No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Questions Presented in this case are too important to leave unsettled with an affirmance by an equally divided Court, and they are guaranteed to recur in the absence of a definitive ruling from this Court. Petitioners thus respectfully request that the Court rehear this case after it obtains a full complement of Justices capable of reaching resolution by a five-Justice majority.

While rehearing is, of course, extraordinarily rare when the Court has *decided* an issue, it is quite common where the Court is equally divided, particularly when there is a vacancy. "[R]ehearing petitions have been granted in the past where the prior decision was by an equally divided Court and it appeared likely that upon reargument a majority one way or the other might be mustered." E. GRESSMAN, ET AL., SUPREME COURT PRACTICE § 15.I.6(A) at 838 (10th ed. 2013). In such unusual circumstances, the Court has often reheard a case, rather than leave it to an equally divided affirmance.[1] "This was particularly true when a new Justice became available to break the tie"—as will eventually be the case here. *Id.* (citing *Gray v. Powell*, 313 U.S. 596 (1941), and *Halliburton Oil Well Cementing Co. v. Walker*, 327 U.S. 812 (1946)). This is true regardless of whether the vacancy will remain until the Court's

[1] *See MacGregor v. Westinghouse Elec. & Mfg. Co.*, 327 U.S. 812 (1946); *Bruce's Juices, Inc. v. American Can Co.*, 327 U.S. 812 (1946); *Balt. & Ohio R.R. Co. v. Kepner*, 313 U.S. 597 (1941); *N.Y., Chi. & St. Louis R.R. Co. v. Frank*, 313 U.S. 596 (1941); *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 313 U.S. 596 (1941); *Toucey v. N.Y. Life Ins. Co.*, 313 U.S. 596 (1941); *United States v. One 1936 Model Ford V-8*, 305 U.S. 666 (1938).

next Term. Thus, this Court has routinely held cases over the summer recess before ultimately rehearing them during the subsequent Term.[2]

This Court's established practice of rehearing cases under the circumstances present here, so that they may be decided by a full complement of nine Justices, makes sense. It ensures that cases important enough for this Court to grant certiorari do not remain unresolved simply because an unexpected vacancy prevents a majority decision. The current vacancy will inevitably be filled, and once it is, the tie will be broken. It makes sense to hold the case for resolution until the Court is capable of resolving it.

And indeed, this case illustrates the reasons for that longstanding practice. The Questions Presented

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[2] *See Halliburton*, 327 U.S. 812 (granting rehearing on February 25, 1946)*, and* 329 U.S. 1 (1946) (issuing decision in case reargued on October 23 and 24, 1946); *MacGregor*, 327 U.S. 812 (granting rehearing on March 11, 1946), *and* 329 U.S. 402 (1947) (issuing decision in case reargued on November 14 and 15, 1946); *Bruce's Juices*, 327 U.S. 812 (granting rehearing on March 11, 1946), *and* 330 U.S. 743 (1947) (issuing decision in case reargued on November 14, 1946); *Kepner*, 313 U.S. 597 (granting rehearing on April 28, 1941), *and* 314 U.S. 44 (1941) (issuing decision in case reargued on October 20, 1941); *Frank*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 360 (1941) (issuing decision in case reargued on October 16 and 17, 1941); *Commercial Molasses*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 104 (1941) (issuing decision in case reargued on October 16, 1941); *Toucey*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 118 (1941) (issuing decision in case reargued on October 17, 1941); *Gray*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 402 (1941) (issuing decision in case reargued on October 21 and 22, 1941).

here are of profound nationwide importance. This case directly raises the continuing vitality of this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court held that public-sector employees can be required to pay agency fees, even if they have declined to join the union. Twice in the past several years, this Court has questioned *Abood's* compatibility with core First Amendment principles. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) ("The *Abood* Court's analysis is questionable on several grounds."); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012) ("[*Abood's*] [a]cceptance of the free-rider argument … represents something of an anomaly ….") . Only this Court can resolve the pressing constitutional question of *Abood's* current status—which is why the Ninth Circuit in this case had no choice but to hold that it was bound by *Abood*. The substantial questions this Court identified in *Harris* and *Knox* should not go unresolved when the Court has a pending case that would enable it to conclusively answer them.

In addition, this case squarely presents the question whether public-sector employees who decline union membership can be forced to annually opt out of subsidizing a union's concededly political speech. There is a circuit split over certain aspects of that scheme (Pet. for Cert. at 35-36), and similar schemes affect tens of thousands of public employees every year. That issue, too, both warrants and requires this Court's definitive resolution.

To leave the Questions Presented unresolved would needlessly prolong the prevailing uncertainty on issues that recur constantly and that affect

millions of public employees in the more than 20 states that allow agency fees. Moreover, the schemes at issue implicate hundreds of millions of dollars flowing to organizations that spend those dollars advocating on matters of clear public concern. Affirmance by an equally divided Court is never a preferable result, but it is a particularly inappropriate way to dispose of questions that have such profound constitutional and national significance.

Moreover, precisely because the issues presented are of such importance, an equally divided affirmance will only defer decision of these pressing questions for another day. Right now, there are multiple cases pending in the lower courts that implicate the Questions Presented.[3] In the absence of a precedential ruling from this Court, at least one of those cases will almost certainly reach the Court in the next several years.

Rather than defer this issue for resolution in some future case at some future time, the better and more efficient course would be to hold the case this Court has already agreed to decide until it is capable

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[3] *See Janus v. AFSCME, Council 31*, No. 1:15-cv-01235 (N.D. Ill.) (Illinois state employees' challenge to compulsory dues); *Cochran v. Jefferson Cnty. Public Sch. Bd. of Educ.*, No. 3:15-cv-751 (W.D. Ky.) (school support personnel's challenge to compulsory dues); *Lamberty v. Conn. State Police Union, Inc.*, No. 3:15-cv-00378 (D. Conn.) (state troopers' challenge to compulsory dues); *Wagenblast v. Inslee*, No. 3:15-cv-05407 (W.D. Wash.) (correctional officers' challenge to compulsory dues and opt-out requirement); *Hamidi v. SEIU Local 1000*, No. 2:14-cv-00319 (E.D. Cal.) (California state employees' challenge to opt-out requirement).

of issuing a decision. The Court is familiar with the record in this case, has already determined that it is an appropriate vehicle for deciding the Questions Presented, has already expended significant resources digesting the briefs and presiding over argument, and is presumably prepared to issue a decision once a tie-breaking Justice is confirmed, hears re-argument, and settles upon his or her view. Respondents prevailed below and there has been no stay, such that nothing is lost and much is gained by rehearing this case once a new Justice is seated. This Court should do so.[4]

[4] Typically, the Court will grant rehearing in expectation of a new Justice being seated, rather than awaiting confirmation. For example, after Justice McReynolds retired on January 31, 1941, the Court affirmed several cases by an equally divided Court. The Court then granted rehearing petitions in all of these cases on April 28, 1941—before Justice Byrnes was confirmed to fill the vacancy. *Kepner*, 313 U.S. 597; *Frank*, 313 U.S. 596; *Commercial Molasses*, 313 U.S. 596; *Toucey*, 313 U.S. 596; *Gray*, 313 U.S. 596.

Respectfully submitted,

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