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

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

California law requires every teacher working in most of its public schools to financially contribute to the local teachers' union and its state and national affiliates in order to subsidize expenses the union claims are germane to collective bargaining. California law also requires public school teachers to subsidize expenditures unrelated to collective bargaining unless a teacher affirmatively objects and then renews his or her opposition in writing every year. The questions presented are:

1. Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

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INTEREST OF THE AMICUS

The National Right to Work Legal Defense Foundation, Inc.,[1] is a nonprofit organization that provides free legal aid to individuals whose rights are infringed by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory fee requirements. Foundation attorneys have represented individuals in almost all of the compulsory union fee cases that have come before this Court,[2] including

[1] Pursuant to Rule 37.6, the Foundation affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Foundation, its members, or its counsel made a monetary contribution to its preparation or submission. All counsel of record have consented to this filing through blanket consents filed with the Court.

[2] *See* http://www.nrtw.org/en/foundation-cases.htm (last visited Sept. 8, 2015).

Knox v. SEIU, Local 1000, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014). The Foundation submits this brief to urge the Court to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

SUMMARY OF ARGUMENT

This Court has already identified why *Abood* should be overruled: because collective bargaining with government is a political activity and because *Abood* is unworkable in practice. *See Harris,* 134 S. Ct. at 2632-34. The Foundation addressed why the record here amply supports *Harris'* conclusions in its amicus brief supporting certiorari, and will not repeat those points again here, but incorporates them by reference.

The Foundation will instead address a single, dispositive point: the power of exclusive representation is a great benefit to unions that assists them with recruiting and retaining dues-paying members. Exclusive representation is an extraordinary power because it grants unions agency authority to speak and contract for all employees in a workplace—whether they approve or not—and compels government policymakers to listen to that speech. That power assists unions with increasing their membership ranks, as employees are far more likely to join an advocacy organization that controls their relations with their employer than an organization that does not.

This point is dispositive because *Abood*'s "free rider" rationale is predicated on the opposite presump-

tion: that exclusivity is a burden imposed on unions that impedes their ability to recruit members. This supposition turns reality on its head. Far from being an imposed burden, exclusive representation is a power that unions voluntarily seek for their own aggrandizement. And far from impairing recruitment, that mantle cloaks unions with government-conferred advantages in retaining members of which voluntary advocacy groups could only dream.

Abood's free rider rationale cannot satisfy the constitutional scrutiny now required by this Court's precedents, which requires showing that compulsory fees "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289). *First*, compulsory fees are unnecessary for exclusive representation because unions will seek, and jealously guard, this crown irrespective of whether they can tax every employee subject to their reign. *Second*, far from being a least restrictive means, compulsory fees exacerbate the associational injury the government inflicts by forcing employees to accept an exclusive agent for lobbying the government.

The Court should overrule *Abood*. And to prevent union resistance to this holding, it should be made clear that unions cannot seize any fees from employees, for any purpose, without the employees' express consent.

ARGUMENT

A. The Court Must Reevaluate *Abood*'s Free Rider Rationale, Notwithstanding *Stare Decisis*, Because *Abood* Failed to Evaluate Whether This Rationale Satisfies the Exacting Scrutiny Required by This Court's Compelled-Association Cases.

Abood's "free-rider" rationale for compulsory union fees postulates that the fees are necessary for exclusive representation because a union's authority to represent all employees creates an incentive for employees not to join or support the union. *See* 431 U.S. at 221-22. The Court should now reevaluate that rationale, and can do so notwithstanding principles of *stare decisis*, because *Abood* failed to determine if that rationale satisfies the constitutional test required by this Court's precedents.

The Court has consistently held that, to satisfy First Amendment scrutiny, forms of compelled expressive association must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing numerous cases). The Court has applied that standard, or similar formulations, to instances of compelled association involving private organizations, *see id.*; *Boy Scouts of America v. Dale*, 530 U.S. 640, 658-59 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 577-78 (1995), and in-

volving political parties, *see Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Rutan v. Republican Party*, 497 U.S. 62, 72 (1990); *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996).

The Court held that this standard applies to compelled association with unions in *Knox*, 132 S. Ct. at 2289, and *Harris*, 134 S. Ct. at 2639. This was for good reason. Forcing individuals to support an organization to petition the government over matters of public policy is self-evidently a form of compelled expressive association. It is indistinguishable from forcing employees to support a mandatory lobbyist, for "in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government." *Harris*, 134 S. Ct. at 2632-33. "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 132 S. Ct. at 2289 (quoting *Ellis v. Ry. Clerks,* 466 U.S. 435, 455 (1984)).

Yet, *Abood* inexplicably failed to apply exacting First Amendment scrutiny to compulsory fees for bargaining with government. Among other things, *Abood* never evaluated whether the free rider argument satisfies the narrow tailoring requirement—*i.e.*, never evaluated whether exclusive representation can be "'achieved through means significantly less restrictive of associational freedoms'" than com-

pulsory union fees, *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

Abood's failure to apply the proper level of scrutiny did not go unnoticed at the time. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, sharply criticized the majority opinion for not applying the exacting scrutiny applied in *Elrod*. *See* 431 U.S. at 262-64 (Powell, J., concurring in the judgment); *accord id.* at 242-44 (Rehnquist, J., concurring).

Abood's lack of constitutional analysis has only grown more aberrant. *Abood* now conflicts with a host of subsequent precedents concerning the constitutional scrutiny applicable to instances of compelled-expressive association—*i.e.*, *Harris*, *Knox*, *Dale*, *O'Hare*, *Hurley*, *Rutan*, and *Roberts*.

Abood's analysis (or lack thereof) can and should be revisited for this reason. *Cf. Citizens United v. FEC*, 558 U.S. 310, 348, 363 (2010) (overruling prior decision, in part, because it conflicted with other lines of precedent). The Court should now do, for the first time, what it failed to do in *Abood*: apply exacting scrutiny to compulsory union fees for bargaining with government, and find the free rider rationale for those fees lacking.

B. Exclusive Representation Is a Boon to Unions That Enhances Their Ability to Recruit and Retain Members.

1. Exclusive Representation Grants Unions the Extraordinary Power to Speak for Others and to Compel Government to Listen and Respond to That Speech.

a. California's public sector labor law, like other labor laws, vests unions with an extraordinary power. If a union meets certain qualifications, it can act as the "exclusive representative" of all employees in a bargaining unit for purposes of dealing with their government employer over certain public policies. *See* Cal. Gov't Code § 3543.1(a).

An exclusive representative is a mandatory agent, vested with legal authority to speak and contract for all employees in a unit, whether each employee approves or not. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944).[3] This mandatory agency relationship is akin to that between trustee and beneficiary, and to "the relationship . . . between attorney and client." *ALPA v. O'Neill*, 499 U.S. 65, 74-75 (1991).

However, unlike voluntary agency relationships, "an individual employee lacks direct control over a union's actions." *Teamsters Local 391 v. Terry*, 494

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[3] Case law concerning the National Labor Relations Act is apposite because California's labor laws, like most public sector labor laws, are based on the NLRA. *See Firefighters Union v. City of Vallejo*, 12 Cal.3d 608, 616-17, 526 P.2d 971 (Cal. 1974).

U.S. 558, 567 (1990). Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

As an exclusive representative, a union's authority to speak and contract for all employees is "exclusive" in the sense that "only that employee organization may represent that unit in their employment relations with the public school employer." Cal. Gov't Code § 3543.1(a). The government employer is prohibited from dealing with individual employees, or with other organizations, over policies deemed mandatory subjects of bargaining. *See id.* at § 3543.3.

Overall, an exclusive representative's "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). An exclusive representative's powers are also comparable to those of a cartel, because exclusive representatives are vested with monopoly power to deal with the government for particular individuals. *See* Morgan O. Reynolds, *Labor Unions*;[4] Trevor Burrus, *Harris v. Quinn and the Ex-*

[4] *Available at* http://www.econlib.org/library/Enc/LaborUnions.html (last visited Sept. 8, 2015).

traordinary Privilege of Compulsory Unionization, 70 N.Y.U. Ann. Surv. Am. Law 283, 289 (2015).[5]

b. Exclusive representative status not only grants unions authority to speak for all employees, but also compels the government to listen and respond to that speech. California law requires that school districts "meet and negotiate" with exclusive representatives, which

> means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties . . .

Cal. Gov't Code § 3540.1(h). School districts are prohibited from changing policies that are subjects of bargaining without first notifying and negotiating with the union. *Id*. at § 3543.2(a)(2).

This authority is extraordinary. Few, if any, other advocacy organizations are vested with the power to force government policymakers to meet and negotiate with them over public policies, much less bind government to follow certain policies. Even vaunted

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[5] *Available at* http://object.cato.org/sites/cato.org/files/articles/burrus-nyuasal-v70n3.pdf (last visited Sept. 8, 2015).

political powerhouses like the AARP and National Rifle Association lack authority to force government to negotiate with them over retirement or firearm policies that affect their members.

A union's exclusive authority to speak for all employees in a unit, coupled with its authority to compel government policymakers to listen and respond to its speech, dramatically increases a union's ability to further its policy agenda. "The loss of individual rights for the greater benefit of the group results in a *tremendous increase* in the power of the representative of the group—the union." *American Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (emphasis added). Here, a teacher union's status as an exclusive representative gives it far greater ability to pursue its agenda concerning a school district's compensation, evaluation, transfer, reassignment, and class size policies—all mandatory subjects of bargaining, Cal. Gov't Code § 3543.2(a)(1)—than the union would have as a voluntary advocacy group that spoke for only its members and that school districts could ignore.

c. Unions naturally use their powers as exclusive representatives to obtain things and policies that benefit the union and its officials. For example, unions can bargain for government employers to use union healthcare plans, where union officials often

sit as paid trustees, that policymakers would not use but for the unions' status.[6]

Unions often bargain for special privileges for their officials and agents, too. This includes "super-seniority" for union agents, *see Pasadena Area Cmty. Coll. Dist.*, 7 PERC ¶ 14205, 1983 WL 862747, *6 (PERB July 26, 1983), and paid "release time" for union agents to engage in union representational activities, *see* Cal. Gov't Code §§ 3543.1(c), 3569, 3569.5; JA 172, 243-44 (release time agreements); 5 U.S.C. § 7131 (federal release time statute). In fiscal year 2012 alone, the federal government granted union agents 3,439,449 hours of paid time to perform union business, which cost taxpayers about $157,196,468.[7]

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[6] Wisconsin's experience is illustrative. Prior to passage of 2011 Wisconsin Act 10, the Wisconsin Education Association Council bargained for school districts to purchase health insurance from the WEA Trust, instead of shopping for the best available plan in the market. After Act 10 prohibited collective bargaining over health benefits, many school districts abandoned the WEA Trust or obtained better terms from it, resulting in substantial savings to taxpayers. *See* Robert M. Costrell, *District Costs for Teacher Health Insurance: n Examination of the Data from the BLS and Wisconsin*, 13-14 (Jan. 2015) *available at* http://www.bushcenter.org/sites/default/files/gwbi-district-costs-for-teacher-health-insurance.pdf (last visited Sept. 9, 2015).

[7] U.S. Office of Pers. Mgmt., *Labor-Management Relations in the Executive Branch*, 10 (Oct. 2014); available at https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf (last visited Sept. 9, 2015).

The government literally pays union officials to bargain with the government.

2. Exclusive Representation Assists Unions with Recruiting and Retaining Members.

A union's unique powers as an exclusive representative facilitate its ability to recruit and retain dues-paying members. *First*, the status alone is advantageous, as individuals are far more likely to join an advocacy organization that has sole authority to speak and deal with their employer, as opposed to one that does not.

Second, exclusive representatives receive government support with recruiting members. They are entitled to detailed lists of personal information about employees they represent. *See* Cal. Gov't Code § 3546(f); *County of L.A. v. L.A. C'nty Empl. Relations Comm'n*, 301 P.3d 1102, 56 Cal.4th 905 (Cal. 2013); JA 243. Unions are also entitled to special access to employees in the workplace. *See* Cal. Gov't Code § 3543.1(b) (granting unions "the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.").

Third, the government usually assists exclusive representatives with obtaining financial support from employees by directly deducting union dues from their paychecks. *See* Cal. Gov't Code § 3543.1(d); *id*. at § 3546; 5 U.S.C. § 7115; 39 U.S.C.A. § 1205. This is a significant privilege, as "'unions face substantial difficulties in collecting funds for political speech without using payroll deductions.'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (quoting *Pocatello Educ. Ass'n v. Heideman,* 504 F.3d 1053, 1058 (9th Cir. 2007). In the words of former NEA General Counsel Robert Chanin:

> [I]t is well recognized that if you take away the mechanism of payroll deduction you won't collect a penny from these people, and it has nothing to do with voluntary or involuntary. I think it has to do with the nature of the beast, and the beasts who are our teachers who are dispersed all over cities who simply don't come up with money regardless of the purpose.

FEC v. NEA, 457 F. Supp. 1102, 1109 (D.D.C. 1978) (quoting the testimony of NEA General Counsel Robert Chanin). "At bottom, the use of the state payroll system to collect union dues is a state subsidy of speech." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013).

Payroll deduction is a particular boon to teacher unions in California because it is effectively *irrevocable*, for school districts are required by law to automatically deduct union dues from the paychecks of

nonmembers. Cal. Gov't Code § 3546(a). Even in jurisdictions where payroll deductions are not mandatory, employees can stop the deductions only during short annual window periods that often differ for each employee.[8] These all-too-common restrictions make it exceedingly difficult for employees to cease financially supporting their exclusive representative, even where compulsory fees are not required.

C. Compulsory Fees Are Not Needed to Induce Unions to Assume the Powers and Privileges of Exclusive Representation.

1. Unions Will Seek Exclusive Representative Power Without Compulsory Fees.

a. *Harris* recognized that "a critical pillar of the *Abood* Court's analysis rests upon an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at

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[8] A typical example is a union allowing employees to stop the deduction of union dues only if they "give written notice to the Company and the Union at least 60 days, and not more than 75 days before any periodic renewal date of this authorization and assignment of my desire to revoke the same." *Anheuser-Busch, Inc. v. Int'l Bhd. of Teamsters, Local 822*, 584 F.2d 41, 42 (4th Cir. 1978); *e.g. Newspaper Guild/CWA v. Hearst Corp.,* 645 F.3d 527, 528-29 (2d Cir. 2011) (15-day revocation window); *Williams v. NLRB*, 105 F.3d 787, 789 (2d Cir. 1996) (10-day revocation window); *NLRB v. U.S. Postal Serv.*, 833 F.2d 1195, 1197 (6th Cir. 1987) (same); *NLRB v. Atlanta Printing Specialties & Paper Prod. Union 527*, 523 F.2d 783, 784 (5th Cir. 1975) (two 15-day revocation windows).

2634. *Abood*'s assumption is unwarranted because the extraordinary powers and privileges that come with being an exclusive representative *are their own reward,* which unions will assume without compulsory fees. Just as there is no need to bribe children with ice cream to induce them to eat cake, there is no need to offer compulsory fees to induce unions to be exclusive representatives.

Empirical evidence bears this out. Exclusive representation exists without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and in the private sector in the nation's twenty-five Right to Work states.[9]

Instructive on this point are recent decisions by the Seventh Circuit and Indiana Supreme Court. Both held that Indiana's statutory ban on compulsory union fees does not unconstitutionally demand services from a union, without just compensation because a union is "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table," *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014), and is "justly compensated by the right to bargain exclusively with the employer." *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014). The same analysis applies here.

Nevertheless, unions often implausibly argue that exclusive representation is a "burden" the govern-

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[9] *See* http://www.nrtw.org/rtws.htm (last visited Sept. 9, 2015).

ment "imposes" on unions. Nothing is further from the truth. Unions *voluntarily* seek the mantle of exclusive representative because of the powers and privileges that come with it. Nothing requires that they do so—unions could petition government on behalf of only their voluntary members if they wished. "[I]t is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation." Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol'y & Econ. Stud. 163, 179 (1995).

Union complaints about the heaviness of the crown they covet cannot be taken seriously. A hypothetical proves the point. Assume a governor proposed relieving unions of their authority to exclusively represent public employees. Would unions rejoice at the prospect of having this ostensible burden lifted from their shoulders, or cry bloody murder and accuse the governor of attempting to undermine their power?[10]

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[10] To the extent the answer is not obvious, experience in Wisconsin makes it so. In 2011, the state enacted Act 10 which, among other things, relieved unions of their authority to exclusively represent public employees over several matters. *See Walker*, 705 F.3d at 643. The unions not only opposed this reform in court, *id.*, but politically opposed it, to include by attempting to recall the Governor. *See* Brian Montopoli, *Scott Walker wins Wisconsin recall election*, (CBS News, June 6, 2012), *available at* http://www.cbsnews.com/news/scott-walker-wins-wisconsin-recall-election/ (last visited Sept. 8, 2015).

b. One of the primary reasons unions covet exclusive representative status is because it facilitates recruiting members, retaining members, and collecting their dues *See* pp.12-14, *supra*. *Abood*'s free-rider rationale inverts reality in speculating that this status frustrates these endeavors. 431 U.S. at 222. The advantages exclusive representation confers on unions far outweigh any minor disadvantages ostensibly caused by the so-called "free rider" incentive.

Simply posing the question makes this clear: are employees more likely to join a union possessing exclusive authority to deal with their employer, or one that lacks that authority? The answer is obviously the former. Employees are far more likely to join and support an organization that controls their relations with their employer than one that does not.

Empirical evidence backs this up. Union membership amongst public employees skyrocketed *after* several states passed laws authorizing their exclusive representation. *See* Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 Cato Journal 87, 96-99 (2010).[11] Union membership rates are far higher in those states that authorized exclusive representation than in those

[11] Available at http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2010/1/cj30n1-5.pdf (last visited Sept. 9, 2015).

states that did not. *Id.* at 106-07. The difference is considerable even absent compulsory fees.[12]

In the private sector in Right to Work states, around 84% of employees exclusively represented by a union are union members, notwithstanding the absence of compulsory fee requirements. *See* Amicus Brief of Mackinac Found. in Supp. of Cert., at 21-22. It is unlikely that anywhere close to 84% of employees are union members at workplaces *not* exclusively represented by a union. Contrary to *Abood*'s supposition, exclusive representative status makes it far more likely that employees will become and remain members of that union.

Because unions will assume the extraordinary powers of exclusive representation without compulsory fee requirements, the requirements are not a "'means significantly less restrictive of associational freedoms,'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289), for government to deal with an exclusive representative. Compulsory union fee requirements fail exacting scrutiny.

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[12] In 2008, public-sector union membership rates were 37.9% in Nevada, 31.6% in Iowa, 27.9% in Florida, and 27.2% in Nebraska, s*ee* Edwards, *supra*, at 106, each of which allow exclusive representation, but ban compulsory fees. By contrast, public-sector union membership rates were far lower in states that ban exclusive representation: 4.2% in Georgia, 5.2% in Virginia, 6.0% in Mississippi, and 8.2% in South and North Carolina. *Id.*

2. An Exclusive Representative's Power to Control Grievance Adjustment Is Another Benefit to a Union, Not a Burden.

The above-stated analysis is equally applicable to an exclusive representative's authority over grievance adjustment. The power that comes with controlling the grievance process far outweighs any negligible free rider costs of doing so.

a. In California, as elsewhere, exclusive representatives may file grievances in their own names and for employees. *See South Bay Union Sch. Dist. v. PERB*, 279 Cal. Rptr. 135 (Cal. Ct. App. 1991). Exclusive representatives also have substantial control over grievances presented by employees, which by law cannot be resolved: (1) without notifying the union and allowing it to participate; (2) through arbitration without the union's involvement; or (3) in a manner inconsistent with the union's contract. Cal. Gov't Code § 3543(b); *cf.* JA 178, 282 (examples of respondent grievance procedures). California law follows "the commonly stated declaration, 'the union owns the grievance.'" Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into A "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 62 (1998).

"Unions *want* unchallenged control over all aspects of the contract, including its grievance procedure and arbitration which they created," and "prefer that the individual employee has no independent rights." *Id.* at 63 (emphasis added). The reason is that control

over contract enforcement grants a union singular control over the employer's policies. *Cf. Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69-70 (1975) (finding that a union "has a legitimate interest in presenting a united front on [grievances] . . . as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests").

That control is a unique privilege in the public sector. While other advocacy groups can petition government over its policies, only unions are empowered to *bind* policymakers to their promises in multi-year enforceable contracts. A teachers' union can force a school district to abide by a particular education policy required in a contract, even if the district's officials wish to change that policy. No other interest group enjoys such control over public policy.

Grievances in the public sector are thus a means for unions to enforce their political deals with government. These means are linked to collective bargaining, for there is little analytical difference between (1) bargaining with government to adopt a policy and (2) compelling government to follow that policy through the contractual mechanisms of grievances and arbitration. *cf. O'Neill*, 499 U.S. at 77 (stating that "[w]e doubt . . . that a bright line could be drawn between contract administration and contract negotiation . . .."). These actions are complementary aspects of the same power.

The two actions are also equally expressive in nature. Grievances concern issues of public policy, and not just the interests of a particular employee. This is especially true given that resolution of a grievance can set a *precedent* applicable to similarly situated employees. A successful union grievance that an individual teacher is contractually entitled to a particular benefit could entitle all teachers in the entire school district to that benefit.

Far from creating a free-rider incentive amongst employees, a union's authority over grievance adjustment creates a strong incentive for employees to join and support the union. An employee will naturally want to stay in the good graces of union officials with wide discretion to determine if the employee's right to certain employment terms is enforced through the grievance and arbitration process.

b. In contrast to these benefits, the free rider costs that come with controlling the grievance process are negligible. To show a free rider cost, a union must prove that its conduct "would be . . . different if it were not required to negotiate on behalf of the nonmembers as well as members." *Harris*, 134 S. Ct. at 2637 n.18. Union grievance processing would be little different absent its duty to represent all employees.

Most grievances present no free rider cost whatsoever because they are filed by the union or its members. Only that small percentage of grievances that involve a nonmember grievant, who demands union

assistance with his grievance,[13] could conceivably present a free rider cost.

Even in those rare instances, there is little free rider cost. Unions do not have to take employee grievances to arbitration. *See Vaca v. Sipes*, 386 U.S. 171, 191 (1967); *IBEW v. Foust*, 442 U.S. 42, 51 (1979). Rather, unions have wide discretion to choose whether, and to what degree, to pursue grievances. *See O'Neill,* 499 U.S. at 67; *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964). In exercising this wide discretion, unions can consider not only the merits of the nonmember's grievance, but also "such factors as the wise allocation of its own resources, its relationship with other employees, and its relationship with the employer." *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003); *see Humphrey*, 375 U.S. at 349-50 (union could favor one employee group over another in a grievance).

Unions cannot claim that enforcing nonmember grievances is an involuntary act compelled by law. Unions have wide discretion not to pursue nonmember grievances. And when a union chooses to pursue a nonmember grievance, it can be because the grievance furthers the interests of the union, its members, or the bargaining unit. That does not present any free rider cost.

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[13] There is no free rider problem when a union inserts itself into a nonmember's grievance against the nonmember's will.

At most, unions are obligated "not [to] 'arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.'" *Foust*, 442 U.S. at 51 (quoting *Vaca*, 386 U.S. at 191). In other words, unions must give all grievances, filed by members and nonmembers alike, some due process and not deny them for illegitimate reasons. This minor duty pales in comparison to the benefits unions attain from their near dictatorial control over the grievance process.

D. Compulsory Fees Exacerbate the Associational Injury That Exclusive Representation Inflicts on Employee Associational Rights.

1. Compulsory Fees Perversely Force Employees to Pay a Union to Infringe on Their First Amendment Freedoms.

a. There is another reason compulsory fees are not a "'means significantly less restrictive of associational freedoms,'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289), to achieve exclusive representation. Compulsory fees are not only unnecessary for exclusive representation, but *additionally* restrict associational freedoms by forcing employees to pay for the suppression of their own rights.

As we have explained, under regimes of exclusive representation, the government compels employees to accept a union as their mandatory agent for dealing with the government, and grants that union authority to speak and contract for them, whether they approve or not. *See* pp. 7-9, *supra*. Employees are effectively required to accept a government-appointed

lobbyist.[14] This necessarily compels employees to associate with both with the union and its advocacy.

Exclusive representatives often pursue bargaining agendas with which represented employees disagree and from which they do not benefit. *See Knox*, 132 S. Ct. at 2289 (quoting *Ellis*, 466 U.S. at 455) (finding that, under an agency shop, "'[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree'"). *Abood* itself recognized as much. 431 U.S. at 222. Even in private sector bargaining, "[t]he complete satisfaction of all who are represented is hardly to be expected" because "inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). "Conflict between employees represented by the same union is a recurring fact." *Humphrey*, 375 U.S. at 349-50.

The degree to which employees disagree with their mandatory agent's advocacy is amplified in the public sector, where a "union takes many positions during collective bargaining that have powerful political

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[14] To "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying especially as representatives of a particular interest group." *Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011). An exclusive representative's function is quintessential "lobbying": meeting and speaking with public officials, as an agent of interested parties, to influence public policies.

and civic consequences." *Knox*, 132 S. Ct. at 2289; *see* Pet. Br. at 24-27 (citing examples). In California, exclusive representatives bargain with school districts over "hours of employment," "class size," teacher "leave, transfer, and reassignment policies," and evaluation policies. Cal. Gov't Code § 3543.2(a)(1). Exclusive representatives also have the "right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks." *Id.* at § 3543.2(a)(3). Teachers may disagree with their bargaining agent's advocacy concerning these policies not only because of how it affects their jobs, but also because it conflicts the teachers' convictions about how best to educate children.

For states to force nonmembers to also subsidize their government-imposed agent and its unwanted advocacy only compounds the associational injury that exclusive representation inflicts on nonmembers. It is akin to requiring that kidnapping victims pay their captors for room and board.

Abood was wrong to say that nonmembers "free ride" on their exclusive representatives. 431 U.S. at 221. In reality, nonmembers are forced by government to go on a "forced ride" with a union advocate to a policy destination they do not wish to travel. *Abood*, in holding that exclusive union representation justifies compulsory union fees, used one constitutional injury to justify yet another.

b. The same analysis applies to an exclusive representative's power to control grievance processing. Nonmembers are largely stripped of their rights to speak and act for themselves in disputes with their employer, and those powers are transferred to their exclusive representative. *See* p.19, *supra*. Due to a "union's exclusive control over the manner and extent to which an individual grievance is presented . . . the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). "The individual is not only barred from bargaining for better terms, but enforcement of the terms bargained by the union on his or her own behalf is only through the grievance procedure and arbitration which the union controls." Summers, *supra*, 20 Comp. Lab. L. & Pol'y J. at 68-69. "No other system so subordinates the individual worker's rights to collective control." *Id*. at 69.

It is wrongful for the government to coerce employees who do *not* want a union to control their individual rights to "petition the Government for a redress of grievances," U.S. Const. amend. I, to pay for the union's exercise of that unwanted control. It not only adds insult to injury, but violates the well-established principle that individuals do not have to pay for services they were forced to accept against their will. *See* Restatement (Third) of Restitution & Unjust Enrichment, § 2(4) ("[l]iability in restitution may not subject an innocent recipient to a forced ex-

change: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse"); *Force v. Haines*, 17 N.J.L. 385, 386-87 (1840) ("Now the great and leading rule of law is, to deem an act done for the benefit of another, without his request, as a voluntary courtesy, for which, no action can be sustained.").

2. Exclusive Representation Compels Association and Is Subject to Constitutional Scrutiny.

a. Respondent CTA argued below that compulsory fees do not compound the associational injury exclusive representation inflicts on employees because exclusive representation does not impinge at all on employees' First Amendment rights. *See* CTA App. Br. at 17-20, No. 13-57095, EFC No. 35-1 (9th Cir. Sept. 2, 2014). This is untenable. Exclusive representation *does* impinge on employees' associational rights, though this impingement was deemed justified by a state's interest in workplace "labor peace," *Abood*, 431 U.S. at 220-21.

The government forcing individuals to accept a union as their *mandatory agent* inherently associates individuals with that union. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (holding that "regardless of whether [an employee] can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights" because the employee is "thrust unwillingly into an agency relationship"). Similarly, the

government granting a union authority to *speak and contract* for employees associates those employees with that union's speech and contracts. That is the whole point of the exclusive representative designation—to establish that the union "represent[s] not only members of the union, but nonunion workers or members of other unions as well." *Douds*, 339 U.S. at 401. "The purpose of exclusive representation is to enable the workers to speak with a single voice, that of the union." *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 720 (7th Cir. 1987).

A contrary conclusion is logically impossible—*i.e.*, that employees are exclusively represented by a union, but not associated with it or its speech. By definition, a "representative" is "someone who stands for or acts on behalf of another." *Black's Law Dictionary* (10th ed. 2014). To assert that a union represents all employees, but employees are not associated with union actions taken on their behalf, makes as much sense as saying that a principal is not associated with the acts of its agent, or that clients are not associated with positions taken by their lawyer.

Overall, "[t]he collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182. "[I]ndividual employees are required by law to sacrifice rights which, in some cases, are valuable to them . . . for the greater benefit of the group," which "results in a tremendous increase in the power of the

representative of the group—the union." *Douds*, 339 U.S. at 401.

Subordination of individual rights to a collective is antithetical to the First Amendment, which exists to protect individual rights *from* majority rule. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). "The reason our Constitution endowed individuals with freedom to think and speak and advocate was to free people from the blighting effect of either a partial or a complete governmental monopoly of ideas." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 796-97 (1961) (Black, J., dissenting). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976).

b. CTA's reliance below on *Minnesota State Board v. Knight*, 465 U.S. 271 (1984), is of no avail. CTA App. Br. at 18. That "case involves no claim that anyone is being compelled to support [union] activities." *Id.* at 291 n.13. *Knight* instead addressed whether it is constitutional to *exclude* employees from union meet and confer sessions with public officials. "The question presented . . . [was] whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* at 273. The "[nonmembers'] principal claim [was] that they have a right to force officers of the state acting in an official policy-making capacity to listen to them in a particular

formal setting." *Id*. at 282. This Court disagreed, holding that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id*. at 283.

This holding has no bearing here. The issue in this case—whether employees can be compelled to support an exclusive representative—differs from the alleged restriction on speech at issue in *Knight*.[15] And the fact that government can choose to whom it *listens* under *Knight* does not mean that government may dictate who *speaks* for individuals.

c. Finally, CTA's position that "exclusive representation works no First Amendment infringement," CTA App. Br. at 20, is unacceptable because of its vast implications. It would allow government to impose exclusive representatives for *any rational basis*. The government would have free reign to appoint mandatory agents to represent almost any profession in their relations with government.

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[15] The associational argument that *Knight* addressed also concerned only whether *excluding* employees from union bargaining sessions infringed on their associational rights by indirectly pressuring employees to join the union. 465 U.S. at 288 (holding that "Appellees' speech and associational rights, however, have not been infringed by Minnesota's *restriction of participation* in 'meet and confer' sessions to the faculty's exclusive representative") (emphasis added). *Knight* never addressed whether an exclusive representative is a mandatory expressive association.

This harm is not hypothetical. Several states already compel citizens who operate *childcare businesses in their own homes* to accept exclusive representatives for lobbying the states over their childcare policies.[16] Oregon and Washington compel proprietors of adult foster homes to accept exclusive representatives to bargain with the states over Medicaid reimbursement rates for their services. *See* Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029. If states can lawfully collectivize home-based businesses, they can politically collectivize virtually anyone.

In *Harris*, this Court reiterated its reluctance to "'sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,'" or to "'practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades.'" 134 S. Ct. at 2629 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J. dissenting)). "'Those brigades are not compatible with the First Amendment.'" *Id*. CTA's position gives legislatures "carte blanche" to impose exclusive representatives on citizens, and thus must be rejected.

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[16] *E.g.* Conn. Gen. Stat. § 17b-705 *et seq*.; 5 Ill. Comp. Stat. 315/3; Md. Code Ann. Fam. Law § 5-595 *et seq*.; Mass. Gen. Laws ch. 15D; § 17; Minn. Stat. § 179A.54 *et seq*.; N.Y. Lab. Law § 695-a *et seq*.; Or. Rev. Stat. § 329A.430; Wash. Rev. Code § 41.56.028.

In short, exclusive representation impinges on employee associational rights and, like any other mandatory association, is subject to constitutional scrutiny, *see Knox*, 132 S. Ct. at 2289. Irrespective of whether it satisfies that scrutiny,[17] employees should not be made to pay unions to impinge on their constitutional rights. One wrong cannot justify another.

E. The Court Should Make Clear That Unions Cannot Seize Any Fees from Employees Without Their Express Consent.

Abood should be overruled for the above-stated reasons, and those identified in *Harris*, 134 S. Ct. at 2632-34. If the Court overrules *Abood*, it should be made clear that unions cannot seize *any* fees from nonmembers, without their *express consent*, to prevent union resistance to this holding.

First, it should be made explicit that unions cannot force nonmembers to pay any type of fee, for any type of activity. Any ambiguity on this point will inevitably result in unions seizing some type of fee from nonmembers. When unions do, the same problems and disputes that bedevil agency fees will arise. This includes disputes over whether the fee is lawfully chargeable, *see Harris*, 134 S. Ct. at 2633, and disputes over whether nonmembers were provided with

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[17] *Abood*'s finding that exclusive representation of full-fledged employees is justified by the "labor peace" interest, 431 U.S. at 220-21, is not challenged in this case and is not at issue.

adequate procedures and disclosures under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).[18]

These problems with compulsory fees, no matter the type or amount, are unresolvable given the underlying incentives at work. Unions have strong financial incentives to extract the greatest fee possible from nonmembers by pushing the envelope on chargeability under any formulation, and imposing burdensome procedures on nonmembers. In contrast, employees have little financial incentive to challenge excessive union fees, or burdensome procedures, because the money at stake for each employee is comparatively low and the time and expense of litigation is high.[19] Given these incentives, unions inevitably

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[18] Foundation attorneys have litigated hundreds of cases before the courts and administrative agencies concerning union failures to comply with *Hudson*'s requirements. *See*, *e.g.*, *Cummings v. Connell*, 402 F.3d 936 (9th Cir. 2005); *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042 (9th Cir. 2003); *UFCW Local 700 (Kroger Ltd. P'ship)*, 361 NLRB No. 39, *petition for review filed*, No. 14-1185 (D.C. Cir. 2014).

[19] Litigating compulsory union fee "cases is expensive." *Harris,* 134 S. Ct. at 2633. For example, the attorneys' fees and expenses awarded in *Knox* were $1,021,176 and $15,412.93, respectively. *Knox v. Chiang*, No. 2:05-CV-02198, 2013 WL 2434606, at *15 (E.D. Cal. June 5, 2013). And in *Beck v. Communications Workers*, which challenged compulsory fees in the private sector, there were more than "six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions" in the district court alone. 776 F.2d 1187, 1194 (4th Cir. 1985), *aff'd on reh'g*, 800 F.2d 1280 (1986), *aff'd,* 487 U.S. 735 (1988).

will press the limits of any framework that permits fee seizures, leading to endless litigation and continual violations of employee First Amendment rights.

This Court should finally heed Justice Black's prophetic dissent in *Street*, 367 U.S. at 795-96, in which he warned of the futility of attempting to fashion a remedy that permits unions to seize some fees from nonmembers, but not others. The Court should make clear that nonmembers cannot be required to pay any dues, fees, or assessments to a union.

Second, if *Abood* is overruled, the Court should hold that union fees cannot be collected from employees without their express consent, and that objection, or "opt-out," requirements are unconstitutional.[20] While it may appear obvious that unions can seize no fees from nonmembers if this Court invalidates a union's legal authority for so doing, unions may attempt to resist this Court's holding by seizing

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[20] The Foundation urges that objection requirements be held unconstitutional even if *Abood* is *not* overruled. Opt-out requirements are intrinsically unlawful because unions lack the lawful authority to seize nonchargeable fees from nonmembers in the first place. An opt-out regime is a two-step process. First, a union seizes fees for political and other nonchargeable expenses from nonmembers without their prior consent. Second, the union stops that seizure, or provides a rebate, if an employee objects to the taking. *See* Cal. Gov't Code § 3546(a). Step one is illegal by definition. If an expense is not chargeable to nonmembers under the First Amendment, a union has no lawful authority to seize fees from them for that expense. There is no lawful fee seizure from which to opt out.

fees from nonmembers unless and until they object to the taking. At least one union is trying this gambit against non-employee providers to resist this Court's holding in *Harris*.[21]

Union opt-out requirements will be unconstitutional if *Abood* is overruled because unions will have no lawful right to seize fees from nonmembers, *period*. Unions can exact fees from nonmembers only when the government forces them to pay those fees. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 186-87 (2007). Overruling *Abood* will render unconstitutional the California statutes that permit the seizure of compulsory fees from nonmembers, such as Cal. Gov't Code § 3546(a), and union forced-fee agreements with school districts. Unions will thereafter lack lawful authority to seize fees from nonmember teachers. In fact, unions will have no more legal right to take money from nonmember teachers than they have the right to take money from the pocket of a man on the street. There will be no lawful fee seizures to which nonmembers can be made to object.

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[21] *See* SEIU Healthcare 775NW's Opp. to Mot. for S.J., at 5-7 (*Centeno v. Quigley*, No. 2:14-cv-200 Doc. 43) (W.D. Wash. Oct. 10, 2014) (policy is to seize fees from all personal care providers in Washington unless the provider objects to the taking); *cf. Schlaud v. UAW*, 785 F.3d 1119 (6th Cir.) (refusing to certify class of childcare providers from whom union unlawfully seized fees because of ostensible need for proof of objection to the seizure), *petition for writ of cert. filed*, No. 15-166 (Aug. 6, 2015).

CONCLUSION

Thomas Jefferson believed that to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." I. Brant, *James Madison: The Nationalist* 354 (1948). Thomas Jefferson was right. *Abood* was wrong. *Abood* should be overruled, and five million[22] public employees freed from compulsory union fee requirements.

Respectfully submitted,

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[22] The basis for this estimate is stated in the Foundation's Amicus Brief in Support of Certiorari, p.3, n.3.