No. 14-915

In the Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*, *Petitioners,*

v.

CALIFORNIA TEACHERS ASS'N, *et al.*, *Respondents.*

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

BRIEF FOR THE ATTORNEY GENERAL OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the Court should overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

2. Whether *Abood*'s requirement that employees not be required to fund a union's nonchargeable expenses must be administered using an opt-in, rather than opt-out, mechanism in order to avoid violating the First Amendment.

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INTRODUCTION

This Court has long recognized that governments are employers as well as regulators, and that as employers they need substantial latitude to manage the public workplace. In particular, a State may permit the majority of a group of public employees to decide that the entire group will bargain collectively with its public employer over certain terms and conditions of employment. Petitioners do not contest the constitutionality of such an arrangement. Nor do they contest that the State may specify that the public employer will negotiate with only one employee organization, and may impose on that organization a corresponding legal duty to fairly represent all employees in the unit.

For nearly forty years it has been settled that, under these circumstances, States may also require that all employees share the cost of such exclusive and equal representation. *See Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977). The State may conclude that mandatory agency fees are the best way to ensure fair and adequate funding of a bargaining mechanism that most employees favor, and that the State believes will serve its own ends by fostering stable public employee relations. *See id.* at 223-232. And in this special context, the First Amendment rights of employees who do not otherwise support the bargaining agent selected by their peers are protected by forbidding compelled subsidization of activities not directly related to the bargaining mission, while imposing no restriction on employees' right to make their own opinions clear outside the negotiating room. *Id.* at 230, 232-237.

Petitioners attack this established approach to reconciling the First Amendment rights of individual employees with the State's powerful interest in managing the public workplace. They provide, however, no justification for overruling *Abood*, other than their disagreement with its holding. And they suggest no other rule that would adequately protect both employee interests and the prerogative of every State to decide how best to structure its public employee relations.

STATEMENT

1. The California Legislature adopted the Educational Employment Relations Act in 1975 to "promote the improvement of personnel management and employer-employee relations" in California public schools. Cal. Gov't Code § 3540. In the preceding years, the State witnessed a series of public-employee work stoppages that leaders feared could reach a "crisis stage." Assemb. Res. 51, 1972 Reg. Sess. (Cal. 1972); *see also San Diego Teachers Ass'n v. Super. Ct.*, 593 P.2d 838, 845 (Cal. 1979). Earlier efforts to give public school employees a voice in setting the terms and conditions of employment were deemed "deficien[t]" because they "omitted a number of key elements" that had helped to "formulat[e] peaceful labor relations in the private sector," including an option to bargain collectively and a mechanism for doing so using one representative for all employees. *Pac. Legal Found. v. Brown*, 624 P.2d 1215, 1218-1219 (Cal. 1981). The EERA sought to address these concerns.

Under the Act, a majority of employees in an appropriate bargaining unit may decide that the entire unit will bargain collectively with a public school employer, using one bargaining representative. Cal.

Gov't Code §§ 3543(a), 3543.1(a) 3543.3, 3544. When recognized as the exclusive bargaining representative, a union "assume[s] an official position in the operational structure of" a school. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983). The union does not simply negotiate a contract for the bargaining unit, for example, but is required to do so in a prescribed way. *See* Cal. Gov't Code § 3543.6(c) (requirement to meet and negotiate with employer in good faith); *id.* § 3543.6(d) (requirement to participate in good faith in impasse procedures). The union also assumes contract-administration responsibilities that the school district and individual employees might otherwise perform less efficiently or not at all. *See id.* § 3543(b) (grievance arbitration); *see also* JA 178-182 (grievance processing); JA 155-170 (teacher-mentoring programs); JA 144-146 (leave-donation system). In discharging these functions, the exclusive representative must "fairly represent each and every employee in the appropriate unit." Cal. Gov't Code § 3544.9.

By law, the scope of collective bargaining is "limited to matters relating to wages, hours of employment, and other terms and conditions of employment," which include "health and welfare benefits …, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security …, procedures for processing grievances," layoffs of non-tenured teachers, and alternative compensation or benefits for a specified set of employees. Cal. Gov't Code § 3543.2(a)(1); *see also id.* § 3543.2(b)-(e) (describing other permissible subjects of meetings and negotiations); *San Mateo City Sch. Dist. v. Pub. Emp't Relations Bd.*, 663 P.2d 523, 527-529 (Cal. 1983) (discussing statute). The exclu-

sive representative may not negotiate with a school district over any contract proposal that would replace or annul provisions of the state Education Code. *Cumero v. Pub. Emp't Relations Bd.*, 778 P.2d 174, 183 (Cal. 1989).

Before collective bargaining begins, the union and the employer must present initial proposals to the public. Cal. Gov't Code § 3547(a), (b); *see also San Mateo*, 663 P.2d at 532. After an opportunity for comment, the statute requires the school district to adopt its initial proposal at a public meeting. Cal. Gov't Code § 3547(c). Before the district may conclude an agreement reached with the union, the statute requires that its major provisions, including costs, be disclosed at a public meeting. *Id.* § 3547.5(a); *see also id.* § 3547.5(b) (requiring certification that district funds can cover contemplated costs). These procedures safeguard the public's rights to be "informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives." *Id.* § 3547(e).

2. Public school employees have no obligation to join an organization acting as their exclusive bargaining representative. *See* Cal. Gov't Code §§ 3543(a), 3543.6(b); *Cumero*, 778 P.2d at 190. Once a majority of employees elects to be represented by a union, the employer will bargain only with that union, Cal. Gov't Code §§ 3543(a), 3543.3; but the Act "guarantees each employee in the unit the free choice of joining the union, refraining from participation in any union, or joining a rival union." *Cumero*, 778 P.2d at 190. Neither the union nor the employer may coerce, discriminate against, or impose or threaten reprisals against any employee for declining to par-

ticipate or for exercising any other right under the Act. Cal. Gov't Code §§ 3543.5(a), 3543.6(b); *Cumero*, 778 P.2d at 178 n.4.

If a represented employee does not join the union, the Act requires the employer, upon notice from the bargaining representative, to deduct from the employee's salary an "[a]gency fee," not to exceed the dues payable by union members, to cover the employee's pro rata share of "chargeable" expenses. *See* Cal. Gov't Code § 3546(a); *see also id.* § 3546.3 (allowing opt out for religious objectors). Chargeable expenses include "the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." *Id.* § 3546(a).

A union may also include in its agency fee the cost of certain "nonchargeable" activities unrelated to collective bargaining. Nonmembers are entitled, however, "to receive a rebate or fee reduction upon request, of that portion of their fee that is" attributable to any such activity. Cal. Gov't Code § 3546(a). Here, they may obtain the refund by checking a box on the respondent unions' form stating, "I request a rebate of the nonchargeable portion of my fees." JA 663. The employee need not disclose any reason for the request. *See* JA 663-664.

Each year, the union must send a written notice to all nonmembers setting forth the amount of the agency fee, the percentage of the fee attributable to chargeable expenses, the basis for that allocation, and a description of the process for declining to pay any nonchargeable amount. Cal. Code Regs. tit. 8, § 32992(a); *see also id.* § 32992(b)(1) (notice must include audited report used to calculate chargeable and nonchargeable expenses or certification from auditor). Nonmembers must have at least thirty days to

opt out of paying nonchargeable amounts, *id.* § 32993(a), (b), and any collection of fees in violation of these provisions is an unfair practice, *id.* § 32997.

A nonmember concerned that the union may have improperly classified its expenses may require a prompt independent review of the classification, here by checking another box on respondent unions' form. JA 635-636, 663. The union bears the burden of substantiating its calculations before an impartial decisionmaker. JA 635-636.

If 30% of employees seek a vote on mandatory fees, the California Public Employment Relations Board will convene an election, and a majority may rescind the fee arrangement. Cal. Gov't Code § 3546(d); Cal. Code Regs. tit. 8, §§ 34020-34040; *see also* Cal. Gov't Code § 3546(d)(2) (reinstatement); Cal. Code Regs. tit. 8, §§ 34050-34065 (same). Similarly, if 30% of employees oppose an incumbent representative, the Board will hold a secret-ballot election in which all employees may vote for a new representative or for "no representation." Cal. Gov't Code §§ 3544.5(d), 3544.7.

3. Petitioners, ten California public school teachers and the Christian Educators Association International, filed suit against a number of local teachers' unions, the unions' national and statewide affiliates, and several local school superintendents. JA 69-103. They alleged that the EERA's mandatory agency fee provision unconstitutionally compelled them to support union activities with which they disagreed. JA 97-99, 100-101. The individual petitioners alleged objections "to many of the unions' public policy positions, including positions taken in collective bargaining," but identified no specific objectionable position. JA 75-79. According to the complaint, requiring "any financial contributions in support of

any union" violated nonmembers' rights under the First Amendment. JA 101.

Petitioners also alleged that the Act violated their speech and associational rights by "requiring [them] to undergo 'opt out' procedures to avoid making financial contributions in support of 'nonchargeable' union expenditures." JA 101. According to the complaint, each petitioner subject to an agency fee requirement had successfully exercised his or her right to opt out, some for many years, and no petitioner had requested that his or her opt-out election last for more than a year. JA 74-77. Nevertheless, petitioners contended that requiring any affirmative step to avoid paying nonchargeable expenditures impermissibly burdened their rights. JA 100-102.

The Attorney General of California intervened in the district court to defend the constitutionality of the challenged state statutes. JA 665-680. The union respondents answered the complaint, denying many of petitioners' factual allegations and pleading contrary facts and defenses. JA 621-662. Some local superintendents answered the complaint, denying petitioners' claims. Dist Ct. Dkts. 39, 40, 41, 42, 51. Other superintendents stipulated that they would not oppose petitioners' claims, with petitioners agreeing to release any claim for fees or costs. Dist. Ct. Dkts. 72, 73, 74, 75, 76.[1]

In the district court, the union respondents sought to discover and present evidence relevant to petitioners' claims. Petitioners, however, asked the court to enter judgment against them on the pleadings, based on *Abood*, 431 U.S. 209, and *Mitchell v.*

[1] The Attorney General understands that Julian Crocker and Donald Carter are no longer in office. Current officials have not been substituted as defendants.

Los Angeles Unified School District, 963 F.2d 258 (9th Cir. 1992). *See* JA 620. They agued that there was no need to develop a factual record and that appellate review should be based on the pleadings alone. JA 619-620. The district court entered judgment against petitioners on that basis, and the court of appeals summarily affirmed. JA 18-24.

SUMMARY OF ARGUMENT

1. Petitioners argue principally that this Court erred in deciding *Abood*, and that California may not use mandatory agency fees as part of a structure for managing public-sector labor relations. The Court should reject those contentions.

Agency fees are one piece of an integrated structure adopted by the California Legislature to address practical employee-relations challenges faced by the State's many local school district employers. Against a backdrop of labor unrest, in 1975 the State adopted a new system allowing collective bargaining between school employees and district employers. A majority of the employees in an appropriate bargaining unit may decide that the entire group will be represented by an exclusive representative to bargain collectively with the employer over those terms of employment that the law allows to be determined at the local level. In that bargaining, the exclusive representative must fairly represent all employees.

This system of exclusive-and-fair representation provides important benefits for the public employer. For example, the single employee representative is responsible for understanding and prioritizing the concerns of the employee group as a whole, and for facilitating the resolution of contract-related disputes between the employer and individual employees. A relationship with one employee representative can

also help district management garner employee support for its own goals.

To make exclusive representation workable and fair, the law imposes two further requirements. First, the representative selected by a majority of employees has a legal duty to provide fair representation for everyone in the unit—even those who would prefer a different representative, or would rather not bargain collectively at all. Second, just as the organization is required to represent all employees, so too all employees are required to share the cost of the representation.

This shared-funding requirement, which is what petitioners challenge, ensures that the representative selected by most employees has the resources to discharge the responsibility the State imposes on it to represent all employees in the unit. It also ensures that the financial burden of representation is spread fairly among all those represented. This avoids the incentive that all employees—whether or not union supporters—would otherwise have to accept the benefits of representation without paying for them. Petitioners suggest that employee organizations would represent nonmembers equally even if the law did not require them to do so, and that employees would reliably pay for representation even if legally entitled to receive the same services for free. The Constitution does not, however, require the State to ignore basic principles of economics and human nature when designing structures to manage the public workplace.

In serving these important employer interests, mandatory agency fees impose some burden on the First Amendment interests of dissenting employees. Those burdens arise, however, in a very limited context. Mandatory fees are imposed only in direct sup-

port of a system of exclusive representation that petitioners do not challenge. The organizational speech that petitioners must help fund is that directly related to collective bargaining and contract administration. With speech in the context of those activities, there is no misleading attribution of any position to petitioners as individuals; and nothing in the agency-fee system restricts the ability of petitioners or other employees to express their own views in a public forum. Agency fees are thus unlike political patronage systems or the compelled subsidization of ideological speech, unrelated to bargaining, that *Abood* itself prohibits.

The rule adopted in *Abood* strikes a proper balance between the State's interests in managing public workplaces and the limited First Amendment burden imposed by mandatory fees. That balance reflects in part the Court's longstanding recognition that constitutional analysis differs when the government acts as employer, rather than regulator. In appropriate circumstances, the government as employer may even prohibit or punish employee speech on matters of public concern—something it could never do as regulator, outside the employment context. Here, agency fees operate solely within the employment context, and without imposing any restriction on employees' own speech in the public square. Petitioners offer no alternative system that would provide the same protection for the State's interests as employer while imposing lesser burdens on dissenting employees.

Finally, even if there were reason to question the original decision in *Abood*, petitioners have not established the special justification that would be required to set it aside under ordinary principles of *stare decisis*. Far from undermining *Abood*, this

Court's later decisions have repeatedly cited it and built on its foundation. While the Court's recent decisions in *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), questioned some of *Abood*'s reasoning and declined to extend it in new directions, neither decision involved the situation addressed in *Abood* itself and at issue here, where the government acts in its traditional role as employer. Overruling *Abood* in this core context would undermine significant reliance interests, without any demonstration that the basic approach adopted in that decision has proved unworkable over the last four decades. There is, of course, a wide range of views concerning the best way to structure labor-management relations in the public sector. This Court should not, however, disturb settled law that has long permitted individual States to make their own choices concerning whether to use mandatory agency fees to serve important interests of the government as employer.

2. Petitioners also ask the Court to invalidate use of an opt-out, rather than opt-in, system for effectuating *Abood*'s unquestioned holding that employees may not be compelled to support ideological speech unrelated to bargaining. In cases alleging compelled speech, however, this Court has appropriately focused on the question of compulsion. Of course, the government generally may not force individual speakers to personally endorse messages to which they object. That concern is not present, however, where an employee is offered an easy way to avoid even funding particular speech, let alone any potentially misleading individual attribution.

Petitioners argue that courts should not "presume acquiescence" in the loss of rights, but there are

many instances in which enforcement of a constitutional right depends on its timely assertion. They also argue that it is independently unconstitutional to require them to opt out every year. That objection is insubstantial, at least given the lack of any supporting record in this case. Finally, while use of an opt-out mechanism imposes no significant burden on objecting employees, it provides administrative advantages to the State, and avoids imposing the opposite burden of opting in on the apparently much larger number of employees who are not union members but nonetheless presently choose to pay a full agency fee. Under any circumstance suggested by the present record, the State's decision to use an opt-out mechanism does not offend the First Amendment.

ARGUMENT

I. CALIFORNIA'S USE OF PUBLIC-SECTOR AGENCY FEES IS CONSISTENT WITH THE FIRST AMENDMENT

In addressing management of the public workplace, as in other areas, States may adopt various different approaches. California has from time to time relied on different combinations of statutory prescription, unilateral decisions by public officials, and conferring or bargaining with employees or employee organizations. In 1975, during a period of unrest among public employees, the state Legislature adopted a new structure for employee relations in the State's many local school districts. *See* pp. 2-3, *supra*. The agency fees petitioners challenge are one piece of that structure.

We begin by discussing how the State's structure serves important interests of public employers, and how each piece relates to the whole. We then

consider the specific, limited burdens that, as *Abood* recognized, mandatory agency fees can impose on First Amendment rights. With that context established, we address the applicable legal framework and why, as *Abood* held, the State's interest in establishing a fair and workable system for managing public workplaces justifies the burden imposed by properly limited agency fees. Finally, we explain why petitioners have not made the sort of special showing that would be required, under familiar principles of *stare decisis*, to support their request that the Court overrule *Abood*.

A. Permitting Employees to Bargain Collectively Through One Representative, Funded by All Represented Employees, Furthers Important State Interests

1. Exclusive Agency and the Duty of Fair Representation

California's system of permitting a majority of public school employees in an appropriate bargaining unit to decide to bargain collectively with a district employer, with a single organization representing all employees, provides important benefits to the State. *See San Mateo*, 663 P.2d at 531 (EERA "expresses a legislative determination that the process of collective negotiations furthers the public interest" by promoting improvement of personnel management and employer-employee relations). For example, collective bargaining requires employees to aggregate, prioritize, and communicate their concerns or desires through their exclusive representative. This facilitates effective resolution or mitigation of issues that would otherwise generate dissatisfaction or conflict in the workplace, and relieves the employer of the burden of trying to assess employees' concerns and

priorities reliably by itself. A single union takes responsibility for reconciling sometimes-conflicting demands and priorities, developing collective positions, and making the trade-offs normally required in negotiation. Thus, in bargaining, the employer has "before it only one collective view of its employees," and can "bas[e] policy decisions on consideration of the majority view of its employees." *Cf. Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291-292 (1984); *see also id.* at 291 (noting State's "legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions").

The EERA also facilitates efficient resolution of individual employee disputes. When an employee complains about application of the terms of an agreement, the exclusive representative can assist in settling the dispute; in ensuring that similar claims are treated consistently; and in terminating non-meritorious grievances before they reach arbitration—which is otherwise the "most costly and time-consuming step in the grievance procedures." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967); *see also* Cal. Gov't Code § 3543(b). Without an exclusive representative performing this function, "a significantly greater number of grievances would proceed to arbitration," which "would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." *Vaca*, 386 U.S. at 191-192 (footnote omitted).

A system of exclusive representation can also help management build employee support for its own priorities. The bargaining process provides a public employer with an effective mechanism for communi-

cating its own needs and priorities, and for securing acceptance of policies or initiatives by the employees' single representative. The representative can then communicate with employees in a way that may be met with less resistance than if the same message were carried by management officials, or can credibly explain what was gained in exchange for a negotiated term that might be unpopular by itself.

Central to this system of workforce management is the duty of fair representation that California law imposes on exclusive bargaining representatives. Under the EERA, exclusive bargaining representatives must "fairly represent each and every employee in the unit," Cal. Gov't Code § 3544.9, and may not discriminate against employees who decline to join the union, *id.* § 3543.6(b). A union's duty of fair representation is "akin to the duty owed by other fiduciaries to their beneficiaries," and requires the union to act in the best interests of the unit as a whole. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74-75 (1991); *see also Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (bargaining representative "is responsible to, and owes complete loyalty to, the interests of all whom it represents"). An exclusive bargaining representative is obligated "to serve the interests of all members [of the unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177.

Imposing this legal duty helps assure public employers that the employee representative they bargain with is acting fairly on behalf of the workforce as a whole. For example, in negotiating contracts, processing grievances, and administering an agreement, an exclusive representative may not seek

preferential treatment for its own members. *See, e.g.*, *Furriel*, PERB Dec. No. 583 (1986), 1986 Cal. PERB LEXIS 33, at *6. Moreover, contrary to petitioners' assertion (at 41), a representative must consider the views of all employees in its unit. *See Kimmett*, PERB Dec. No. 106 (1979), 1979 Cal. PERB LEXIS 27, at *12 (although formal procedures not required, union must give "some consideration of the views of various groups of employees and some access for communication of those views"); *Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB*, 595 F.2d 808, 811-812 (D.C. Cir. 1979) (union must have "fair understanding of the interests of all represented employees," and may not "merely compute[] the composite personal preferences of individual union members without consideration of the views or interests of non-union employees"). Unions do have substantial latitude to advance bargaining positions that benefit the unit as a whole, even if those positions run counter to the economic interests of some employees. But the duty of fair representation requires that a representative make such trade-offs in a reasoned and nondiscriminatory manner. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270-272 (2009); *Romero,* PERB Dec. No. 124, at 9 (1980) (duty breached by "action or inaction [that is] without a rational basis or devoid of honest judgment").

2. Agency Fees Ensure Fair and Adequate Funding for Exclusive Representation

While a system of collective bargaining through exclusive agents can provide substantial advantages to public employers, it is not inexpensive. *See, e.g.*, *Abood*, 431 U.S. at 221. For example, bargaining often requires the "services of lawyers, expert negotiators, economists, and a research staff, as well as

general administrative personnel." *Id.* Processing employee grievances may require the exclusive bargaining representative to provide staff, legal representation, and other services as well as to underwrite the cost of any grievance arbitration. *See, e.g.*, *Vaca*, 386 U.S. at 175 (union paid for medical examination); JA 288 (union pays half of arbitration fees and expenses).[2]

The EERA addresses this issue by authorizing mandatory agency fees, which spread the costs of representation among all members of the bargaining unit. This ensures that an exclusive representative has the resources necessary to discharge its responsibilities to all employees—and thus that the system can provide public employers with the benefits envisioned by the State. Requiring all employees to share the cost of representation also eliminates "the inequity that would otherwise arise" from a state-imposed requirement that the union represent all employees equally, without preference for dues-paying members. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part, dissenting in part). And by preventing that inequity, it heads off the resentment and conflict that an unfair allocation of the funding burden would predictably cause among employees, which could otherwise present a serious workplace problem for public employers.

Petitioners challenge the State's judgment that compulsory agency fees are an appropriate means to support exclusive representation, but none of their arguments is persuasive. First, petitioners suggest

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[2] Although petitioners claim (at 45) that adjusting grievances consumes only a "small percentage" of agency fees, they offer no citation to support that speculation.

that the duty of fair representation is unimportant, because unions would not pursue preferential policies for members even if they could. Br. 41-43. There is, however, no reason to think that is the case. *See Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 35-36, 46-48 (1954) (union agreed to contract granting retroactive wage increases for union members, but not nonunion members); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 793-795, 797 (2d Cir. 1974) (union negotiated for seniority policy that favored union members); *Addington v. US Airlines Pilots Ass'n*, 791 F.3d 967, 990 (9th Cir. 2015) (seniority policy that disfavored those supporting rival union); *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 721 F.2d 1402, 1404 (D.C. Cir. 1983) (union policy provided lawyers to represent union members in grievance arbitrations but only non-lawyer staff to represent nonmembers). Indeed, petitioners themselves argue elsewhere that unions do seek preferential treatment for their members. Br. 41-42 n.11 (alleging unions manipulate negotiations to withhold insurance benefits from nonmembers); JA 638-640 (denying allegation); JA 92 (alleging unions opposed ballot initiative proponents argued would benefit nonmembers).

Second, petitioners contend it is "implausible" for the State to worry that employees would refuse to pay for valuable representation even if the law entitled them to receive it free of charge. Br. 33. But a situation in which all are entitled to a benefit but no one is required to pay for it presents a classic "free-rider" problem. *See, e.g.*, N. Gregory Mankiw, Principles of Microeconomics 218 (7th ed. 2015) (with public goods that are "not excludable, people have an incentive to be free riders," which means they "receive[] the benefit of a good but do[] not pay for it"); Donald Rutherford, Routledge Dictionary of Econom-

ics 233 (3d ed. 2013) (defining "free rider" as an "individual who does not pay for the goods or services he or she consumes"—such as "non-unionized workers who gain wage increases achieved under collective bargaining, without paying dues to a union to represent them") (capitalization omitted). Some employees might provide financial support for union activities without any legal compulsion. But basic principles of human nature surely support the State's inference that others would decline to pay voluntarily for what they would get anyway for free.

That, indeed, is what Congress concluded when it authorized mandatory agency-fee arrangements in the private sector: "[I]n the absence of a union-security provision many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 740-741 (1963) (citations and internal quotation marks omitted); *see also Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 755 (1988) (Congress permitted agency-fee arrangements "because of the considerable evidence adduced at congressional hearings indicating that such agreements promoted stability by eliminating free riders") (citations and internal quotation marks omitted). Petitioners offer no sound reason—and no citation to anything in the record in this case, which they affirmatively chose not to develop—to support their argument that basic rules of economics, confirmed by longstanding legislative judgments, do not apply to public-sector agency fees. [3]

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[3] Arguments made by a number of petitioners' *amici* support the State's position on this point. *See* Nat'l Right to Work Legal Defense Found. Br. 18 n.12 (public-sector union membership rates only 27.2% to 37.9% in four States allowing exclusive rep-

(continued…)

As this Court recognized in *Knox*, many organizations provide advocacy benefits that nonmembers can enjoy for free. 132 S. Ct. at 2289-2290; *see also* Pet. Br. 34. But "[w]hat is distinctive … about the 'free riders' who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part, dissenting in part) (emphasis in original). Thus, unions operating under a legal duty of fair representation are unable to avoid or mitigate the free-rider problem by, for example, providing preferential treatment to their members. Comparisons to private entities without those same state-imposed obligations are inapt.

(…continued)
resentation but banning compulsory fees); Gov. Martinez Br. 5-6 ("[t]here are a multitude of reasons why a public employee would not want to be associated with and support a union," ranging from "a practical or financial motivation, to an ideological belief"); *id*. 7 (public employee "might not feel any practical need to support union activities"). Petitioners' example of federal-employee unions (*see* Br. 31) highlights the same concern. *See* Richard Kearney & Patrice Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014) ("out of the approximately 1.9 million full-time federal … employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues"). Some *amici* point to empirical evidence—untested by adversarial proceedings—that they claim shows that agency fees are not necessary to have a functioning system of exclusive representation, *see, e.g.*, Mackinac Ctr. Br., but the California Legislature was not required to accept such claims.

B. Agency Fees Impose Limited First Amendment Burdens

Against the State's interests in its chosen system of exclusive representation, petitioners point to a burden on their First Amendment right not to engage in "compelled political speech." *E.g.*, Pet. Br. 1. *Abood* itself acknowledged that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," 431 U.S. at 222—a point the Court recently reiterated in *Knox*, 132 S. Ct. at 2295, and *Harris*, 134 S. Ct. at 2639, 2643. The question of agency fees arises, however, in a specific and limited context. California authorizes mandatory fees only as part of a broader mandatory association, the constitutionality of which petitioners do not contest. With mandatory agency fees, moreover, there is no misleading attribution of individual belief, and no restriction on the public expression of personal views. Agency fees are thus not at all like a political patronage system, or like the compelled subsidization of ideological speech, unrelated to collective bargaining, that *Abood* itself condemned.

1. Agency Fees Are Part of an Uncontested Mandatory Association

Public employees subject to agency fees are all bound together, in the first instance, as employees of one employer and members of an appropriate bargaining unit. Petitioners do not contend that it violates the Constitution for a State to permit the majority of such an employee group to decide that the entire group will bargain collectively with the public employer, through one exclusive representative, over negotiable terms and conditions of their employment.

See JA 74; *see also Knight*, 465 U.S. at 279, 288, 290, 291; *Abood*, 431 U.S. at 220-221.

There are not many situations in which the Constitution permits even such limited mandatory associations. Where it does, however, this Court has recognized that the government may also require the payment of fees to support the activities of the association. *See United States v. United Foods, Inc.*, 533 U.S. 405, 413-414 (2001); *Knox*, 132 S. Ct. at 2289. This is true even when activities supported by the fees include activities or expression involving matters of broad community concern. Thus, for example, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court upheld compulsory bar dues for activities relating to regulation of the legal profession and improving the quality of legal services. *Id*. at 13-14 (because "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services," State Bar may "constitutionally fund activities germane to those goals out of the mandatory dues of all members"). And in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Court rejected a First Amendment challenge to a requirement that all students enrolled at a public university pay student activity fees that were then distributed on a viewpoint-neutral basis, even though it was "all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable." *Id*. at 232.

Likewise, in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 472-473 (1997), the Court upheld a system of mandatory fees to pay for generic fruit advertising, when they were assessed as part of a legally mandated collective industry program. And the *absence* of this kind of "broader regulatory sys-

tem" was the basis on which the Court invalidated compulsory fees for advertising mushrooms. *United Foods*, 533 U.S. at 415-416; *id.* at 413-414 ("threshold inquiry" in compelled-subsidization cases "must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place"). As the Court summarized the rule in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the government may compel the payment of subsidies that are "germane to the regulatory interests that justified compelled membership," *id.* at 558, but not for speech that is "unconnected to any legitimate government purpose," *id.* at 565 n.8.

Here, petitioners do not dispute that the State has constitutionally established a system under which some of their terms of employment are set through collective bargaining, performed on behalf of entire groups of employees of which petitioners are members. The further requirement that they pay a proportionate share of the costs of that system does not impermissibly burden their individual First Amendment rights.

2. Agency Fees Are Unlike Impermissible Burdens

The activities that agency fees support also arise in a context that minimizes interference with individual interests. In collective bargaining and contract administration, the principal audience for the bargaining agent's speech is the management of a public employer, in private negotiations or employment-related proceedings. *Cf. Lehnert*, 500 U.S. at 522, 528-529 (plurality opinion) (First Amendment interests more burdened when speech funded by compulsory fees is in public forum). In those discus-

sions, moreover, it is understood that union representatives are expressing a set of collective positions on behalf of the employee group—not the personal views of any individual employee. (In the same way, the employer's negotiator does not necessarily express the personal views of the superintendent, principal, or other administrators.) In collective bargaining, the employer considers the union's statements as the bargaining unit's "official collective position," recognizing that "not every [employee] agrees with the official [union] view on every policy question." *Knight*, 465 U.S. at 276 (discussing meet-and-confer sessions); *see also Glickman*, 521 U.S. at 471 (advertising funded through compelled assessments not attributed to individual fee payers but to collective).

California's agency-fee system also imposes no constraint on the freedom of individual employees to express views contrary to those of the union or its spokesperson, or to associate with other like-minded individuals in questioning or opposing the union's position. Although individual employees do not participate in contract negotiations, they remain free to communicate their views to school officials, their colleagues, and the public at large. *See Abood*, 431 U.S. at 230 ("public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint"); *City of Madison, Jt. Sch. Dist. v. Wisc. Emp. Relations Comm'n*, 429 U.S. 167, 175 (1976) (teachers have constitutionally protected right to express views on collectively bargained agreement at school board meeting).

California's agency-fee system thus poses no threat to the vitality of public debate. In cases involving free-speech rights of public employees, "[t]he

interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam). California's system does not restrict employees' ability to speak out about any issue, including in opposition to an exclusive bargaining representative. It limits neither the individual employee's interests in free self-expression nor the public's interest in receiving the well-informed views of public school teachers.

Similarly, nothing in California's system discriminates on the basis of viewpoint. *See* Pet. Br. 23-24. California law authorizes compulsory agency fees to be allocated to organizations based on their status as the exclusive bargaining representative, not based on any viewpoint an organization may espouse. Cal. Gov't Code §§ 3543(a), 3546(a); *see Perry Educ. Ass'n.*, 460 U.S. at 48-49 (no viewpoint discrimination in school policy granting access to certain facilities to exclusive bargaining representative, because it is "more accurate to characterize the access policy as based on the *status* of" the recognized union). Indeed, state law forbids employers from favoring any employee organization over another based on the organization's viewpoint (or for any other reason). Cal. Gov't Code § 3543.5(d). This case is therefore nothing like *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 825, 831 (1995), which held that a public university could not fund student publications in a way that "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."[4]

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[4] In *Carey v. Brown*, 447 U.S. 455 (1980), also cited by petitioners (at 24), the Court acknowledged that a statute that generally barred residential picketing, except for picketing on labor-

(continued…)

Likewise, compulsory agency fees are unlike government restrictions on speech or attempts to prescribe orthodoxy in thought or belief. They do not, for example, regulate or punish employee speech based on its content. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 574 (1968). They do not compel any employee to personally express or endorse any message. Unlike a state requirement that school children salute the flag or recite the Pledge of Allegiance, agency fees do not require any employee to express "affirmation of a belief [or] attitude of mind" or compel any "individual to communicate by word and sign his acceptance of … political ideas." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *see also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (rejecting requirement that funding recipients "pledge allegiance to" government policy). Nor do they conscript employees as "courier[s] for" any state message. *Wooley v. Maynard*, 430 U.S. 705, 713, 717 (1977) (State may not require drivers to display "Live Free or Die" on license plates); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-801 (1988) (compelling charitable solicitors to communicate specified information violated First Amendment).

(…continued)
related matters, did *not* discriminate on the basis of viewpoint. *Id*. at 462 n.6. The statute failed instead because it favored one topic (labor disputes) over all others. *Id*. at 460-461. Presumably petitioners do not suggest that agency fees must be used to support speech unrelated to collective bargaining. In *City of Madison* (*see* Pet. Br. 24), the Court held that a school board could not be required to exclude teachers from a public meeting at which a proposed labor agreement was being discussed. 429 U.S. at 175-176. The EERA imposes no constraint on teachers' ability to attend or speak at public meetings.

Instead, this case is analogous to those in which the Court has rejected claims of impermissible compelled support or association. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 51, 70 (2006), the Court rejected a First Amendment challenge to a federal statute that required law schools to give the military equal access to recruiting services, notwithstanding the schools' objections to certain military policies. The Court explained that facilitating military recruiters' activities on campus did not suggest the law schools agreed with the recruiters' speech; the law schools were free to communicate their own views about the military's policies; and the law-student audience could appreciate the difference between "speech a school sponsors and speech the school permits because legally required to do so." *Id.* at 60, 65. Similarly, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87-88 (1980), the Court held that the law could require a shopping mall owner to permit pamphleteering on the premises where there was little practical likelihood that speakers would be understood to be expressing the views of the property owner, and the owner could take steps to disavow the speech. As in these cases, in the collective-bargaining context it is clear that the union is not necessarily expressing the personal views of any individual teacher, and individual employees are free to express contrary views or join opposing organizations.

3. Agency Fees Are Not Like Patronage Schemes or Compelled Support for Political Speech Outside the Bargaining Context

Disregarding these features of California's agency-fee system, petitioners analogize mandatory agency fees to patronage-based employment schemes or the compulsory support of political and ideological speech, unrelated to bargaining, that *Abood* invalidated. Pet. Br. 18-20, 21-28. Neither comparison is apt.

In a patronage-based employment regime, public employees must "pledge their political allegiance" to a particular political party. *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion). Under such schemes, employees must withhold support for their own preferred party and may be required to campaign for or contribute to the incumbent employer's party. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66-67 (1990) (employees penalized for, *inter alia*, voting in opposing party's primary and lacking support of party officials); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715-716 (1996) (contractor suffered retaliation for refusing to make campaign contribution to incumbent mayor and for supporting opponent's campaign, including by displaying opponent's campaign posters). By making employees "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold," *Rutan*, 497 U.S. at 73, patronage-based employment systems interfere with First Amendment rights in a way that is absent with agency fees, which involve no coercion of belief and impose no restraint on employees' ability to express opposing views or affiliate with opposing organizations.

The nature of the speech involved in a union's representational activities is also different from that in a union's advocacy activities outside the context of contract negotiation and administration. Whereas a union's non-representational political and ideological activities may address broad issues of public policy, unrelated to the school workplace (*see* JA 641), many of the routine employment matters addressed in collective-bargaining agreements—such as procedures for taking leave (JA 134-136, 264-277) or workplace policies for identifying and resolving safety concerns on campus (JA 170-171, 289-290)—are not "political" or "ideological" in any relevant sense. Collective bargaining over these matters will not normally implicate strongly held personal views or ideological disagreements within the bargaining unit. *See Lehnert*, 500 U.S. at 522 (plurality opinion) (extent of disagreement relevant to degree of infringement on First Amendment interests). Similarly, a "petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011); *see also Abood*, 431 U.S. at 263 n.16 (Powell, J., concurring in the judgment) (requiring fees for grievance processing effects a "minimal intrusion on First Amendment interests").

Of course, bargaining may also address topics such as salaries or class size, which are both at the core of the employment relationship and, at least in the aggregate, matters of broader policy concern. *Abood* itself expressly recognized as much. 431 U.S. at 222, 231. But as to these issues, the context of communications is very different when they are part

of contract negotiation or administration than in other settings. *See* pp. 23-27, *supra*.[5]

In addition, the scope of union speech in the collective-bargaining context is constrained by statute. The permissible subjects of bargaining are statutorily prescribed. Cal. Gov't Code § 3543.2. And in bargaining, unions are bound by duties that do not apply elsewhere. The duty of fair representation precludes them from taking positions that prefer members at the expense of nonmembers. *See* pp. 15-16, *supra*. The duty to bargain in good faith requires them to approach collective bargaining with a "genuine desire to reach agreement." *San Diego Teachers Ass'n*, 593 P.2d at 843. They may not, for example, refuse to consider an employer's proposal on a subject within the scope of bargaining, or take unilateral action without negotiating. *Torrance Mun. Emps., AFSCME Local 1117*, PERB Dec. No. 1971-M (2008), 2008 Cal. PERB LEXIS 43, at *38-41; *Standard Teachers Ass'n*, PERB Dec. No. 1775 (2005), 2005 Cal. PERB LEXIS 122, at *31. They must also participate in good faith in prescribed procedures in the case of an impasse in negotiations. Cal. Gov't Code § 3543.6(d). Thus, whereas in general advocacy activities a union is free to express whatever positions or engage in whatever lawful tactics it thinks will advance its interests, the same is not true in collec-

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[5] Petitioners invoke the dissenting opinion in *Harris* in support of their view that agency fees are unconstitutional if representational activities can be characterized as involving matters of "public concern." Pet. Br. 30, 49. They twice omit, however, half of the dissent's observation, which was that compelled fees could not be used for "speech in political campaigns" because it "relates to matters of public concern *and has no bearing on the government's interest in structuring its workforce*[.]" *Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting) (emphasis added).

tive bargaining. State law constrains and channels bargaining activities, for both unions and management, as part of a system that the state Legislature concluded would help establish workable terms and conditions of employment in public workplaces.[6]

C. The State's Interests Are Sufficient to Justify the Limited Burden on Speech Associated with Compulsory Agency Fees

In the context of public-sector bargaining, *Abood* strikes a sound and workable balance between the government's substantial interests in peaceful labor relations and efficient administration and the rights of employees who would prefer to have no association with a union. As *Abood* recognized, compulsory agency fees do "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so." 431 U.S. at 222. As to fees that support central bargaining and contract-administration functions, the limited interference involved is justified by the countervailing benefits to the public employer of a fairly and adequately funded system of exclusive representation. *Id*. at 220-222; *see* pp. 13-20, *supra*. That justification does not extend, however, to compelled funding for a union's own political or ideological activities.

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[6] For the same reasons, collective bargaining is hardly the same as lobbying. *See* Pet. Br. 24-25. In addition, on the record in this case, petitioners cannot support their suggestion (at 24-25) that unions use agency fees to support lobbying beyond that related to ratification or implementation of collective-bargaining agreements. *See* JA 634 (respondent unions do not treat lobbying and political activities as chargeable unless specifically related to ratification or implementation of agreement); JA 644 (bargaining positions not coordinated with express political advocacy).

Abood, 431 U.S. at 234-235; *see also Lehnert*, 500 U.S. at 516. That balanced approach was sound when *Abood* was decided, and it remains sound today.

1. The Court Has Long Recognized Government's Greater Latitude to Manage the Public Workplace

The permissibility of the balance *Abood* struck reflects in part this Court's longstanding recognition that "there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (alteration in original) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). This distinction has been "particularly clear" in the context of public employment, where the government has a special "mission as employer." *Id.* When it acts in that capacity, "'[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one[.]'" *Id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)); *see also Guarnieri*, 131 S. Ct. at 2494 (noting "unique nature" of government's role as employer and its "substantial interest in ensuring that all of its operations are efficient and effective"); *Connick v. Meyers*, 461 U.S. 138, 150 (1983) (noting "government's legitimate purpose in promoting efficiency and integrity in the discharge of official duties") (internal quotation marks omitted).

In light of this important interest, the Court has "often recognized that government has significantly

greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 553 U.S. at 599; *see also NASA v. Nelson*, 562 U.S. 134, 148 (2011) ("Time and again [the Court's] cases have recognized that the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" (quoting *Engquist*, 553 U.S. at 599)). For example, the Court has held that public employers need not obtain a warrant or marshal probable cause before examining the contents of an employee's desk for certain work-related reasons. *See O'Connor v. Ortega*, 480 U.S. 709, 719-720 (1987) (plurality opinion) (Court "balance[s] the invasion of the employees' legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace"); *id.* at 732 (Scalia, J., concurring in the judgment) (work-related searches that are "regarded as reasonable and normal in the private-employer context" do not violate the Fourth Amendment). Similarly, the Constitution does not bar a municipal police force from requiring officers to cut their hair. *Kelley v. Johnson*, 425 U.S. 238, 244-245 (1976) ("highly significant" that officer sought constitutional protection "not as a member of the citizenry at large, but on the contrary as an employee of the police department"). And government contractors may be required to answer intrusive background questions that help further the government's interests in managing its internal operations. *Nelson*, 562 U.S. at 153-155.

With respect to the First Amendment, even the "profound national commitment to the freedom of speech must of necessity operate differently when the government acts as employer rather than sovereign." *Waters*, 511 U.S. at 679 (plurality opinion) (citation

and internal quotation marks omitted). Accordingly, the Court has approved employment-based restrictions that directly restrict speech by public employees, including speech of central First Amendment concern. For example, in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), the Court upheld a provision of the federal Hatch Act that prohibited federal employees from taking any active part in political management or political campaigns. *Id.* at 99, 101; *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (reaffirming *Mitchell*). Although those restrictions directly regulated core political speech and association, the Court deemed them sustainable so long as "the act regulated … [was] reasonably deemed by Congress to interfere with the efficiency of the public service." *Mitchell*, 330 U.S. at 101.

Indeed, in some circumstances the Court has permitted government agencies to punish public employees based on the content of their speech. *See Connick*, 461 U.S. at 154. Although the government as regulator could never impose such sanctions, "the State has interests as an employer in regulating speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. Thus, public employers generally may penalize employees' speech when it is expressed pursuant to official job duties, or when it involves matters of only private concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418, 421 (2006); *Connick*, 461 U.S. at 147. Where an employee speaks on her own behalf on an issue of public concern, the government employer may still restrict or punish the speech if it has "an adequate justification for treating the employee differently from any other member of the public," such as that the speech "has some potential to affect the

[employer's] operations." *Garcetti*, 547 U.S. at 418. In such a case, the Court balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *see also Connick*, 461 U.S. at 150.

The Court has applied similar principles with respect to Petition Clause claims, reasoning that the "substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the Petition Clause." *Guarnieri*, 131 S. Ct. at 2495. Indeed, "[i]n light of the government's interests in the public employment context, it would be surprising if Petition Clause claims by public employees were not limited as necessary to protect the employer's functions and responsibilities." *Id.* at 2497; *cf. id.* at 2506 (Scalia, J., concurring in the judgment in part and dissenting in part) (Petition Clause does not apply to public employees' petitions addressed to government in its capacity as employer).

In assessing government employees' constitutional claims, moreover, the Court has accorded weight to the employer's judgment about the appropriate way to assure the proper functioning of the workplace. For example, an employer generally is not required to "allow events to unfold" to the point at which disruption actually occurs; it may take steps to forestall such harm. *Connick*, 461 U.S. at 152; *see Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996) (Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions

of harm used to justify restrictions on speech of the public at large") (internal quotation marks omitted). In addition, to justify a specific workplace restriction, the government need not demonstrate that it has chosen the least restrictive possible option. *See Nelson*, 562 U.S. at 153-155 (government need not have adopted less-intrusive means to achieve goal where its approach reflected "a reasonable position, falling within the wide latitude granted the Government in its dealings with employees") (internal quotation marks omitted); *Mitchell*, 330 U.S. at 102 (precise scope of employment restriction involves "matters of detail for Congress").[7]

2. Agency Fees Are a Permissible Feature of the State's System for Managing the Public School Workforce

The present case is like those discussed above in that it involves the government's interests and actions not as general regulator, but as employer. Once a group of employees has voted to unionize, the limitation of bargaining to a single representative, the accompanying imposition of a duty of fair representation, and the establishment of an equitable funding mechanism are all measures that the State imposes, on behalf of local school districts, to serve the inter-

[7] *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), on which petitioners rely (at 17), are inapposite. Both cases involved significant restraints on individuals' ability to associate, and neither involved the government acting in its capacity as employer. *See NAACP*, 357 U.S. at 462 (requirement to disclose membership list exposed members "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); *Jaycees*, 468 U.S. at 623 (requirement that "force[d] … group to accept members it does not desire").

ests of the government as employer. To the extent this case differs from others in this area, the distinction is that the burdens on employee interests here are much more modest than those imposed by, say, restrictions on individual speech on matters of public concern. These public-employer cases thus provide strong support for the line drawn in *Abood* and embodied in the California statutes challenged here.

California's agency-fee requirement is also closely tailored to the State's objectives. Under the EERA, public school employees have no obligation to join or participate in any union's activities; are free to speak out against their exclusive bargaining representative or any position it may take in collective bargaining; and have no obligation to fund union activities that are not germane to the collective representation. The fee system is thus carefully limited to serving the State's interest in assuring financial support for required bargaining activities in a way that is both stable and fair to all represented employees.

Petitioners argue (Br. 48) that cases involving the government as employer are inapposite because petitioners do not work directly for the State. But the exact governmental structure the State has chosen makes no difference to the constitutional analysis. *Cf. Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-608 (1991) ("local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion" (internal quotation marks, ellipses, and alterations omitted)). In California, state law establishes a basic statutory framework for the employment of teachers by local school districts. In enacting the EERA as part of that framework, the State did not exercise "its sovereign power 'to regulate or license'" citizens. *See Nelson*,

562 U.S. at 148 (quoting *Cafeteria & Rest. Workers*, 367 U.S. at 896). The Act prescribes a system of workplace management that applies to teachers (and local administrators) only in their capacity as public employees, not as members of the citizenry at large. Cal. Gov't Code § 3540 (EERA enacted to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California").

The cases cited by petitioners (at 50-51) likewise do not undermine the State's position. In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), for example, the Court held unconstitutional a law prohibiting government employees from receiving honoraria for speeches and articles (among other things), because the prohibition broadly restricted speech that had "nothing to do with [employees'] jobs" and that was disseminated to the public at large, rather than more limited "audiences composed of co-workers or supervisors." *Id.* at 458, 465; *see also id.* at 461 (ban covered dance reviews as well as lectures on the Quaker religion and African-American history). Moreover, the speech at issue did not "even arguably have any adverse impact on the efficiency of the offices" in which the employees worked. *Id.* at 465; *see also City of San Diego*, 543 U.S. at 80 ("In *NTEU*, it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer."). While *NTEU* recognized the government's important concern for operational efficiency, the sweeping honoraria ban—which "induce[d]" employees "to curtail their expression," including with respect to speech that had no relevance to the employee's work, and which imposed a "significant burden on the public's right to read and hear" employees' expressions—was not a "reasonable response" to that concern. 513 U.S.

at 469, 470, 476. California's agency-fee system does not curtail any employee's personal expression, and is directly related to the State's interests in fostering effective labor-management relations in the public workplace.[8]

In their challenge to the connection between the State's interests and mandatory agency fees, petitioners argue that the State could have an exclusive-bargaining system, including a duty of fair representation, without requiring that each employee bear a proportionate share of the associated costs. Br. 31-33. In petitioners' view, for example, unions facing financial shortfalls should redirect membership dues raised from willing members for political or ideological purposes to representational activities. Br. 31-32. But under petitioners' own First Amendment theory, a requirement that some employees subsidize representational speech on behalf of others would impermissibly burden the contributing employees' rights. *Cf. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 n.2 (2007) (noting possible First Amendment concern if State burdened union's ability to spend its

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[8] None of the other cases cited by petitioners (at 51 n.14) is on point. *See Lane v. Franks*, 134 S. Ct. 2369, 2374-2375, 2381 (2014) (employee may not be fired for giving "truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities" where government does "not assert, and cannot demonstrate, any government interest that tips the balance in [its] favor"); *Rankin v. McPherson*, 483 U.S. 378, 389-390 (1987) (employee fired for content of her speech, and "possibility of interference with the functions of [employer's] office had *not* been a consideration in [the] discharge of" the employee (emphasis in original)); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979) (remanding case for determination whether school would have taken adverse employment action but for teacher's statements to principal that school policies were racially discriminatory).

members' dues). In any event, there is little reason to think that union members would continue to support the union's activities knowing that their contributions were being diverted to serve the needs of nonmembers who declined to contribute their share of the costs. And if they did, they would presumably be unhappy about the situation, fostering rancor and resentment in the workplace and directly undercutting the interests of the government employer.

Petitioners' second alternative—more active union membership campaigns (Br. 32)—would likewise directly threaten the State's core objectives in establishing a system that serves the interests of public employers. A union forced to rally a smaller number of employees to pay higher dues in order to support basic contract negotiation and administration duties would likely assume a more adversarial posture toward management in order to recruit and retain members. *See* Patricia N. Blair, *Union Security Agreements in Public Sector Employment*, 60 Cornell L. Rev. 183, 189 (1974-1975). Such a union would be more likely to press unreasonable demands, resist concessions, pursue insubstantial grievances, and disparage management. A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. Indus. Com. L. Rev. 993, 1012 (1975-1976); *see also id.* ("assured status for the union is not a guarantee of successful union-employer relations but it is a prerequisite") (internal quotation marks omitted).

To be sure, some teachers may disagree with positions taken by their bargaining representative or oppose the idea of collective bargaining itself. Pet. Br. 34-36, 45-46; Wilson Br. 23-27; Romero Br. 13-14. But two premises for any mandatory fee are that a majority of the employee group has voted to be repre-

sented by an exclusive bargaining representative and that the selected representative is duty-bound to treat all employees in the unit fairly and without discrimination. Under those circumstances, all members of the bargaining unit benefit from the creation of a system that not only requires but enables fair representation of all employees. There is, moreover, good reason to conclude that many policies adopted through the collective-bargaining process generally inure to the benefit of all teachers. *See* JA 134-137 (providing for paid sick leave); JA 267-270 (permitting personal necessity leave, including for religious observance); JA 289 (requiring creation of emergency plan enabling employee to receive immediate assistance in the case of threats to employee's safety); JA 290 (requiring district to notify teacher of student with significant behavioral problems); *see also* JA 655-656 (most of union respondents' collective-bargaining activities involve improvement in wages, benefits, and workplace conditions that benefit petitioners).[9]

In any event, as this Court has observed, "[i]nevitably differences [will] arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of

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[9] Petitioners argue (at 46) that union representation in the grievance-adjustment process offers no tangible assistance to employees. But grievance procedures, as well as other dispute-resolution mechanisms in collective-bargaining agreements, involve issues directly affecting a teacher's career, including (contrary to petitioners' claim) whether discipline short of termination should be imposed. *See* Cal. Gov't Code § 3543.2(b) (disciplinary action short of termination negotiable upon request of either party); JA 133-134 (employee right to union representation regarding employer-proposed involuntary transfer); JA 243 (union representation at meetings regarding imposition of discipline or involuntary transfers or reassignments).

employees," and "[t]he complete satisfaction of all who are represented is hardly to be expected." *Huffman*, 345 U.S. at 338. Indeed, from the public employer's point of view, a central purpose of exclusive representation is to provide a mechanism for collating the disparate views of all employees into a collective set of positions and priorities. This allows the negotiation of an agreement that is likely to be broadly satisfactory to employees as a whole, thus fostering relative peace and productivity in the workplace. Of course, no system will ensure universal satisfaction; and the constitutionality of the system does not depend on whether every fee payer perceives a benefit from his financial contribution to the system. *See Keller*, 496 U.S. at 16 (upholding compelled payment of bar dues used in part to discipline some dues payers); *Southworth*, 529 U.S. at 231 (sustaining mandatory student activity fee in light of "the important and substantial purposes of the University" without a showing that the program benefitted dissenting students).[10] But if most employees elect to have a union, then a system of exclusive representation, made comprehensive and equitable through state-imposed rules to ensure both fair representation and fair funding, is a constitutional approach to making collective bargaining serve both the interests of all employees and those of the public.

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[10] Petitioners err in arguing that, under *Harris*, respondents must demonstrate that benefits for nonmembers could not be achieved without mandatory fees. *See* Pet. Br. 30-31. As explained above, this kind of "exacting scrutiny," *Harris*, 134 S. Ct. at 2641, does not apply where the government acts in its capacity as employer. Moreover, petitioners cannot complain about an absence of evidence when they affirmatively prevented the development of any factual record.

D. Petitioners Have Not Established Any Special Justification for Overruling *Abood*

Even if there were reason to question the original decision in *Abood*, its practical approach to balancing employer and employee interests in the public employment context has defined and shaped the law for almost forty years. In any such situation, due respect for the rule of *stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (internal quotation marks omitted). Even in constitutional cases, that doctrine "carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal citations and quotation marks omitted); *see also, e.g.*, *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Here, contrary to petitioners' submission, there is no such justification for upending settled law.

To begin with, *Abood*'s basic rule has not been undermined by later developments in the law. On the contrary, in the years since *Abood* was decided this Court has repeatedly relied and built on its central principles. In *Keller*, for example, the Court sustained a system of mandatory fees imposed to support the regulation-related activities of an integrated bar association, relying largely on *Abood*'s holding that when the government may mandate some form of association, it may also compel contributions to fund activities that are germane to the purposes for which the association is justified. *Kel-*

ler, 496 U.S. at 13-14; *see also Southworth*, 529 U.S. at 231 ("principles outlined in *Abood* provided the foundation for [the Court's] later decision in *Keller*"). Similarly, in *Glickman* the Court relied on *Abood* in sustaining mandatory assessments for advertising that were part of a comprehensive industry program. *Glickman*, 521 U.S. at 472-473. The Court also applied *Abood*'s rule in *United Foods*, which invalidated a different program of compelled assessments for mushroom advertising because, unlike workplace agency fees or the assessments in *Glickman*, the fees in question were "not part of some broader regulatory scheme." 533 U.S. at 415; *see also Johanns*, 544 U.S. at 558 (*United Foods* "concluded that *Abood* and *Keller* were controlling").

As petitioners emphasize (*e.g.*, Br. 28-29, 55), the Court's recent opinions in *Knox* and *Harris* questioned aspects of *Abood*'s reasoning. *See Knox*, 132 S. Ct. at 2290; *Harris*, 134 S. Ct. at 2632-2634. Neither case, however, involved the constitutionality of mandatory fees for a union's core activities in representing public-sector employees in a traditional public workplace. *Knox* held only that a union could not impose a special assessment on all employees to pay unanticipated, nonchargeable expenses for *political* speech. 132 S. Ct. at 2284, 2286. And *Harris* refused to approve a "significant expansion" of *Abood* to cover an "unusual" arrangement involving fees imposed on individuals who were not traditional government employees (some of them being, indeed, relatives of their direct household employers) and were not subject to uniform terms and conditions of employment established through a conventional bargaining process. 134 S. Ct. at 2627, 2634-2636.

Again, "there is a crucial difference, with respect to constitutional analysis, between the govern-

ment exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage its internal operation.'" *Engquist*, 553 U.S. at 598 (quoting *Cafeteria & Rest. Workers*, 367 U.S. at 896). *Knox* and *Harris* involved challenges to mandatory fees imposed outside the standard *Abood* context, where the government acts as employer and fees allow the union to fulfill its traditional role of negotiating and administering a collective-bargaining agreement that sets many of the terms and conditions of employment. In that context, present here, the Court has recognized "[t]ime and again" that governments are entitled to greater flexibility when it comes to choosing structures for their own internal operations. *See Nelson*, 562 U.S. at 148.

Overruling *Abood* would also undermine significant reliance interests. California has built its approach to public-employee bargaining on the understanding that it could require one bargaining agent to provide equal representation to all employees, and then ensure fair and adequate funding for that arrangement by allowing the agent to collect mandatory agency fees to fund its core representational activities. Local school districts have negotiated multi-year collective-bargaining agreements that assign rights and responsibilities on the understanding that unions will have an assured source of funding to perform contractually assigned tasks—and that the costs of those representational activities will be borne fairly by all members of the bargaining unit, rather than by just some subset, or the employer, or the public at large.

The State has followed this approach, moreover, not only in providing the basic, statewide structure for its large system of locally controlled public schools, but also in managing other sectors of the

public workforce. Cal. Gov't Code §§ 3502.5(a) (local government employment), 3515.5 (state employment), 3583.5 (public higher education). Accepting petitioners' invitation to overrule *Abood* would eliminate a form of workplace management that California and many other States have adopted. That significant disruption would "jeopardize the delicate balance governments have struck between the rights of public employees and the government's legitimate purpose in promoting efficiency and integrity in the discharge of official duties." *Engquist*, 553 U.S. at 607 (internal quotation marks and alterations omitted).

Petitioners seek to counter these substantial reliance interests in part by arguing that *Abood*'s distinction between "chargeable" and "nonchargeable" expenses has proven unduly difficult to apply. *See* Pet. Br. 56-57. As an initial matter, there is no basis in the record of this case—which petitioners affirmatively chose not to develop—to suggest that the line between "chargeable" and "nonchargeable" expenses is too difficult to discern. In any event, *Abood* itself recognized that courts would face line-drawing challenges, 431 U.S. at 236, and in the ensuing years the Court has elaborated principles for courts to apply in resolving questions of chargeability. *See Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Lehnert*, 500 U.S. 507; *Locke v. Karass*, 555 U.S. 207 (2009). This process of clarification has not proven unduly complex or difficult. Indeed, in the nearly forty years since *Abood*, the Court has heard only a handful of challenges involving the proper classification of expenses or the procedures surrounding employees' right to opt out of paying nonchargeable expenses. *See Harris*, 134 S. Ct. at 2633 (noting cases); *see also Knox*, 132 S. Ct. at 2294-2295, *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869 (1998). Thus, this is not a

situation in which the Court has struggled to "craft a principled and objective standard" and in which there is "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Johnson v. United States*, 135 S. Ct. 2551, 2558, 2560 (2015) ("even clear laws produce close cases").

Petitioners' *amici* further argue that individual employees face insuperable obstacles in seeking to verify that bargaining representatives have properly separated chargeable from nonchargeable expenses. *E.g.*, Ill. State Workers Br. 5-12; *see also Harris*, 134 S. Ct. at 2633. But the record in this case demonstrates no such hurdle. The respondent unions here have alleged without contradiction that they deliberately create a "cushion" by reducing the percentage of expenses charged to fee payers below what the unions believe would be justified under the law. JA 640-641, 646, 649. If a fee payer nonetheless has concerns about the union's calculation of chargeable expenses, she need only check a box on a form in order to initiate a prompt review of the union's determinations by an impartial decisionmaker. JA 635-636. The union then bears the burden of establishing the propriety of its calculations—and pays the cost of the verification proceeding, which is then spread across all employees as a chargeable expense. *See Cumero*, 778 P.2d at 193; JA 635-636. The objecting employee need not adduce any evidence, lodge any specific objection, or be present for the proceeding. JA 635.

To the extent parties or courts face anything more than routine line-drawing questions in addressing chargeability questions under current law, that concern can and should be addressed in a concrete case with a developed sets of facts. If, in such cases,

the right place to draw the line is unclear, it may well be that courts should take account of the important First Amendment interests involved by erring on the side of holding expenses nonchargeable, either categorically or on specific facts. Petitioners have not, however, come close to making the case that *Abood*'s conceptual line between core bargaining-related expenses and expenses for a union's own political or ideological speech is so unclear or unadministrable as to justify going to the other extreme, entirely dismantling a longstanding legal framework that serves important interests of public employers.

There is, of course, a wide range of views concerning the best way to structure labor-management relations in the public sector, including whether to allow collective bargaining or to permit mandatory agency fees. California does not question the various choices that other governments have made. This Court should not, however, disturb the settled law that has long permitted individual States to adopt and refine the specific structures they determine are best suited to their own public workplaces.

Here, California could have chosen a number of different ways to set the terms and conditions of employment in the State's vast public school system. It could have adopted mandatory statewide requirements for teachers' wages, benefits, leave, and other working conditions (as, indeed, it has for some important terms of employment); or it could have authorized school districts to impose terms and conditions unilaterally, without any fixed process for communicating with employees. Instead, the State decided to require collective bargaining in cases in which a majority of employees elects it; require representation by a single bargaining agent, constrained by a duty of fair representation; and permit that sys-

tem to be funded with mandatory fees. That system imposes on some employees a form of representation that they would not otherwise choose, and related costs that they would not otherwise agree to pay. It does not, however, force them to support speech that is attributed to them as individuals or that is understood to represent their personal views, and it imposes no constraint on their ability to express their own views. In the special context at issue here, the First Amendment does not forbid California from imposing these limited burdens on some employees as part of an overall system of collective bargaining over some of the terms and conditions of their public employment.

II. FIRST AMENDMENT CONCERNS ARE SATISFIED IF EMPLOYERS PROVIDE A REASONABLE WAY TO OPT-OUT OF PAYING NONCHARGEABLE EXPENSES

Petitioners also present a second question: Whether it independently violates the First Amendment for public employers to use an opt-out, rather than opt-in, mechanism for protecting the right of objecting employees not to pay any *non*chargeable portion of an agency fee. Their short discussion of the point (Br. 60-63) offers no adequate reason to depart from another longstanding proposition "repeatedly invoked" by this Court's prior cases: that in protecting the rights of employees under the First Amendment "[d]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Davenport*, 551 U.S. at 185 (citations and internal quotation marks omitted); *see Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986) ("In *Abood*, we reiterated that the nonunion employee has the burden of raising an

objection, but that the union retains the burden of proof.").

In elaborating on the line drawn in *Abood* between representation-related and other union speech, the Court has been attentive to the need for practical mechanisms to "prevent[] compulsory subsidization of ideological activity by employees who object thereto." *Hudson*, 475 U.S. at 302. The Court's focus, however, has appropriately been on the question of "compulsion." *See, e.g.*, *Abood*, 431 U.S. at 235-236 ("the Constitution requires only that such [ideological] expenditures be financed from charges … paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment"). That has been true even for claims that the government was forcing someone to speak a government-prescribed message in a way that could be misattributed to the unwilling speaker.

In *Wooley v. Maynard*, for example, the Court held it unconstitutional for New Hampshire to impose a criminal sanction on those who chose not to speak by covering up the message that the State would otherwise have forced them to display on their personal license plates. 430 U.S. at 707, 717. In *Barnette*, the Court struck down a government "compulsion of students to declare a belief," enforceable by expulsion. 319 U.S. at 631, 629; *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 n.4 (2004) (Rehnquist, C.J., concurring in the judgment) (in *Barnette* "[t]here was no opportunity to opt out"). In each case, the government used the threat of punishment to compel individual speakers to associate themselves with a message to which they objected.

The same concerns are not present where, as here, an employee is offered an easy, penalty-free

way to opt out of funding (let alone being personally associated with) the speech at issue. In order to avoid paying nonchargeable expenses, employees such as petitioners need merely check a box and return a form. JA 623, 637, 663-664. They are subject to no penalty for doing so. If an employee exercises her opt-out right, she does not fund any nonchargeable speech or activity. And if she does not avail herself of such a readily available opt-out mechanism, it seems hard to say she was "compelled" to support objectionable speech. To hold otherwise would suggest that New Hampshire, in *Wooley*, was constitutionally required not only to allow a few objecting drivers to put tape over part of their license plates, but to avoid putting any driver in the position of having to take any affirmative step to avoid transmitting the unwanted message.

Petitioners argue that "social science" shows "'people have a strong tendency to go along with the status quo or default option'" (Br. 61, quoting Richard Thaler & Cass Sunstein, Nudge 8 (2008)), and an opt-out arrangement thus subjects employees to "'a risk that the fees … will be used to further political and ideological ends with which they do not agree.'" *Id.* (quoting *Knox*, 132 S. Ct. at 2290). But the schoolchildren in *Barnette* had no right to avoid making a choice about whether to leave the classroom during the pledge of allegiance, just as the drivers in *Wooley* had no right to insist that the State save them the trouble of covering up the license plate slogan to which they objected. What they had was the right to exercise a choice. An opt-out system fully protects that right. *See Hudson*, 475 U.S. at 306 n.16 ("The nonmember's 'burden' is simply the obligation to make his objection known.").

Petitioners rely (at 60) on the proposition that courts "do not presume acquiescence in the loss of fundamental rights." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoted in *Knox*, 132 S. Ct. at 2290). There are, however, many instances in which enjoyment of a constitutional right requires its timely assertion. The Seventh Amendment right to trial by jury is forever waived unless asserted within 14 days after service of the relevant pleading. Fed. R. Civ. P. 38. The Due Process right not to be subjected to the authority of a court without personal jurisdiction is waived if a party appears without timely asserting the right. Fed. R. Civ. P. 12(h)(1); *Ins. Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982). The Fifth Amendment does not bar uncounseled custodial interrogation unless a suspect affirmatively asserts his right to counsel or silence. *Berghuis v. Thompkins*, 560 U.S. 370, 381-382 (2010) (suspect did not effectively invoke right to silence merely by remaining silent in response to questions for nearly three hours). Indeed, waiver and forfeiture rules can effectively bar the belated assertion of constitutional rights affecting life and death. *Coleman v. Thompson*, 501 U.S. 722 (1991) (applying procedural default rule in capital case); 28 U.S.C. § 2244(d)(1) (statute of limitations for federal habeas).

Florida Prepaid itself supports the use of reasonable opt-out methods as a means by which to safeguard rights. It was an Eleventh Amendment case, where the plaintiff suing a state-entity defendant claimed that the State had waived sovereign immunity by engaging in a commercial function regulated by federal law. 527 U.S. at 669-671. The entity moved to dismiss based on sovereign immunity. *Id.* at 671. This Court held that the mere act of engaging in commerce did not amount to a prospec-

tive waiver of the sovereign's right not to be brought to court—noting, in that context, that it would not presume the waiver of a fundamental right. The Court never suggested, however, that the district court should have dismissed the case against the public entity in the absence of an affirmative motion seeking that relief. *Florida Prepaid* required honoring a right if it was timely asserted. The State's opt-in system here does not offend that principle.

Finally, petitioners argue (Br. 62) that even if they may be required to opt out of paying nonchargeable expenses, it is unconstitutional to require them to make such an election every year. But that objection is insubstantial, at least given the lack of any supporting record here. Petitioners' complaint indicates that they have successfully opted-out every year; and they have not alleged (much less established) that the annual process has caused them any cognizable harm. Indeed, most employees are presumably used to making decisions regarding employment benefits and deductions on an annual basis, just as they complete other paperwork (such as tax returns) every year. Confining such choices to a designated period of time results in administrative efficiency. At the same time, allowing employees to make the choice anew each year provides them with an easy way to respond to changed circumstances or perspectives.

Of course, public employees must be afforded reasonable protection of their substantive rights. Judicial intervention might be needed, for instance, if employees were not given clear notification of their opt-out rights, or if a particular opt-out mechanism were unduly burdensome. *E.g.*, *Abrams v. Commc'ns Workers of Am.*, 59 F.3d 1373, 1380 (D.C. Cir. 1995). Any such claim would, however, be fact-specific, and

petitioners here have made no factual record—or even allegation—of that sort. On the contrary, they alleged that they were aware of, and successfully exercised, their opt-out rights. JA 74-79.

A State could choose to require its public employers to use an opt-in system for collecting any nonchargeable portion of an agency fee—just as it could choose to forbid the collection of any agency fee. *See Davenport*, 551 U.S. at 184-186. But the Constitution does not dictate either choice. Although this case again has no record, or even allegation, on the point, the State understands that the overwhelming majority of employees covered by the agency fees at issue in this case do not choose to opt out of paying nonchargeable expenses. By treating that choice as the default option, the State's opt-out system requires public employers to process fewer forms and make fewer individual changes to their payroll settings, resulting in lower administrative expenditures and a lower chance of error. It also results in a lower net burden on all employees: If changing to an opt-in system would reduce a perceived burden on the relatively small number of employees who now choose to opt out of funding nonchargeable activities, it would simultaneously impose an equivalent new burden on the much larger number of employees who choose to pay the full agency fee. The State's decision to impose whatever minimal burden is involved in communicating a choice with respect to nonchargeable fees on a smaller rather than a larger group of employees does not violate the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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