exclusive representative that fairly represents all employees. Once employees democratically select a union, an employer can reasonably conclude that it is inefficient and unfair to foist the entire cost of the union's execution of its statutory duties on those employees who have chosen to join the union.

Petitioners also argue (Br. 41) that the duty to fairly represent all employees "does not impose any meaningful obligation on unions," even though half-a-breath later they concede that an exclusive representative is statutorily barred "from advocating wage-and-benefit systems that facially favor union members." Their argument seems to be that most exclusive representatives do not actually engage in such preferential advocacy. But that is because it has been prohibited in the private sector since at least 1935

(and even so unions have at times violated that prohibition, see Att'y Gen. of Cal. Br. 18 (citing cases)), and because the main benefit of the system, from the perspective of any employer, public or private, is the ability to bargain with a single representative of all employees. That the duty of fair representation is uniformly imposed does not change the fact that the union is statutorily required to expend resources on behalf of nonmembers, which justifies agency fees.

Finally, petitioners advert (Br. 43-44) to the disagreement among the Justices in *Lehnert* over whether the governmental interests supporting agency fees justify only fees for activities that are "reasonably necessary" to the discharge of the union's statutory duties. 500 U.S. at 556-558 (Scalia, J., concurring in the judgment in part and dissenting in part). But reaffirming that the governmental interest supporting agency fees arises from the exclusive representative's statutorily required "duty of fair representation to all employees in the unit," *Abood*, 431 U.S. at 224, does not require the Court to revisit that separate, later debate. This case was decided on the pleadings without evidence of the unions' expenditures or an analysis of whether they are chargeable to nonmembers under California law. The possibility that in a future case the Court might consider refining the "germaneness" requirement says nothing about whether *Abood*'s analysis of the governmental interests permitting agency fees for at least some contract-negotiation and administration activities was correct.

2. Agency fees satisfy the standards that this Court has applied to evaluate conditions of public employment

a. As discussed, this Court's public-employment cases have asked whether a requirement is "reasonable," "adequate," or "appropriate" in achieving the government's interests as an employer. Agency fees that finance the union's activities germane to collective bargaining—defined, at minimum, to encompass the union's execution of its statutory duties on behalf of all employees—satisfy those standards, because they reasonably advance the government's interest in solving the free-rider problem. Although agency fees and exclusive representation may not be "inextricably linked," *Harris*, 134 S. Ct. at 2640, agency fees are an effective means of eliminating the intrinsic moral hazard of exclusive representation.

As *Abood* acknowledged, those fees do represent a limited "impingement" on the expressive-association rights of those employees who truly object to the union's bargaining positions (as opposed to those who only want a free ride). 431 U.S. at 225. But that impingement is not so substantial as to render the condition on public employment invalid. The fees simply support the efforts of the exclusive representative within the special channels in the employment setting for contract negotiation, contract administration, and grievance resolution—transactional and workplace activities that typically are quite different from the sort of expression in which public employees might engage as citizens. See *Lehnert*, 500 U.S. at 551 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part) (proceeding "on the assumption * * * that all forced contributions to a union impli-

cate the First Amendment, whether or not the activities to which the contributions are directed are communicative"). Indeed, communications to the employer concerning such matters by an individual employee, in his capacity as an employee, would not, under this Court's precedents, be subject to heightened First Amendment protection. The result should be no different for such communications on behalf of all employees in the unit by their exclusive representative.

Mandatory agency fees, moreover, do not force an employee to affiliate or associate with the union in any meaningfully expressive sense. No reasonable person would conclude, upon learning that a teacher had paid mandatory agency fees, but had refused to support a union's political or ideological activities, that the teacher supported the union. If anything, he would draw the opposite inference.

Nor is a different conclusion called for by the fact that from the general public's perspective, the decisions the *employer* might make in the collective-bargaining process could have significant fiscal and public-policy effects or political implications. It is from *that* distinct perspective that the issues involved are matters of public concern. But the payment of agency fees by individuals in their capacities as public employees to their representative in the employment context does not prevent those individuals, in their capacities as citizens, from "petition[ing] their neighbors and government in opposition to the union which represents them in the workplace," *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.), joining anti-union organizations, or lobbying their elected representatives. See *Abood*, 431 U.S. at 230; *City of Madison*

Joint Sch. Dist. No. 8 v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 175-176 & n.10 (1976).

b. Petitioners contend (Br. 20-29, 33) that *Abood*'s basic line is illusory because "there is no difference between collective-bargaining advocacy and other ideological advocacy." That is not a realistic view of the world. The typical worker would surely perceive a significant difference between, on the one hand, contributing to a union's legal and research costs to develop a collective-bargaining proposal for his own unit, and, on the other hand, making a political contribution to a union-favored candidate for governor.

But in any event, petitioners' argument misses the point not only of *Abood*, but also of this Court's broader employment-conditions jurisprudence, in such decisions as *Pickering*, *Branti*, *Garcetti*, and *Guarnieri*: The First Amendment generally permits conditions of employment that impact employees' expressive interests within the context of the employment relationship, so long as they bear a reasonable or appropriate relationship to the government's interest *as an employer*. That is why, for example, an employee can be penalized even for speech on matters of public concern when the public employer has an "adequate" employment-related justification. *Garcetti*, 547 U.S. at 418. It is likewise why political affiliation can be a job requirement when such a requirement is "reasonable" or "appropriate." *O'Hare*, 518 U.S. at 719; *Branti*, 445 U.S. at 518.

The line drawn by *Abood* reflects that same basic reasonableness standard. The government *qua* employer has no interest in the union's efforts to elect particular candidates to a state board or run a pro-union advertising campaign. See *Lehnert*, 500 U.S. at

520-521 (opinion of Blackmun, J.). But it does have a vital interest in a sufficiently funded, robust bargaining counterparty that, in accord with its statutory duty, fairly represents all employees in a bargaining unit, and provides an effective voice for their concerns, preferences, and grievances.

That fundamental distinction also affects the magnitude of the impingement on employees' associational rights. When public employees pay fees to cover the costs of collective bargaining, they are required to do no more than what "would be 'regarded as reasonable and normal in the private-employer context.'" *Quon*, 560 U.S. at 764-765 (quoting *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring in the judgment)). But if public employees were required to pay fees to cover a union's political and ideological activities unrelated to its statutory duties, that would go beyond what private employers may do under the NLRA or RLA, and it would raise the specter that the purpose of the fees is to "leverage the employment relationship" to bolster political allies and infringe public employees' freedom of expression and association as private citizens. *Garcetti*, 547 U.S. at 419. *Abood* thus prevents precisely the same threat to the First Amendment as this Court's other public-employee decisions.

c. Our federalist system leaves room for different public employers with different workforce compositions, different histories, different needs, and different values to reach different conclusions about how best to ensure an effective bargaining counterparty and a harmonious workplace. Some States do not allow public employees to collectively bargain at all; others allow collective bargaining but not agency fees; and over 20 States have authorized agency fees for

some or all employees. See *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting); Union Resps. Br. 4-5, 32. The federal government does not allow agency fees, but it also bars collective bargaining over wages for most employees. See *Fort Stewart Sch.* v. *Federal Labor Relations Auth.*, 495 U.S. 641, 649 (1990). The diverse models no doubt reflect varying assessments of the impact and unfairness of the free-rider problem and genuine policy disagreements about whether public-sector collective bargaining is worthwhile.

But even under standards of scrutiny more demanding than the reasonableness review afforded to conditions on government employment, this Court has not held that a governmental interest is insufficient to support a challenged legal requirement because the requirement has not been adopted by all 50 States and the federal government. Particularly as applied to conditions of public employment, such a homogenizing constitutional doctrine would lead to "judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers," *Garcetti*, 547 U.S. at 423, and would "unnecessarily constitutionalize[] another element of American life," *Elrod*, 427 U.S. at 389 (Powell, J., dissenting).

C. Petitioners Have Identified No Special Justification To Overrule The *Abood* Line Of Cases

For the reasons given above, *Abood* was correctly decided. But even if the Court harbored some doubt about that conclusion, *stare decisis* would strongly favor declining to revisit a question that has been settled for nearly four decades. Although "stare decisis is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persua-

sive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (emphasis, citations, and internal quotation marks omitted). No such special justification has been established here.

1. Overruling *Abood* would destabilize First Amendment law. It would require the Court also to overrule at least *Lehnert*, *Locke*, and *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986). In addition, given the state-action holding of the RLA cases (see pp. 3, 16, *supra*), overruling *Abood* would raise doubt about the constitutionality of an RLA provision that this Court has upheld for nearly 70 years against First Amendment challenges. Moreover, it would leave lower courts, state and local governments, and the broader public at a loss as to why the Court has jettisoned the traditional deferential standard of scrutiny for conditions of public employment only in the context of public-sector unions.

Discarding *Abood* would also shake the doctrinal foundations of this Court's decisions in other areas. For example, the Court's unanimous opinion in *Keller* permitted mandatory dues for an integrated bar largely on the strength of *Abood*, relying on the "substantial analogy" between a union and a state bar. 496 U.S. at 12, 14. Likewise, in evaluating student activity fees, the Court has held that "*Abood* and *Keller* * * * provide the beginning point for our analysis." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 230-231 (2000). And this Court's decisions considering the constitutionality of statutory schemes imposing assessments to fund generic advertising relied expressly on a "proper application of the rule in

Abood." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 413-417 (2001); see *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471-474 (1997).

Petitioners assert (Br. 53) that "nobody defends [*Abood*'s] original rationale," but that rests on the mistaken view that *Abood* did not apply general principles of this Court's public-employee cases. See pp. 15-18, *supra*. They also contend (Br. 55-56) that *Abood* conflicts with subsequent decisions of this Court. But they do not identify any *holding* of the Court that conflicts with *Abood*, because none exists. They rely (Pet. Br. 54-55) on dicta in *Knox* and then in *Harris*, but *Harris* made clear that the Court was not disturbing *Abood*. 134 S. Ct. at 2638 n.19. As between declining to give effect to dicta and overruling multiple holdings of this Court stretching back almost 40 years, the former is obviously more consistent with jurisprudential stability.

2. Petitioners contend (Br. 56-57) that the *Abood* rule has proven "entirely 'unworkable,'" noting *Harris*'s observation that *Abood* had overlooked the "'conceptual difficulty'" of distinguishing between union expenditures germane to collective bargaining and those that are not germane. Br. 56 (quoting *Harris*, 134 S. Ct. at 2632). With respect, that view lacks support. Since *Abood* was decided in 1977, this Court has decided two cases drawing the line between chargeable and nonchargeable expenses for public employees (*Lehnert* and *Locke*), and one other case addressing that issue under the RLA (*Ellis* v. *Railway Clerks*, 466 U.S. 435 (1984)). *Locke* was unanimous; *Ellis* was 8-1; and *Lehnert* was 8-1 on the result for a number of the challenged expenditures.

Overruling *Abood*, moreover, would not free courts from having to apply the "germaneness" requirement, because the same issue arises for private-sector employers under the NLRA. *Beck*, 487 U.S. at 745, 762-763. And in neither context is it particularly difficult in the mine-run of cases to distinguish between union activities directed at an employer as part of bargaining, contract administration, and grievance adjustment, and speech directed to the broader political arena. Cf. *Keller*, 496 U.S. at 15-16. Any residual concerns or conceptual difficulty should be addressed by refining the "germaneness" requirement, not by sweeping away decades of precedent authorizing fees even for activities that are clearly constitutionally chargeable.

3. Most troubling, overruling *Abood* would invalidate numerous state collective-bargaining frameworks erected in reliance on this Court's longstanding, repeated pronouncements that agency fees are permissible. See Att'y Gen. of Cal. Br. 45-46; Union Resps. Br. 32-34. That would require public employers and unions to find new sources of funding—for example, by raising dues for union members—to subsidize employees who elect to abstain from paying for a free benefit. Upending decades of settled expectations would thus inflict substantial costs and disruption on state and local governments.

II. THE NOTICE PROCEDURE PERMITTED BY CALIFORNIA LAW DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners briefly contend (Br. 60-63) that the procedure under California law for declining to pay fees for nonchargeable expenses—essentially, checking a box on a form and mailing it in—violates their First Amendment right not to be terminated from employment for refusal to support the union's political or ideological activities. That argument lacks merit.

This Court first held in *Street* in 1961 that an objection to paying nonchargeable expenses must "affirmatively be made known to the union by the dissenting employee," 367 U.S. at 774, and it has adopted the same rule in the context of public employers, see *Hudson*, 475 U.S. at 306 & n.16. Employees, however, must have a clear, simple opportunity to object each year to the portion of a fee that is nonchargeable. As this Court explained in *Knox*, it is constitutionally "tolerable" to give employees "one opportunity per year" to object "if employees are able at the time to make an informed choice." 132 S. Ct. at 2291.

Contrary to petitioners' evident assumption, an individual often must interpose an objection to invoke a constitutional right, even for many rights deemed fundamental. For example, in criminal trials, most rights must be invoked by the criminal defendant, which is why unobjected-to claims are reviewed only for plain error. See Fed. R. Crim. P. 52(b). A failure to raise a timely objection to the denial of a constitutional right in state court generally precludes federal habeas review, precisely because States may permissibly condition federal rights on timely objections. *Wainwright* v. *Sykes*, 433 U.S. 72, 86-88 (1977). Like-

wise, in civil litigation, a party must affirmatively object that a court lacks personal jurisdiction, see Fed. R. Civ. P. 12(h)(1), must affirmatively opt out of a Rule 23(b)(3) class action, Fed. R. Civ. P. 23(c)(2)(B)(v), and must request a jury trial, see Fed. R. Civ. P. 38(d). And when the government takes an individual's property, she must affirmatively seek just compensation through the procedure that the government has established. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985).

Of course, if the mechanism for invoking a constitutional right were unduly burdensome, it would raise a serious constitutional question. But the procedure authorized by California law is nowhere close to the line. The notice in the record, for example, states in plain language that the employee can obtain "a rebate of the nonchargeable portion of [the] fees." J.A. 663-664. The employee is asked only to check a box and mail in a form. It is difficult to believe that anyone with a genuine objection would find that annual procedure overly taxing. And if an objecting employee challenges the union's calculations, the union has the burden of proving the percentage of chargeable expenses. *Hudson*, 475 U.S. at 306.

Petitioners cite no general constitutional principle, much less a "venerable" one (Br. 60), suggesting that requiring employees to state an objection is unlawful, but rather rely primarily on the latest social-science theories. See Pet. Br. 61 (quoting Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 8 (2009)). The First Amendment's prohibition on the "abridg[ment]" of speech, however, does not encompass "nudges."

The First Amendment protects those who truly object to subsidizing the union's political activities; it is not designed for public employees who are so indifferent that they do not make the effort to check a box and mail in a form. Although courts "do not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utils. Comm'n*, 301 U.S. 292, 307 (1937), no such presumption is required where an employee is provided clear notice and a simple way to object, yet does nothing.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 29 U.S.C. 158 (1940) provides in pertinent part:

Unfair labor practices by employer defined.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.

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3. 29 U.S.C. 158 provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

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(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and con-

ditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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4. 45 U.S.C. 152 provides in pertinent part:

General duties

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Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other

member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of

the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided*, *however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided*, *further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

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5. Cal. Gov't Code § 3540 (West 2010) provides:

Purpose of chapter

It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

It is the further intention of the Legislature that this chapter shall not restrict, limit, or prohibit the full exercise of the functions of any academic senate or faculty council established by a school district in a community college to represent the faculty in making recommendations to the administration and governing board of the school district with respect to district policies on academic and professional matters, so long as the exercise of the functions does not conflict with lawful collective agreements.

It is further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that this legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the "Public Employment Relations Board."

6. Cal. Gov't Code § 3543.2 (West Supp. 2015) provides:

Scope of representation; requests to meet and negotiate

(a)(1) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to former

Section 22316 of the Education Code, as that section read on December 31, 1999, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code.[1]

(2) A public school employer shall give reasonable written notice to the exclusive representative of the public school employer's intent to make any change to matters within the scope of representation of the employees represented by the exclusive representative for purposes of providing the exclusive representative a reasonable amount of time to negotiate with the public school employer regarding the proposed changes.

(3) The exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent those matters are within the discretion of the public school employer under the law.

(4) All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, except that this section does not limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

(b) Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures

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[1] Internal Revenue Code sections are in Title 26 of the U.S.C.A.

for disciplinary action, other than dismissal, including a suspension of pay for up to 15 days, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, Section 44944 of the Education Code shall apply.

(c) Notwithstanding Section 44955 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding procedures and criteria for the layoff of certificated employees for lack of funds. If the public school employer and the exclusive representative do not reach mutual agreement, Section 44955 of the Education Code shall apply.

(d) Notwithstanding Section 45028 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding the payment of additional compensation based upon criteria other than years of training and years of experience. If the public school employer and the exclusive representative do not reach mutual agreement, Section 45028 of the Education Code shall apply.

(e) Pursuant to Section 45028 of the Education Code, the public school employer and the exclusive representative shall, upon the request of either party, meet and negotiate a salary schedule based on criteria other than a uniform allowance for years of training and years of experience. If the public school employer and the exclusive representative do not reach mutual agreement, the provisions of Section 45028 of the Education Code requiring a salary schedule based

upon a uniform allowance for years of training and years of experience shall apply. A salary schedule established pursuant to this subdivision shall not result in the reduction of the salary of a teacher.

7. Cal. Gov't Code § 3544.9 (West 2010) provides:

Exclusive representative; duty

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

8. Cal. Gov't Code § 3546 (West 2010) provides:

Member of recognized employee organization or payment of fair share service fee; condition of employment

(a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee

organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Boards, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.

(b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.

(c) The arrangement described in subdivision (a) shall remain in effect unless it is rescinded pursuant to subdivision (d). The employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board.

(d)(1) The arrangement described in subdivision (a) may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit, the signatures are obtained in one academic year. There shall not be more than one vote

taken during the term of any collective bargaining agreement in effect on or after January 1, 2001.

(2) If the arrangement described in subdivision (a) is rescinded pursuant to paragraph (1), a majority of all employees in the negotiating unit may request that the arrangement be reinstated. That request shall be submitted to the board along with a petition containing the signatures of at least 30 percent of the employees in the negotiating unit. The vote shall be conducted at the worksite by secret ballot, and shall be conducted no sooner than one year after the rescission of the arrangement under this subdivision.

(3) If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote to rescind or reinstate in a manner that it shall prescribe in accordance with this subdivision.

(4) The cost of conducting an election under this subdivision to reinstate the organizational security arrangement shall be borne by the petitioning party and the cost of conducting an election to rescind the arrangement shall be borne by the board.

(e) The recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section. The recognized employee organization shall have the exclusive right to determine whether any such action or proceeding shall or shall not be compromised, resisted, defended, tried,

or appealed. This indemnification and hold harmless duty shall not apply to actions related to compliance with this section brought by the exclusive representative of district employees against the public school employer.

(f) The employer of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit, regardless of when that employee commences employment, so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in Chicago Teachers Union v. Hudson (1986) 89 L.Ed. 2d 232.

9. Cal. Code Regs. tit. 8, § 32992 (2015) provides:

Notification of Nonmember.

(a) The exclusive representative shall provide annual written notice to each nonmember who will be required to pay an agency fee. The notice shall include:

(1) The amount of the exclusive representative's dues and the agency fee;

(2) The percentage of the agency fee amount that is attributable to chargeable expenditures and the basis for this calculation;

(3) The amount of the agency fee to be paid by a nonmember who objects to the payment of an agency fee amount that includes nonchargeable expenditures (hereinafter referred to as an "agency fee objector"); and

(4) Procedures for (A) objecting to the payment of an agency fee amount that includes nonchargeable expenditures and (B) challenging the calculation of the nonchargeable expenditures.

(b)(1) The calculation of the chargeable and nonchargeable expenditures will be based on an audited financial report, and the notice will include either a copy of the audited financial report used to calculate the chargeable and nonchargeable expenditures or a certification from the independent auditor that the summarized chargeable and nonchargeable expenditures contained in the notice have been audited and correctly reproduced from the audited report, or

(2) the calculation of the chargeable and nonchargeable expenditures may be based on an unaudited financial report if the exclusive representative's annual revenues are less than $50,000 and a nonmember is afforded a procedure sufficiently reliable to ensure that a nonmember can independently verify that the employee organization spent its money as stated in the notice.

(c) Such written notice shall be sent/distributed to the nonmember either:

(1) At least 30 days prior to collection of the agency fee; or

(2) Concurrent with the initial agency fee collection provided escrow requirements in Section 32995 are met; or

(3) In the case of public school employees, where the agency fee year covers the traditional school year, on or

before October 15 of the school year, provided escrow requirements in Section 32995 are met.

10. Cal. Code Regs. tit. 8, § 32993 (2015) provides:

Exclusive Representative's Objection Procedure.

Each exclusive representative that has an agency fee provision shall administer an Objection Procedure in accordance with the following:

(a) An agency fee objection shall be filed in writing with the designated representative of the exclusive representative.

(b) The procedure shall allow at least 30 days following distribution of the notice required under Section 32992 of these regulations for the filing of an agency fee objection.

11. Cal. Code Regs. tit. 8, § 32994 (2015) provides:

Exclusive Representative's Challenge Procedure.

(a) An agency fee payer who disagrees with the exclusive representative's determination of the chargeable expenditures contained in the agency fee amount and who files a timely agency fee challenge with the exclusive representative shall be hereafter known as an "agency fee challenger." An agency fee challenger may file an unfair practice charge that challenges the determination of the chargeable expenditures contained in the agency fee amount; however, no complaint shall issue until the agen-

cy fee challenger has first exhausted the Exclusive Representative's Challenge Procedure. No agency fee challenger shall be required to exhaust the Exclusive Representative's Challenge Procedure where it is insufficient on its face.

(b) Each exclusive representative that has an agency fee provision shall administer a Challenge Procedure in accordance with the following:

(1) An agency fee challenge shall be filed in writing with the official designated by the exclusive representative in the annual notice.

(2) The procedure shall allow at least 30 days following distribution of the notice required under Section 32992 of these regulations for the filing of an agency fee challenge.

(3) Upon receipt of an agency fee challenge, the exclusive representative shall within 45 days of the last day for filing a challenge request a prompt hearing regarding the agency fee before an impartial decisionmaker.

(4) The impartial decisionmaker shall be selected by the American Arbitration Association or the California State Mediation Service. The selection between these entities shall be made by the exclusive representative.

(5) Any party may make a request for a consolidated hearing of multiple agency fee challenges based on case similarities, including but not limited to, hearing location. At any time prior to the start of the hearing, any party may make a motion to the impartial decisionmaker challenging any consolidation of the hearing.

(6) The exclusive representative bears the burden of establishing the reasonableness of the amount of the chargeable expenditures.

(7) Agency fee challenge hearings shall be fair, informal proceedings conducted in conformance with basic precepts of due process.

(8) All decisions of the impartial decisionmaker shall be in writing, and shall be rendered no later than 30 days after the close of the hearing.

(9) All hearing costs shall be borne by the exclusive representative, unless the exclusive representative and the agency fee challenger agree otherwise.