No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

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

BRIEF FOR THE STATES OF NEW YORK, ALASKA CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANISHA DASGUPTA
Deputy Solicitor General
VALERIE FIGUEREDO
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
Counsel for Amici Curiae

*Counsel of Record

(Additional Counsel Listed on Signature Page)

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QUESTION PRESENTED

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed that the Constitution permits States to adopt the model of collective bargaining that is widely used in the private sector pursuant to federal labor law. Under this model, a union that employees select to serve as their exclusive representative in collective-bargaining negotiations may charge all represented employees—including those who decline to join the union—an "agency fee" to defray the costs of union collective-bargaining activities benefiting all employees. In reliance on *Abood*, twenty-three States and the District of Columbia have long authorized public-sector collective-bargaining arrangements that include agency-fee provisions.

Amici States address the following question raised by petitioners:

> Whether *Abood* should be overruled, thereby forcing States to abandon collective-bargaining arrangements utilizing agency-fee rules, which many States have long used to ensure labor peace and guarantee the efficient and uninterrupted provision of government services to the public?

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INTEREST OF THE AMICI STATES

Abood v. Detroit Board of Education recognized that States' judgments about how best to manage labor relations with their own employees warrant deference, and that the First Amendment does not prohibit States from adopting the same labor-management tools that have long proven effective in the private sector. *See* 431 U.S. 209 (1977). *Abood* held in relevant part that States may permit collective-bargaining arrangements under which state and local government employees being represented in labor negotiations by a union—including those employees who decline to become union members—may be charged an "agency fee" to cover the costs incurred by the union for collective-bargaining activities. *Id.* at 221.

This amicus brief is filed on behalf of the States of New York, Alaska, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington, and the District of Columbia[1]. Amici States have a significant interest in preserving the flexibility to structure public-sector labor relations that *Abood* allows.

Amici States employ a wide range of different labor-management systems and their practical experience confirms that there is no one-size-fits-all

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[1] The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "amici States."

solution. The task of balancing the potentially divergent interests of public employers, public employees, and the public is delicate and difficult, and also politically sensitive. And the stakes are high. In the decades before *Abood*, many States faced paralyzing public-employee strikes and labor unrest that routinely jeopardized public order and safety. The relative success of state labor-relations systems since *Abood* should not be mistaken for evidence that the leeway afforded by that decision is no longer needed. For state and local governments, labor peace secures the uninterrupted function of *government itself* and is a necessary precondition for the secure and effective provision of government services.

Amici States also have a substantial interest in avoiding the vast disruption in state and local labor relations that would occur if the Court were now to overrule *Abood*'s approval of public-sector collective-bargaining arrangements utilizing agency-fee rules. That ruling is the foundation for thousands of contracts involving millions of public employees in twenty-three States and the District of Columbia.[2]

Moreover, *Abood* is permissive, not mandatory. Voters and elected officials in each State remain free to decide what rules or policies should apply in public-sector labor relations. Petitioners seek to constrain those options by constitutionalizing a single approach to public-sector labor relations for all state and local governments nationwide. But this Court should decline to intervene in the ongoing policy debate about public-sector unions, just as it

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[2] See *infra* footnote 4, and accompanying Appendix.

declined to do so nearly forty years ago in *Abood*. As this Court has recognized, the Constitution permits States "broad autonomy in structuring their governments" out of respect for the "integrity, dignity, and residual sovereignty of the States" and to "secure[] to citizens the liberties that derive from diffusion of sovereign power." *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

STATEMENT OF THE CASE

A. This Court's Long-Standing Recognition that Agency Fees May Be Imposed to Fund Private-Sector Collective-Bargaining Activities

Labor relations law in the United States has long been based on a model of exclusive representation accompanied by "agency-fee" authorization. The first federal law guaranteeing workers the right to organize was the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq*. Enacted in 1926 after decades of labor unrest in the railroad industry that resulted in repeated railroad shutdowns, the RLA enabled railroad workers to select a union that would serve as their exclusive representative in collective-bargaining negotiations and imposed a corresponding duty of fair-representation on the union to represent all employees in good faith and without discrimination. *See Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 444 (1987); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961). The RLA was later expanded to specifically authorize "union-shop" arrangements that required employees to join the union designated as their

exclusive-bargaining representative and to pay an "agency fee," as a condition of continued employment. *See* Ch. 1220, 64 Stat. 1238 (1951) (amending 45 U.S.C. § 152).

Congress adopted a similar model in 1935 in enacting the much broader National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, the federal statute that comprehensively regulates labor relations for most employees in the private sector. As with the RLA, Congress sought to end labor strife and to reduce the need for labor strikes by encouraging collective bargaining. And Congress once again identified exclusive-representation collective bargaining as the best model for achieving labor peace. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). To protect the effective operation of the exclusive-representation system, the NLRA authorized "agency shop" agreements that permitted employees to choose not to join the union that represented them, but required all represented employees to pay fees defraying the costs of the collective-bargaining services the union provided. *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 738 & 744-45 (1988).

In a series of decisions beginning with *Railway Employees' Department v. Hanson*, 351 U.S. 225, 238 (1956), this Court construed the "union shop" and "agency shop" provisions of the RLA and NLRA as requiring only financial support for an employee-selected union, not compelled union membership by objecting employees. This Court also determined that compulsory fees must be limited to compensating the union for actual collective-bargaining related activities, and could not be used to fund unrelated political lobbying. With those limits in place, the Court

rejected claims that the First Amendment prohibited government legislation authorizing unions to impose a mandatory financial obligation on represented employees who chose not to join the union, to defray the costs of union activities germane to collective bargaining. *See Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113 (1963); *Street*, 367 U.S. at 749.

B. The Court's Holding in *Abood* That States May Use Collective-Bargaining Arrangements With Agency-Fee Provisions to Manage Their Labor Relations with State and Local Government Employees

In *Abood*, this Court recognized the important state interest in avoiding labor strife that could disrupt government operations and programs. The Court confirmed that States should not be deprived of the ability to pursue labor peace through effective collective bargaining, and held that States could permit exclusive-representation and agency-fee rules similar to those that federal law allowed for private-sector labor regulation. 431 U.S. at 229-33.

Abood involved a First Amendment challenge to a Michigan statute that authorized collective bargaining for local public school teachers under the same exclusive-representation, agency-fee model authorized by federal law for the private sector. *Id.* at 213-14, 223-24. The Court, in rejecting that challenge, noted that government entities have a strong interest in providing for exclusive representation in light of "[t]he confusion and conflict that could arise" if government employers had to reach multiple, potentially varying agreements with different unions. *Id.* at 224; *see also id.* at 220. And

the Court further observed that the union's "tasks of negotiating and administering a collective-bargaining agreement . . . often entail expenditure of much time and money." *Id.* at 221. The Court recognized that agency fees address the inherent "free rider" problem created by exclusive representation—that is, employees guaranteed union representation may decline to share in the costs incurred by the union, creating the risk that unions will be underfunded and unable to fulfill their intended duties and responsibilities. *Id.*

Abood acknowledged that public-sector unionization was controversial as a policy matter and that there was widespread debate and disagreement about the application of private-sector models to public-sector labor relations. *Id.* at 224-25, 229. Partly for that reason, *Abood* deferred to state judgments about appropriate measures for effective state and local government labor relations. The Court noted that the "ingredients" of labor peace and stability were too numerous, complex, and context-dependent for judges to second-guess the wisdom of particular state choices. *Id.* at 225 n.20 (quoting *Hanson*, 351 U.S. at 233-34).

Abood and the cases that followed it establish that the First Amendment permits agency fees to be imposed on public-sector employees who do not wish to join a union designated as their exclusive collective-bargaining representative, so long as objecting employees are not charged for political or ideological activities unrelated to the union's collective-bargaining activities. *See, e.g., Locke v. Karass*, 555 U.S. 207, 213 (2009); *see also Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2284 (2012) (invalidating requirement that "objecting nonmembers" of a public-sector union "pay a special fee for the purpose of

financing the union's political and ideological activities").

The Court has "determined that the First Amendment burdens accompanying the payment requirement are justified by the government's interest in preventing freeriding by nonmembers who benefit from the union's collective-bargaining activities and in maintaining peaceful labor relations." *Locke*, 555 U.S. at 213. Although the Court recently concluded that those justifications are not sufficient to permit government imposition of an agency-fee requirement on persons who are not "full-fledged public employees," *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014), the Court recognized that different considerations are implicated when a State—in its capacity as an employer—devises collective-bargaining rules for its own employees, *id.* at 2634.

C. *Abood*'s Centrality to Public-Sector Labor Relations Nationwide

Abood's framework is now central to state labor law. *See* Appendix, Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative. Forty-one States, the District of Columbia, and Puerto Rico, authorize collective bargaining for at least some public employees, and all adopt the federal model of exclusive representation.[3] Twenty-three States and the District

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[3] These States are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico,

(*continues on next page*)

of Columbia also authorize agency fees (also known as "fair share" fees) to provide a mechanism for ensuring that represented employees contribute to union costs germane to collective bargaining. The majority of these statutes make agency-fee requirements a permissible subject of bargaining and authorize (but do not require) agency-fee provisions as part of public-sector collective-bargaining agreements.[4] Many state agency-fee statutes were enacted in specific reliance on *Abood*.[5]

D. Petitioners' Challenge to California's Agency-Fee Provisions for State Public-School Teachers

California law permits public-school employees to select a union as their exclusive representative for collective bargaining with the State. Cal. Gov't Code § 3544(a). To support the effectiveness of those collective-bargaining arrangements, California also

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North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* Appendix.

[4] These States are Alaska, California (for local and state employees), Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia. *See* Appendix.

[5] *See, e.g.*, N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*); *see also* Sally J. Whiteside, Robert P. Vogt, & Sherryl R. Scott, *Illinois Public Labor Relations Laws: A Commentary and Analysis,* 60 Chi.-Kent L. Rev. 883, 924 & n.264 (1984) (Illinois Public Labor Relations Act was drafted by the Illinois Legislature to comport with *Abood*).

authorizes the union to collect an agency fee from all represented public-school employees, regardless of union membership. *Id.* § 3546(a). Consistent with *Abood*, non-union-member employees are entitled to a "fee reduction" for "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." *Id.*

Petitioners, a group of California public-school teachers, bring a First Amendment challenge to California's agency-fee provision for public-school employees. The district court entered judgment in favor of respondents on the pleadings (Pet. App. 3a-8a), and the Ninth Circuit summarily affirmed, holding that *Abood* bars petitioners' First Amendment claim (Pet. App. 1a-2a).

SUMMARY OF ARGUMENT

States enacted public-sector collective-bargaining laws to address and avoid strikes and labor breakdowns that threatened the provision of government services and imposed vast financial and other harms on the public. *Abood* appropriately gave weight to that important interest and afforded deference to state judgments about how best to structure the labor relations of state and local governments—a complex and politically sensitive subject.

Abood confirmed that States may deploy the same tools for achieving public-sector labor peace that Congress has long made available to private employers, and that have proved successful for avoiding strikes in the private sector. In the decades since *Abood*, many States have come to rely on that

decision. For many States, as for many private employers, "agency-fee" provisions are important to ensuring a stable collective-bargaining partner with the wherewithal to help devise workplace arrangements that promote labor peace. To be sure, different States have enacted different systems for regulating public-employee labor relations. But this variation is a natural and appropriate result of *Abood*'s flexible framework, not a reason to abandon that decision.

Contrary to petitioners' arguments (Pet. Br. 12, 23-24), the First Amendment does not prohibit States from adopting the types of agency-fee rules that private employers have long utilized. Petitioners give short shrift to the government's important interest in avoiding labor unrest in government workplaces. And they overlook the leeway that this Court has traditionally granted in the First Amendment context to States acting in the role of employers—relying instead on the Court's analysis of the considerations implicated when the government imposes an agency-fee requirement on persons who are not "full-fledged public employees," *Harris*, 134 S. Ct. at 2634. *Abood* is in line with this Court's First Amendment cases in recognizing that the government must have flexibility to manage its own internal operations, especially with respect to matters affecting the delivery of government services.

ARGUMENT

THE STATES HAVE A SIGNIFICANT AND VALID INTEREST IN PRESERVING *ABOOD*

Abood recognized that States have a significant and valid interest in being able to employ the models of collective bargaining that have proved successful for achieving labor peace and avoiding strikes in the private sector. And *Abood* deferred to the judgments of States that have chosen to permit use of the core elements of private-sector collective bargaining—exclusive representation and agency fees—to manage labor relations with state and local government employees.

In the decades since *Abood*, States have relied substantially on that decision when crafting their public-sector labor-management systems. Petitioners' attack on *Abood* and its approval of public-sector agency-fee rules threatens the labor-relations systems of twenty-three States and the District of Columbia.[6]

Principles of *stare decisis* have special force where States have relied on this Court's precedent in structuring their laws, and their resulting statutes would be invalidated if the Court's precedent were overruled or altered. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785-86 (1992); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991). Here, the *Abood* rule is deeply entrenched, and is the foundation for thousands of contracts

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[6] See *supra* n.4, and accompanying Appendix.

involving millions of public employees across the Nation. Even in constitutional cases, the doctrine of *stare decisis* carries such persuasive weight that this Court has "always required . . . special justification" for overruling settled precedent. *See, e.g., United States v. Int'l Bus. Machs. Corp.,* 517 U.S. 843, 856 (1996) (quotation marks omitted).

Petitioners identify no special justification for overruling *Abood*. Rather, they base their call to revisit *Abood* on decisions declining to extend *Abood*'s reasoning to new and different contexts. For example, petitioners rely substantially on *Knox v. Service Employees International Union*, which holds that the First Amendment prohibits a union from charging the non-members it represents in collective bargaining a "special assessment or dues increase levied to meet expenses that were not disclosed when the amount of the regular assessment was set." 132 S. Ct. at 2285; *see also id.* at 2293, 2296. They also rely heavily on *Harris v. Quinn*, which holds that *Abood*'s rationale does not apply where the government seeks to impose an agency-fee requirement on persons who are not "full-fledged public employees," 134 S. Ct. at 2638. Neither of those decisions disputes that different considerations are implicated when a State—in its capacity as an employer—devises collective-bargaining rules for its own employees. *See Harris*, 134 S. Ct. at 2634; *Knox*, 132 S. Ct. at 2290.

I. Agency Fees Are Important to Maintaining the Collective-Bargaining Model That Many States Rely Upon to Ensure the Effective and Efficient Provision of Services to the Public.

Amici States' experiences confirm that exclusive-representation collective bargaining protects the public from harmful disruptions to government services and programs, and fosters efficiency in government workplaces. Petitioners' attacks on *Abood* misapprehend the significance of agency fees to that collective-bargaining system.

A. State Laws Governing Public-Sector Collective Bargaining Were Adopted in Response to Devastating Strikes and Labor Unrest by State and Local Government Employees.

Labor regulation in the United States has always been concerned with avoiding the harm to the public caused by labor strife and work stoppages. For example, Congress enacted the RLA and NLRA in large part to avoid labor unrest that threatened to disrupt the flow of interstate commerce and undermine national economic stability. *See*, *e.g.*, 29 U.S.C. § 151 (NLRA findings and declaration of policy); *see also* 45 U.S.C. § 151a (RLA general purposes). Those statutes aimed to establish effective collective-bargaining procedures for the private sector as an alternative to labor disruptions that often had been violent, jeopardized public order, and destabilized the economy.

Public-sector collective-bargaining laws were likewise enacted to protect the public from the harmful effects of government work stoppages and other disruptions in government operations. *See* David Lewin et al., Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining 13 (Mar. 16, 2011) (explaining that public unrest led many States to enact public-employee collective-bargaining laws); *see also* Br. for Resp. California 2, 8, 12 (citing A. Res. 51, 1972 Reg. Sess. (Cal. 1972) (describing fears about "crisis stage" work-stoppages that precipitated California's collective-bargaining rules for public employees)). Although strikes and other work disruptions by public workers are now rare (yet not unheard of), they were common at the time that the majority of States first adopted public-sector collective-bargaining laws. *See, e.g.,* David Ziskind, *One Thousand Strikes of Government Employees* 187 (1940) (documenting 1,116 strikes by employees in all sectors of government service through 1940); *see also* Morris A. Horowitz, *Collective Bargaining in the Public Sector* 2 (1994).

Before public-sector collective-bargaining arrangements became widely available, important public services were repeatedly interrupted or disrupted by strikes (or the threat of strikes) by public employees of all types—from public school teachers to grave diggers. *See* Richard C. Kearney, *Labor Relations in the Public Sector* 221-24 (3d ed. 2001); Ronald Donovan, *Administering the Taylor Law: Pubic Employee Relations in New York* 1-3, 106-07 (1990) (discussing strikes in New York between 1940s and 1960s). Much of the labor unrest occurred because state and local workers wanted "a greater

voice" in determining the terms of their employment, and lacked other means to air grievances and settle disputes with management. *See* N.Y. Governor's Comm. on Pub. Emp. Relations, *Final Report* 42, 54 (1966). States thus realized "that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment." *Id.* at 9.[7]

The pace of public-sector labor disruptions increased dramatically in the 1960s, in part because public employees were seeking the *same* labor protections and rights that they had seen guaranteed to their private-sector counterparts through collective bargaining under federal labor law. Between 1965 and 1970, for example, there were over 1,400 separate work-stoppages by state and local public workers, involving well over a quarter million employees. Kearney, *supra*, at 226-27. In the 1960s, "strikes by public employees" in New York alone were "too numerous to recall or record"; they included "strikes by transit workers, firemen, sanitation employees, teachers, ferry workers, [and] on other occasions, social workers, practical nurses, city-

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[7] *See also* Pa. Governor's Comm'n to Revise the Pub. Emp. Law, *Report and Recommendations* 6 (1968) (concluding that the "inability" of public employees to "bargain collectively has . . . led to more friction and strikes than any other single cause"); 5 Ill. Comp. Stat. § 315/2(2) (declaring aim to establish "an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act").

employed lifeguards, doctors and public health nurses, etc." *DiMaggio v. Brown*, 19 N.Y.2d 283, 289 (1967).[8]

Walkouts and other work stoppages occurred despite state laws that directly prohibited public employees from striking or punished them for doing so.[9] *See, e.g., Ass'n of Surrogates & Sup. Ct. Reporters v. State*, 78 N.Y.2d 143, 152-53 (1991) (recounting New York's historical experience). The States found that direct prohibitions on strikes were ineffective and difficult to enforce, and failed to address the root causes of labor unrest.[10] And it quickly became clear

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[8] *See also* Mass. Legis. Research Council, *Report Relative to Collective Bargaining and Local Government Employees* 31 (1969) (in 1966, 450,000 man-days were lost to strikes by public-sector employees); Anne M. Ross, *Public Employee Unions and the Right to Strike*, 92 Monthly Lab. Rev. 14, 14 (1969) ("In 1966-67 alone, strikes in the public sector, at the State and local levels, caused more idle man-days and involved more workers than strikes in all the preceding 8 years . . . ."); Jack Stieber, *Public Employee Unionism: Structure, Growth, Policy* 159-68 (1973) (describing rise in strike activity between 1958 and 1970); Ohio Legis. Serv. Comm., *Public Employee Labor Relations* 35-38 (1969) (discussion of strike activity nationwide and strikes in Ohio).

[9] Prohibitions on strikes by public employees remain common, underscoring the continued state interest in avoiding labor unrest in the public sector. *See* Richard C. Kearney & Patrice M. Mareschal, *Labor Relations in the Public Sector* 244 (5th ed. 2014) (thirty-seven States ban strikes by some or all public employees).

[10] *See, e.g.,* Pa. Governor's Comm., *supra*, at 7 ("Twenty years of experience has taught" that statutory ban on public-employee strikes "is unreasonable and unenforceable, particularly when combined with ineffective or non-existent collective bargaining."); N.Y. Governor's Comm., *supra*, at 40-41 (explaining that "feeling of futility" among public-sector

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that regardless of the merits and scope of the underlying controversy, labor unrest in the public sector had the potential to inflict vast public harm and disruption.

- In Baltimore, a 1974 strike by police officers, jail guards, and other municipal workers resulted in widespread "looting, shooting, and rock-throwing," and "fires ran 150 percent above normal." *See* Md. Dep't of Labor, Licensing & Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 5 (1996) (recounting 1974 strike); Ralph de Toledano, *The Police Were Shouting "Scab,"* Daily News, Oct. 29, 1975, at 18 (same). State troopers had to patrol the streets to keep the peace. *See* Ben A. Franklin, *Troopers Patrol Baltimore to Bar Renewed Unrest*, N.Y. Times, July 13, 1974, at 1.
- In 1968, a series of public-school teacher walkouts in New York City resulted in more than one million children being deprived of education for thirty-six school days. Parents had to physically occupy public schools to keep the schools open. Other parents banded together to improvise alternative schools in "churches, storefronts, brownstone basements and apartments." Many children were denied key services provided through public schools. For example, while the city typically provided 400,000 free daily lunches to schoolchildren,

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employees, grounded in their inability to participate in determining the terms of their employment, led to strikes despite statutory prohibition on strikes).

only 160,000 were provided during the teacher strikes. *See Strike's Bitter End*, Time, Nov. 29, 1968, at 97.

- In the decades between 1940 and 1980, strikes by public transport workers in Cleveland, Philadelphia, Atlanta, Chicago, Los Angeles, and New York City caused vast disruptions. In 1944, soldiers under federal command had to reopen the Philadelphia transit system. *See Atlanta Buses Running Again*, N.Y. Times, June 25, 1950, at 50 (Atlanta's transit strike); *Bus Strike Imperils Chicago's Transit*, N.Y. Times, Aug. 26, 1968, at 25 (Chicago strike); *Strike Halts Most Public Transit Runs in Philadelphia*, N.Y. Times, Mar. 26, 1977, at 8 (Philadelphia strike); *Transit Workers Strike Los Angeles Area Bus System*, N.Y. Times, Aug. 27, 1979, at A15 (Los Angeles and Cleveland strikes). In 1966, private businesses suffered over $100 million in losses daily during a twelve-day transit strike in New York City. *See Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33. Moreover, because people could not travel to hospitals to donate blood, the city's blood supply fell to a twenty-year low, causing the postponement of nonemergency surgeries. *Id.*
- During this same period, multiple strikes by sanitation workers caused uncollected trash to pile up on city streets, threatening a serious public-health emergency in many cities. *See, e.g.*, *Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 33; *see also* Joseph F. Sullivan, *Mediators Seek to Settle Newark Sanitation Strike*, N.Y. Times, Dec. 29, 1976, at 55 (discussing strike in Newark, N.J.); Ziskind,

supra, at 91-94 (recounting strikes by sanitation workers across the country).

- In 1965, a strike by eight thousand welfare workers in New York City forced two-thirds of the city's welfare centers to close for twenty-eight days and led to the interruption of services to more than 500,000 welfare recipients, many of whom were children or elderly. *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205-06 (2001); *see also* Emanuel Perlmutter, *Welfare Strike Due in City Today Inspite of Writ*, N.Y. Times, Jan. 4, 1965, at 1. Strikes by workers at state mental hospitals also interrupted critical care for patients with mental illness. In 1968, a strike by mental-health workers at four state-run hospitals in New York forced patients to be sent home and led to a reduction in psychiatric treatment and rehabilitation services. *See* Donovan, *supra,* 89-90 (1990); Damon Stetson, *Fourth Hospital Moves Patients*, N.Y. Times, Nov. 23, 1968, at 1. Care was also interrupted in Ohio in 1974 when half of the workers at the State's mental hospitals went on strike. *See* Louise Cooke, *Workers' Unrest Interrupts Municipal Service*, St. Petersburg Times, July 15, 1974, at 4-A.

As these examples illustrate, the harm of unresolved public-labor disputes is not confined to the internal operations of public employers. For state and local governments that employ workers to provide public services, many of which are essential to the well-being of their citizens, the connection between labor peace and the public welfare is direct and unavoidable. Public services such as police and

fire protection, sanitation, and public-health tend to be provided uniquely by state and local governments, and the absence of those services threatens serious irreparable harm to the public. *See Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Even where private substitutes exist, state and local programs are often made available at no cost (such as public education) or are heavily subsidized (such as public transportation). Disruption of these services harms the public generally but especially threatens the most vulnerable citizens—low-income persons or those who have a special need for government support. The harms of public-sector labor breakdowns are thus difficult to predict or to control, and even short-term disruptions in particular services can have vast social and economic spillover effects.

B. In Responding to These Crises, States Naturally Looked to the Collective-Bargaining Model That Had Already Proven Effective in the Private Sector under Federal Labor Law.

In the wake of these devastating work stoppages, States aimed to craft effective and fair bargaining systems that would assure public-sector labor stability for the benefit of *the public* who depended on government services and operations.[11] A primary

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[11] *See, e.g.,* Del. Code tit. 19, § 1301 (collective bargaining system for public employees is designed "to protect the public by assuring the orderly and uninterrupted operations and functions" of government); Fla. Stat. § 447.201 (same); Iowa

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goal of state laws in establishing public-sector collective bargaining was to give public employees a voice in negotiating the terms and conditions of their employment, in order to avoid and minimize the potential for strikes that threatened state and local government operations and the provision of public services. *See, e.g.*, N.Y. Governor's Comm., *supra*, at 9, 42. Many States adopted collective bargaining for public employees only after careful study by expert committees or commissions charged with examining the underlying reasons for public-sector labor unrest and devising appropriate solutions.[12]

States understandably sought guidance in federal-law collective-bargaining solutions that had already proven effective in minimizing labor unrest in private

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Code § 20.1 (same); Kansas Stat. § 75-4321(3) (same); Neb. Revised Stat. §§ 48-802, 81-1370 (same); N.Y. Civ. Serv. Law § 200 (same); Or. Rev. Stat. § 243.656(3) (permitting collective bargaining safeguards "the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest"); Vt. Stat. Ann., tit. 3, § 901 (state employees' labor relations act aims "to protect the rights of the public in connection with labor disputes").

[12] *See, e.g.*, Milton Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission, 1966-1967*, 21 Indus. & Lab. Rel. Rev. 541, 549 (1968); *see also* Conn. Interim Comm'n to Study Collective Bargaining by Municipalities, *Final Report* 7-8 (1965); N.J. Pub. & Sch. Emps.' Grievance Procedure Study Comm'n, *Final Report* 6, 15-17 (1968); N.Y. Governor's Comm., *supra*, at 34-35, 41-42; Md. Dep't of Labor, *supra*, at 3-6; Mass. Legis. Research Council, *supra*, at 8-11; Mich. Advisory Comm. Pub. Emp. Relations, *Report to Governor* (1967), *reprinted in* Gov't Emp. Relations Report, No. 181 (Feb. 28, 1967); Pa. Governor's Comm., *supra*, at ii, 1.

industry.[13] Indeed, no alternative schemes had been demonstrated to be workable and effective in diminishing labor strife. As a result, every State that established collective bargaining for state and local public employees provided for the exclusive-representation model that Congress had adopted for private employees. See *supra* n.3 & Appendix. Many States also authorized agency-fee payments as an adjunct to exclusive representation, again following the example of what Congress permitted for the private sector. See *supra* n.4 & Appendix.

As in the private sector, "agency-fee" provisions are important to developing a collaborative union-

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[13] *See, e.g.*, Harry T. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885, 932 (1973) (noting "accelerating" trend among States towards using "private sector principles to guide the development of labor relations in the public sector"); Russell A. Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 Mich. L. Rev. 891, 897, 899, 901, 904 (1968) (noting that various state commissions relied on NLRA and other private-sector models in offering recommendations for public-sector labor relations policy in the State); Stieber, *supra*, at 212 (stating that public-sector collective bargaining followed the pattern in the private sector); *see also* N.J. Pub. & Sch. Emps.' Grievance Procedure, *supra*, at 15 ("As experience in private employment suggests, stable negotiating relationships will benefit both public employees and the general public."); N.Y. Governor's Comm., *supra*, at 20-21, 29 (observing that framework for collective bargaining in public sector could be modeled on "the methods developed since 1935 in the private sector"); *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168, 176, 624 P.2d 1215, 1218-19 (1981) (describing California's approach to enactment of public-sector labor laws as attempt to mirror "key elements that have proven to be important factors in formulating peaceful labor relations in the private sector").

labor relationship that promotes labor peace and ensures the delivery of high-quality services. Because unions operate in a complex legal environment, they need expert staff to adequately negotiate on behalf of all the employees they represent. *See Abood*, 431 U.S. at 221 (recognizing that unions may require "[t]he services of lawyers, expert negotiators, economists, and a research staff" in negotiating and administering a collective-bargaining agreement). A lack of adequate funding can reduce a union's ability to maintain the staff expertise necessary to perform collective-bargaining functions.[14]

Eliminating agency fees as a secure funding mechanism may require unions to focus disproportionate effort on recruiting members and collecting fees, thereby diverting attention from bargaining and contract-administration responsibilities. *See* A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. Indus. & Com. L. Rev. 993, 1012 (1975). Moreover, the absence of secure funding may create skewed incentives for unions to make excessive bargaining demands or disparage management as antagonistic to labor, in order to encourage employees to give financial support. *See* Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev.

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[14] *See, e.g.*, Jeffrey H. Keefe, *Eliminating Fair Share Fees and Making Public Employment "Right-to-Work" Would Increase the Pay Penalty for Working in State and Local Government* 6 (Econ. Pol'y Inst. Briefing Paper No. 408, 2015); Raymond Hogler, Steven Shulman & Stephan Weiler, *Right-to-Work Legislation, Social Capital, and Variations in State Union Density*, 34 Rev. of Reg'l Studies 95, 109 (2004).

183, 189 (1975). State experiences show that a well-funded union is a more stable bargaining partner and that negotiating with such a partner "lead[s] to greater labor peace and stability." Md. Dep't of Labor, *supra*, at 19.

Petitioners claim that individuals who support a union will undoubtedly support it financially (Pet. Br. 32-33), but this argument ignores the well-documented problem of free-riding. "An economically rational individual will seek to enjoy the collective benefits of the group without paying for them," and this behavior becomes more prevalent as the group grows in size. Keefe, *supra*, at 7; Mancur Olson, *The Logic of Collective Action* 84-87 (1965); *cf. Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 452 (1984) (observing that free-riding corrodes workplace harmony and cooperation by "stirring up resentment" because some employees can "enjoy[] benefits earned through other employees' time and money"). For example, in the federal public sector, where exclusive-representation collective bargaining is available without agency-fee requirements, only one-third of all federal employees represented by a collective-bargaining agreement are fee-paying union members. *See* Kearney & Mareschal, *supra*, at 26.[15]

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[15] The need for financial support from represented employees is mitigated in the federal sector because, in contrast to the wide array of issues that may be the subject of bargaining at the local and state level, the scope of collective bargaining in the federal public sector is severely restricted. See *infra* at 31-32. Kearney & Mareschal, *supra*, at 25. In addition, federal law permits federal agencies to subsidize the costs of collective bargaining by allowing employees who serve as union representatives to participate in certain collective-bargaining

(*continues on next page*)

C. The Benefits to States of Public-Sector Collective Bargaining Extend Well Beyond the Prevention of Strikes

The number of government work stoppages has declined significantly in the public sector since the late 1970s. *See* Kearney & Mareschal, *supra*, at 237 (explaining that in 2011, there were eighteen strikes of one thousand employees or more in the private sector as compared to only one in the public sector). But the relative success of public-sector labor relations at ensuring that government services are not interrupted does not undermine the continued importance of *Abood* and the flexibility it affords States to craft a labor-relations system best suited to their individual circumstances. *See*, e.g., *Shelby County,* 133 S. Ct. at 2650 (Ginsburg, J. dissenting) (eliminating a remedy "when it has worked and is continuing to work . . . is like throwing away your umbrella in a rainstorm because you are not getting wet").

1. Public-sector collective bargaining can promote greater efficiency in the delivery of public services.

As one scholar of labor relations has found, States with collective bargaining "have higher public sector productivity and efficiency rates," and "produce better quality services than other states." Robert Q. Hanham, *Collective Bargaining and Public Employee Unionism in West Virginia*, W. Va. Pub.

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activities during their paid workday, in lieu of their regularly assigned work. *See* 5 U.S.C. § 7131.

Affairs Rep., Feb. 1992, at 9. "Unions and collective bargaining relationships are a proven vehicle for promoting education and skill development of workers in general." *See* Thomas A. Kochan, Will the Supreme Court Support or Block Development of a Modern Collective Bargaining System for Homecare Workers? 5 (Dec. 10, 2013). And a better-skilled, better-trained, and more stable workforce permits States to improve the quality of services to the public. Unions also promote employee engagement and communication, which leads to lower employee turnover, and a more stable and higher performing workforce. U.S. Dep't of Labor Task Force on Excellence in State and Local Government through Labor-Management Cooperation, *Final Report*, i, 2 (1996) ("*Task Force Report*").[16]

In short, collective-bargaining relationships can increase productivity and permit States to improve the delivery and quality of their services while also enjoying significant cost savings. In Connecticut, collective bargaining between a public-sector health employees' union and the State resulted in a program to reduce workplace injuries. After only one year, the program reduced workers' compensation expenses by five-million dollars through a forty-percent reduction in workplace injuries. *Task Force Report*, *supra*, at

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[16] *See also* Kochan, *supra*, at 5, 9; E. Edward Herman, Alfred Kuhn, Ronald L. Seeber, *Collective Bargaining & Labor Relations*, 311-312 (2d ed. 1987); Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 169 (1984); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291-92 (1983) (recognizing state's "legitimate interest" in system of exclusive representation because it ensures that decisions by public employers will be based on "majority view" of its employees).

15. Similarly, in Seattle, municipal government officials and a union of public-employee sewer workers worked collaboratively to identify a number of significant cost savings in the maintenance and repair of the City's underground transit tunnel. *Id.* at 19-20. As a result, the city was able to achieve concrete cost savings while also improving the quality of its transportation infrastructure. The union and management also worked together to reduce power interruptions to the city's electric buses, providing relief to hundreds of commuters who had previously endured long waits due to disabled buses or service interruptions. *Id.* at 20.

Particularly when faced with a looming economic crisis, government and unions have worked together to develop solutions that are mutually beneficial and ensure the continued provision of indispensable government services. In Los Angeles, the city council addressed the city's budget crisis in part by working with the sanitation workers' union to trim costs and improve service delivery. *Id.* at 15-16. This collaboration led to a reduction in overtime hours and a twenty-five percent cost reduction without any lay-offs. Similarly, in New York City, local government and the sanitation workers' union negotiated to reduce the number of sanitation workers operating a sanitation truck, permitting the city to lower its labor costs by adopting cost-saving technologies. Lewin et al., *supra*, at 17.

2. Petitioners' amici misrepresent the role of collective bargaining in municipal bankruptcies.

Petitioners' amici incorrectly claim that public-sector collective bargaining creates heightened risks of municipal bankruptcy. Br. of Amici Curiae State of Michigan, et al. in Support of Pets. ("Pet. States Amici") 11-20. Contrary to amici's arguments, there is no clear correlation between collective bargaining and a municipality's fiscal health.

First, the vast majority of municipalities across the country have permitted collective bargaining for public-sector employees since the mid-1970s, *see* Kearney & Mareschal, *supra*, at 64-66, but only a very small percentage of municipalities—two-hundred-and-sixty-four in total—have filed for bankruptcy after that time,[17] Chapman & Cutler, LLP, *Primer on Municipal Debt Adjustment—Chapter 9: The Last Resort for Financially Distressed Municipalities*, app. C-3 (2012) (municipal bankruptcies between 1980 and 2012). Moreover, a number of

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[17] Under Chapter 9, a State may authorize "municipalities" to file for bankruptcy. *See* 11 U.S.C. §§ 101(15), (27), (40), 109(c). As a matter of state law, the term "municipality" may include local governments, such as cities and counties, or special-purpose government entities, such as public utilities or school districts. Between 2008 and 2012, only one out of every 1,668 local governments eligible to file under Chapter 9 actually filed for bankruptcy protection. *See* Mike Maciag, *How Rare Are Municipal Bankruptcies?*, Governing (Jan. 24, 2013). During that time period, there were 21,683 local governments nationwide eligible to make a Chapter 9 filing. *See* Council of State Gov'ts, E. Reg'l Conf., *How Rare Are Municipal Bankruptcies?* Fiscal Notes, Jan. 2013, at 1.

those bankruptcies occurred in States that do not permit collective bargaining by state and local government employees or severely restrict it. Texas, for example, ranks third among all States in municipal bankruptcies but does not permit public-sector collective bargaining except by police or firefighters. *See* Chapman & Cutler, LLP, *supra*, at app. C-2; Kearney & Mareschal, *supra*, at 66.

Second, high public-sector labor costs—which can result even when employment agreements are individually negotiated rather than collectively bargained[18]—are generally not the sole or substantial cause of municipal bankruptcies.[19] *See* Silvia A. Allegretto, Ken Jacobs & Laurel Lucia, *The Wrong Target: Public Sector Unions and State Budget Deficits* 8-9 (Univ. Cal-Berkeley Inst. for Research on Labor & Employment Pol'y Br., Oct. 2011) (concluding that state budget deficits since 2008 were caused by the housing crisis and declining state revenues). For instance, in 2008, the City of Vallejo, California filed for bankruptcy relief even after negotiations with labor groups successfully resulted in a 6.5% percent decrease in the salary of public-safety employees. Other factors—such as a downturn in the housing market and a lack of a corporate tax base—collectively resulted in a large operating deficit that eventually led to the city's bankruptcy filing. *See* Robert J. Landry III & Keren H. Deal, *More Municipalities Likely to Face Chapter 9: Is a Perfect*

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[18] *See, e.g.*, Hanham, *supra*, at 9.

[19] In fact, as a share of state budgets, public-sector compensation, including wages, salaries, and benefits, has declined since 1992. *See* Allegretto et al., *supra*, at 6.

Storm Brewing?, Am. Bankr. Inst. J., July-Aug. 2008, at 18, 71, & n.36.

Amici's reliance on the purported "public impact" of the cost of public-employee pension plans is similarly misplaced. *See, e.g.*, Pet. States Amici 14. All States—regardless of whether they authorize collective bargaining in the public sector—establish the terms and conditions of their public-employee benefit plans by statute.[20] It is the legislature, and not unions, that sets the scope of public-employee pension benefits.

II. The Variation in Public-Sector Collective-Bargaining Laws Does Not Undermine *Abood*, but Rather Confirms the Validity of Its Flexible Framework.

Abood recognizes that the task of crafting a workable labor-relations system is complex and difficult, and requires balancing numerous potentially conflicting interests in areas where there is widespread debate and no clear answer. As a result, *Abood* does not mandate that any State enact any particular labor-relations law. It leaves States free to devise systems based on their own history and particular policy choices, and it gives voters in each State the ultimate say over changes or amendments to labor policy. *See* 431 U.S. at 224-25 & n.20.

Abood thus confirmed that States should have the leeway to adopt the labor-relations systems best

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[20] *See* National Association of State Retirement Administrators, http://www.nasra.org/ (state-by-state collection of statutes addressing public-employee retirement benefits).

suited to their individual circumstances and policy judgments. And States have relied on that flexibility. States have enacted more than one hundred statutes governing state and local labor relations, augmented by local ordinances, court decisions, attorney general opinions, and executive orders. *See* Kearney & Mareschal, *supra*, at 64-66.

Exclusive representation—the constitutionality of which petitioners do not contest—has been adopted by every State that statutorily authorizes public-sector bargaining. Moreover, although not all States have authorized the imposition of agency fees, that feature remains a widely adopted mechanism for ensuring that unions can effectively fulfill their exclusive-representation duties. Relying on *Abood*, twenty-three States and the District of Columbia have enacted laws authorizing fair-share provisions at all levels of state and local government, and on that basis public entities have entered into multiyear contracts with unions containing such clauses. See also *supra* n.4.

Many public-sector labor schemes that decline to permit agency fees also circumscribe the scope of collective bargaining in public employment.[21] For example, federal law permits federal public-sector

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[21] *See, e.g.*, Wis. Stat. § 111.91(2)-(3) (prohibiting collective bargaining for state employees over designated subjects and limiting bargaining over wage increases); *see also* Kearney, *supra*, at 55-70 (noting that while many States follow the NLRA model by authorizing "a broad scope of negotiations over wages, hours and other terms and conditions of employment," the details and scope of state public-sector "bargaining provisions vary greatly").

workers to elect a union to serve as their exclusive representative without any attendant requirement that workers join or financially support the union, but also severely restricts the scope of issues that can be collectively bargained, and exempts key topics that would be covered by broader state collective-bargaining regimes, such as wages and number of employees. *See* 5 U.S.C. § 7106(a)(1); *see also Navy Charleston Naval Shipyard v. Fed. Labor Relations Auth.*, 885 F.2d 185, 187 (4th Cir. 1989).

Likewise, many of the States that do not authorize agency fees—sometimes referred to as "right-to-work" States—have also made fundamentally different choices about the role and scope of collective bargaining. Many of those States deny public employees the right to collectively bargain at all,[22] or limit collective bargaining to only a few classes of employees.[23] The "right-to-work" States have thus made a foundationally different policy choice about labor relations for state and local government workers. *See* Kearney & Mareschal, *supra*, at 71 (explaining that in States that do not permit collective bargaining, the Legislature made a "calculated choice" to provide a "'good business climate' by holding down public employee compensation"). Those States' differing policy choices

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[22] *See, e.g.*, N.C. Gen. Stat. § 95-98; Va. Code § 40.1-57.2.

[23] *See* Ariz. Rev. Stat. § 23-1411 (public-safety employees); Ark. Code Ann. § 6-17-202(b) (school teachers); Ind. Code § 20-29-4-1 (school employees); La. Rev. Stat. Ann. § 23:890(B) (municipal public transit employees); Tex. Local Gov't Code § 174.023 (firefighters and police officers); Utah Code Ann. § 34-20a-3 (firefighters).

may well be appropriate to their particular circumstances, but do not refute the benefit of agency fees for other States that adopt more comprehensive public-sector collective bargaining. And notably, certain States with general right-to-work laws nonetheless authorize agency-fee agreements for some classes of public workers—for example, firefighters and police officers.[24]

Much of the variation in public-sector labor laws can be explained by historical experience and differing circumstances. Many of the right-to-work States suffered no history of public-sector labor unrest or a much milder history than States with broader public-sector collective bargaining and authorization for agency fees. *See* Kearney, *supra*, at 65 & 73-74; *see also* Stieber, *supra*, at 161. Similarly, there have been far fewer strikes and work stoppages by federal employees than by state and local government workers, *see* Kearney & Mareschal, *supra*, at 238, potentially explaining why federal collective-bargaining rules differ. When properly understood, the variation in approaches to public-sector collective bargaining confirms *Abood*'s wisdom in giving States discretion to implement different collective-bargaining rules that in turn reflect differing state experiences, budgetary conditions, economic and demographic factors, and policy judgments.

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[24] *See, e.g.,* Mich. Comp. Laws § 423.210(4) (exempting police, firefighters, and state troopers from general prohibition on agency-fee agreements); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (exempting "public safety employees" from restrictions on "fair-share agreements").

III. The First Amendment Does Not Prohibit States from Borrowing Effective and Widely Accepted Private-Sector Collective-Bargaining Models to Regulate Public-Sector Labor Relations.

Abood is not unusual among this Court's First Amendment cases in recognizing that government entities (i) have an important interest in avoiding disruptions in government workplaces and (ii) are entitled to considerable constitutional leeway when acting as employers as opposed to sovereigns. Indeed, the Court's public-employee speech cases allow governmental entities broad authority to curtail their employees' First Amendment-protected speech in order to promote effective government operations, including the efficient delivery of government services. *See, e.g., Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598-600 (2008); *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006); *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality op.) (discussing additional examples). The Court on many occasions recognized that the Constitution allows the government reasonable flexibility to fulfill its "mission as employer," *Engquist*, 553 U.S. at 598 (quoting *Waters*, 511 U.S. at 674-75), and accordingly rejected any notion that employment-related measures must be "narrowly tailored to a compelling government interest," *Waters,* 511 U.S. at 674-75. *See also Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 153-55 (2011).

As this Court has observed, "there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate" and the government acting "to manage its internal operation[s]." *Engquist,* 553 U.S. at 598

(alteration and quotation marks omitted); *see also Connick v. Myers*, 511 U.S. 138, 143 (1983) (recognizing "the common sense realization that government offices could not function if every employment decision became a constitutional matter"). First, "[t]he government's interest in achieving its goals as effectively and efficiently as possible" commands greater weight, being "elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 U.S. at 675 (plurality op.). Second, the government's "reasonable predictions of disruption" are entitled to "substantial weight . . . even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign [the Court's] review of legislative predictions of harm is considerably less deferential." *Id.* at 673.

Abood's holding—that public employers may adopt a model of collective bargaining that utilizes agency fees in support of exclusive representation—is fully consistent with these principles and with the decisions in which the Court has applied them. *Abood* correctly recognized that States have an important, ongoing interest in avoiding public-sector labor unrest. Indeed, that interest fairly could be described as compelling. See *supra* I.A. And *Abood* deferred to state policy judgments that the best way to address that interest may be through public-sector collective-bargaining systems that include provisions for exclusive representation and the payment of agency fees. See *supra* I.B. The deference that *Abood* extends to state labor relations and collective-bargaining laws is thus appropriately centered on government's decisions in structuring negotiations as to the terms

and conditions of public employment. *Abood* recognizes that public employees may not be compelled to support political or ideological activities by unions outside of the collective-bargaining process.

This Court has on many occasions confirmed that the First Amendment is not a mandate for lesser public efficiency. The Court has explained that when an individual "enters government service," he or she "must accept certain limitations on his or her freedom," including limitations that would be imposed in a private employment setting. *Garcetti*, 547 U.S. at 418. These limitations may and often do restrict speech or associational activities that the government could not limit outside of the employment relationship. *See, e.g.*, *Connick*, 461 U.S. at 141 (rejecting employee claim that termination for views expressed in questionnaire distributed to coworkers violated First Amendment); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99, 101 (1947) (upholding provision of federal statute prohibiting federal employees from active participation in political management or political campaigns).

Abood upholds only the right of States to emulate federal policies for effective collective bargaining and to adopt collective-bargaining schemes of tested efficacy and widespread application in the private sector, if a State concludes that doing so is best suited to its own ends. Almost every State in the Nation has adopted some features from private-sector collective bargaining for public-sector labor laws which those States deem critical to assuring labor peace and stability. Nothing in this Court's large body of public-employee First Amendment precedent prohibits that choice.

CONCLUSION

This Court should decline to overrule *Abood*.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANISHA DASGUPTA
Deputy Solicitor General
VALERIE FIGUEREDO
Assistant Solicitor General
(212) 416-8020
barbara.underwood@ag.ny.gov

November 2015

* *Counsel of Record*

(*counsel listing continues on next page*)

CRAIG W. RICHARDS
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06106

MATTHEW P. DENN
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19901

DOUGLAS S. CHIN
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601

TOM MILLER
Attorney General
State of Iowa
1305 E. Walnut St.
Des Moines, IA 50319

JACK CONWAY
Attorney General
State of Kentucky
700 Capital Ave., Ste 118
Frankfort, KY 40601

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Pl.
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

CHRIS KOSTER
Attorney General
State of Missouri
Supreme Court Building
207 West High St.
Jefferson City, MO 65101

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

JOSEPH A. FOSTER
Attorney General
State of New Hampshire
33 Capitol St.
Concord, NH 03301

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

HECTOR H. BALDERAS
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

MARK R. HERRING
Attorney General
Commonwealth of Virginia
900 E. Main St.
Richmond, VA 23219

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington St. S.E.
PO Box 40100
Olympia, WA 98504

BRUCE R. BEEMER
First Deputy
Attorney General
Commonwealth of
Pennsylvania
Strawberry Sq., 16th Fl.
Harrisburg, PA 17120

KARL A. RACINE
Attorney General
District of Columbia
One Judiciary Square
441 4th St., N.W.
Washington, D.C. 20001

Appendix

Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative*

Alabama	No statutory authority
Alaska *Alaska Stat.*	*Public Employees* – §§ 23.40.100, **23.40.110**
Arizona	No statutory authority
Arkansas *Ark. Code Ann.*	*Teachers* – § 6-17-202
California *Cal. Gov't Code*	*Local Government Employees* – § **3502.5** *State Employees* – §§ 3515.5, **3515.7** *School Employees* – §§ 3543-3543.2, **3546** *Higher Education Employees* – §§ **3583.5**, **3584** *Home Care Providers* – § **110019**

**Citations in bold indicate authorization for agency or fair-share fees. Some States combine authority for collective-bargaining and for fees in a single statutory provision.*

Colorado *Colorado Rev. Stat.*	*Public Mass Transportation System Employees* – § 8-3-107
Connecticut *Conn. Gen. Stat.*	*Municipal Employees* – §§ 7-468 to -69 *State Employees* – §§ 5-271, **5-280** *Teachers* – § **10-153a** *Family Child Care Providers* – § **17b-705a** *Personal-Care Attendants* – § **17b-706b**
Delaware *Del. Code Ann.* *[tit.], [§]*	*Public Employees* – 19, §§ 1303-1304, **1319** *Police Officers & Firefighters* – 19, §§ 1603-1604 *Public School Employees* – 14, §§ 4003-4004, **4019**
District of Columbia *D.C. Code*	*Public Employees* – §§ 1-617.10, 1-617.11, **1-617.07**
Florida *Fla. Stat.*	*Public Employees* – § 447.307
Georgia *Ga. Code Ann.*	*Firefighters* – § 25-5-5 Collective-Bargaining Restriction on Teachers – § 20-2-989.10

Hawai‘i *Haw. Rev. Stat.*	*Public Employees* – §§ **89-3**, **89-4**, 89-8
Idaho *Idaho Code Ann.*	*Teachers* – § 33-1273 *Firefighters* – § 44-1803
Illinois *[ch.] Ill. Comp. Stat. Ann. [§]*	*Public Employees* – 5, § **315/6** *Educational Employees* – 115, §§ 5/3, 5/10, **5/11** *Home Care & Home Health Workers* – 20, § **2405/3**
Indiana *Ind. Code*	*Employees of Correctional Institutions* – § 11-10-5-5 *Employees of State Institutions* – § 12-24-3-5 *Employees of Soldiers' & Sailors' Children's Home* – § 16-33-4-23 *Employees of the Schools for the Blind and for the Deaf* – §§ 20-21-4-4, 20-22-4-4 *Employees of a School Corp. or Charter School* – § 20-26-5-32.2 *Teachers* – §§ 20-29-2-9, 20-29-5-2 *Some Local Public Safety Employees* – § 36-8-22-7
Iowa *Iowa Code*	*Public Employees* – § 20.16

Kansas *Kan. Stat. Ann.*	*Teachers* – § 72-5415
Kentucky *Ky. Rev. Stat. Ann.*	*City & Local Government Firefighters* – §§ 345.030, 345.040 *Local Government Police Officers* – §§ 67C.402, 67C.404 *Urban-County Police Officers, Firefighter Personnel, Firefighters & Corrections Personnel* – §§ 67A.6902, 67A.6903 ***Housing Auth. of Louisville v. Serv. Emp. Int'l Union, Local 557***, 885 S.W.2d 692, 696-97 (Ky. 1994) (upholding fair-share fees)
Louisiana	No statutory authority
Maine *Me. Rev. Stat.[tit.][§]*	*Municipal Employees* – 26, §§ **629**, **963**, 965, 967 *State Employees* – 26 §§ **979-B**, 979-D, 979-F *University of Maine Employees* – 26 §§ 1023, 1025, 1026 *Judicial Employees* – 26 §§ **1283**, 1285, 1287

Maryland *Md. Code Ann.,* *[subject]*	*State Employees* – State Pers. & Pens., §§ 3-301, 3-407; **3-502** *Teachers* – Educ. §§ 6-404, **6-407** *School Employees* – Educ. §§ **6-504**, 6-505, 6-509 *Family Child Care Providers* – Fam. Law § **5-595.3** *Independent Child Care Providers* – Health-Gen. § **15-904**
Massachusetts *Mass. Gen. Laws* *[ch.], [§]*	*Public Employees* – 150E, §§ **2**, 4,5, **12** *Child Care Providers* – 15D, § 17 *Personal Care Attendants* – 118E, § 73
Michigan *Mich. Comp.* *Laws Ann.*	*Public Employees* – §§ 423.26, **423.210**, 423.211, *Public Police & Fire Dep't Employees* – § 423.234 *State Police Troopers & Sergeants* – § 423.274
Minnesota *Minn. Stat.*	*Public Employees* – § **179A.06**
Mississippi	No statutory authority

Missouri *Mo. Rev. Stat.*	*Public Employees* – §§ 105.510, **105.520; *Schaffer v. Bd. of Educ.***, 869 S.W.2d 163, 166 (Mo. Ct. App. 1993) (finding implicit authority for fair-share provisions in § 105.520) *Personal Care Attendants* – § 208.862
Montana *Mont. Code Ann.*	*Public Employees* – §§ **39-31-204**, 39-31-205, 39-31-305, **39-31-401**
Nebraska *Neb. Rev. Stat.*	*Public Employees* – §§ 48-816, 48-838 *State Employees* – § 81-1372
Nevada *Nev. Rev. Stat.*	*Local Government Employees* – § 288.160
New Hampshire *N.H. Rev. Stat. Ann.*	*Public Employees* – §§ **273-A:3**, 273-A:11; ***Nashua Teachers Union v. Sch. Dist.*,** 707 A.2d 448, 451-52 (N.H. 1998**)** (§ 273-A:3(I) permits negotiation of agency fees)
New Jersey *N.J. Stat. Ann.*	*Public Employees* – §§ 34:13A-5.3, **34A:13A-5.5**, **34:13A-5.6**

New Mexico *N.M. Stat. Ann.*	*Public Employees* – §§ **10-7E-9**, 10-7E-15 *Family Child Care Providers* – § 50-4-33
New York *N.Y. [subject] Law*	*Public Employees* – Civ. Serv. §§ 204, **208** *Child Care Providers* – Lab. § 695-d
North Carolina *N.C. Gen. Stat.*	Public-sector collective-bargaining restriction – § 95-98
North Dakota *N.D. Cent. Code*	*Meet and Confer Authorization for Teachers* – § 15.1-16-13
Ohio *Ohio Rev. Code Ann.*	*Public Employees* – §§ 4117.04, 4117.05, **4117.09**
Oklahoma *Okla. Stat. Ann.* *[tit.] [§]*	*Municipal Firefighters & Police Officers* – 11 § 51-103 *Rural Fire Protection District Firefighters* – 19 § 901.30-2 *School Employees* – 70 § 509.2
Oregon *Or. Rev. Stat.*	*Public Employees* – §§ 243.666, 243.672 *Family Child Care Workers* – § 657A.430 *Home Care Workers* – §§ 410.612, 410.614

Pennsylvania *Pa. Stat. Ann. [tit.]*	*Public Employees* – 43 §§ **1102.3**, 1101.606 *Police Officers & Firefighters* – 43 § 217.1
Puerto Rico *P.R. Laws [tit.], [§]*	*Public Employees* – 3 §§ 1451b, 1451f, **1454a**
Rhode Island *R.I. Gen. Laws*	*State Employees* – §§ **36-11-2**, 36-11-7 *Employees, including Public Employees* – § 28-7-14 *Municipal Firefighters* – § 28-9.1-5 *Municipal Police Officers* – § 28-9.2-5 *Teachers* – § 28-9.3-3; ***N. Kingstown v. N. Kingstown Teachers Ass'n***, 297 A.2d 342, 346 (R.I. 1972) (fair-share fees permissible) *Municipal Employees* – § 28-9.4-4 *State Police* – § 28-9.5-5 *Statewide 911 Employees* – § 28-9.6-5 *State Correctional Officers* – § 28-9.7-5 *Family Child Care Providers* – §§ 40-6.6-2, 40-6.6-4

South Carolina	Public sector collective bargaining restriction
South Dakota *S.D. Codified Laws*	*Public Employees* – § 3-18-3
Tennessee *Tenn. Code*	*Meet and Confer Authorization for Local Public-School Teachers* – § 49-5-608
Texas *Tex Gov't Code Ann.*	Public-sector collective-bargaining restriction – § 617.002
Utah *Utah Code Ann.*	*Firefighters* – § 34-20A-4
Vermont *Vt. Stat. Ann.* *[tit.], [§]*	*State Employees* – 3, §§ **903**, 941 *Judiciary Employees* – 3, §§ 1011, **1012** *Teachers & Administrators* – 16, §§ **1982**, 1991 *Independent Direct Support Providers* – 21, § **1634** *Municipal Employees* – 21, §§ **1722**, 1723, **1726**, 1734
Virginia *Va. Code Ann.*	Public sector collective bargaining restriction – § 40.1-57.2

Washington *Wash. Rev. Code*	*State Employees* – §§ **41.80.50**. 41.80.080, **41.80.100** *Local Government Employees* – §§ 41.56.100, **41.56.113**, **41.56.122** *School Employees* – §§ 41.59.090, **41.59.100** *Community College Employees* – §§ **28B.52.025**, 28B.52.030, **28B.52.045** *Marine Employees* – §§ 47.64.011, 47.64.135, **47.64.160** *Port Employees* – §§ 53.18.015, 53.18.050 *Long-Term Care Workers* – § 74.39A.270
West Virginia	No statutory authority
Wisconsin *Wis. Stat.*	*Public Safety Officers* – §§ **111.81**, 111.82, **111.85**, 111.825, 111.83
Wyoming *Wyo. Stat. Ann.*	*Firefighters* – § 27-10-103