No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.

Respondents.

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

BRIEF FOR THE STATE OF CALIFORNIA SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled.

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INTEREST OF AMICUS CURIAE

The State of California and its local jurisdictions employ a large and diverse workforce charged with delivering critical public services to the State's forty million residents. The State meets the challenges of managing a workforce of this size and scale through a number of different statutes that authorize collective bargaining over specified terms and conditions of employment. If the majority of employees in a particular bargaining unit wish to bargain collectively, the law requires that they designate one organization as the exclusive employee representative for purposes of negotiating and administering one agreement for the entire unit. Concomitantly, the law requires the selected organization to represent all employees fairly in performing its representational duties, with no preference for the organization's own members.

This system provides important benefits to the State and its local jurisdictions. Chief among them, it facilitates the efficient identification and resolution of issues that could otherwise lead to dissatisfaction, inefficiency, and even disruption in the workplace. Indeed, California adopted its system in response to widespread public sector labor unrest, and only after other approaches proved ineffective.

As contemplated by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), California also relies on mandatory "agency fees" as an integral part of its collective bargaining system. Compulsory fees spread the cost of contract negotiation and administration fairly among all employees in a bargaining unit. Likewise, agency fees ensure that whatever organization is selected by employees to serve as exclusive representative has the resources necessary to discharge its responsibilities, including the state-imposed duty of

fair representation. In reliance on *Abood*, the State and many of its local jurisdictions have reached multi-year agreements providing for the collection of agency fees. A decision to overrule *Abood* would disrupt these arrangements and eliminate an important element of California's system for managing the public workforce—without any countervailing benefit in terms of liberating public employees from any government compulsion, coercion, or restraint with respect to their individual liberty of expression.

SUMMARY OF ARGUMENT

Agency fees are an integral part of the State's approach to managing its large and diverse public sector workforce. Adopted against a backdrop of labor unrest, California's collective bargaining system gives employees a greater voice in setting the terms and conditions of their employment while providing significant benefits to public employers. It allows employees to designate a single organization as the exclusive representative for an entire bargaining unit, and then charges that representative with understanding, prioritizing, and communicating the concerns of the employee group as a whole. It also enlists that organization's support in resolving contract-related disputes between the employer and individual employees, and helps employers build support for their own goals.

Two further requirements are necessary to make this system work. First, the exclusive representative must have sufficient resources to carry out the responsibilities imposed on it by the State. Second, the exclusive representative must be independent from the government employer. Any attempt by the State to control or influence the exclusive representative's views or positions would undermine the very purpose for which the State adopted its collective bargaining

system. Public employers achieve these twin goals by requiring all members of a bargaining unit to pay the costs of contract negotiation and administration.

Petitioner's argument that this arrangement violates the First Amendment rests on his assertion that agency fees are no different from government efforts to require private citizens to pay for or endorse political or ideological messages in a public forum. That contention entirely misunderstands the distinct context in which agency fees arise.

As California's experience confirms, agency fees support activities in a limited and highly specialized forum. While political and ideological activities in the public marketplace of ideas or in the halls of a state legislature may address a broad range of issues of public policy, state law narrowly prescribes the subjects that bargaining may address. At the same time, the union's position on issues in collective bargaining is constrained by its duty to fairly represent all employees in the bargaining unit. That means that a union's speech during bargaining does not reflect its *own* views and perspectives, but rather the composite practical interests of the unit as a whole. In addition, whereas in lobbying or other political activities, a union may speak without listening and assume no responsibility for actually resolving issues on its advocacy agenda, the same is not true in bargaining. In bargaining, the union owes a duty to negotiate in good faith, which requires it to listen, consider the employer's views, and take positions on management proposals. In California, moreover, unions often bind themselves to give their full support to any final agreement reached, irrespective of the organization's own doubts or concerns about its provisions. These distinctive features of collective bargaining make clear that it is not the same as union lobbying or electioneering.

The special features of collective bargaining also demonstrate that agency fees impose only a limited burden on the First Amendment interests of employees who decline to join the union. The principal audience for the union's speech is the management of a public employer, in private negotiation sessions. Likewise, many issues addressed in bargaining will not realistically implicate strongly held personal views or ideological objections within the bargaining unit. And even if a subject of bargaining is controversial, the exclusive bargaining representative's positions on those subjects cannot reasonably be perceived as those of any individual employee. In bargaining, a union expresses a set of collective positions that are not associated with any particular worker.

In another unusual context, this Court upheld a government program that imposed mandatory fees to fund the operation of a specialized forum that served an important government interest by supporting non-government speech. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), this Court considered the constitutionality of a requirement that all students pay an activity fee that funded student extracurricular speech—even though it forced some students to subsidize speech they found offensive. Analogizing to its forum cases, the Court concluded that the program helped further the university's important interest in educating students by promoting students' own expressive activities, and that the objecting students' First Amendment interests were protected so long as the program remained viewpoint neutral.

Like the student activity fee in *Southworth*, agency fees fund a system that serves an important government interest through a highly specialized forum that depends on private speech. While state law

prescribes the subjects that may be discussed in that forum, the State does not influence the views expressed by non-government speakers. Like the program in *Southworth*, the limited forum created by the State in collective bargaining requires the funding of private speakers whose positions are free from government influence or control. Indeed, the forum cannot operate properly unless the speaker is an entity that is (and is seen to be) independent from the government. Agency fees are thus a necessary part of an important government program, and are collected and used in a way that does not improperly burden any individual expressive interests.

Like other States and local jurisdictions, California has long relied on agency fees in structuring its public sector labor relations. Overruling *Abood* would deprive California of a tool it deems important to managing its public sector workforces. Such a decision would also cause immediate practical problems for the State. Twenty of California's twenty-one collective bargaining agreements authorize the exclusive representative to collect agency fees. A decision declaring those provisions unconstitutional would almost certainly lead to demands that the State renegotiate provisions of its existing collective bargaining agreements to address the claimed effects of this Court's ruling. The significant disruption to the State's longstanding approach to managing large and complex public workforces, moreover, would not be counterbalanced by the removal of any real burden on the expressive interests of individual public employees. Under these circumstances, the Court should not overrule *Abood*.

ARGUMENT

I. CALIFORNIA'S SYSTEM OF PUBLIC SECTOR LABOR-MANAGEMENT RELATIONS SERVES IMPORTANT STATE INTERESTS

A. California Adopted a System of Exclusive Representation to Address Serious Management Challenges in Public Workplaces

Like many other States, California extended collective bargaining rights to public sector employees in response to widespread labor unrest and work stoppages during the late 1960s and early 1970s. In 1970 alone, 36,000 public employees participated in thirty strikes across California, missing a combined 385,000 days of work. *See* Cal. Senate Select Committee on Local Public Safety Employment Practices, To Meet and Confer: A Study of Public Employee Labor Relations 13 (1972) (hereafter To Meet and Confer); Assemb. Res. 51, 1972 Reg. Sess. (Cal. 1972) (documenting strikes by social workers in Sacramento, teachers in Los Angeles, and county and municipal workers in San Francisco).

These stoppages involved many different sectors of the public workforce, including public safety and infrastructure workers. In 1970, for example, Sacramento firefighters staged a two-week strike. *Firemen Decide to End Walkout, Appeal Penalties*, Sacramento Bee, Oct. 21, 1970, at A1. Picket lines cropped up across the city, and morning commuters were left stranded after bus drivers joined the strike in solidarity. *City Firemen Strike, Also Halt Bus Service*, Sacramento Bee, Oct. 7, 1970, at A1. Two years later, 500 hydroelectric and civil maintenance employees walked off their jobs at the State Water Project. Greg King, Deliver Us From Evil: A Public History of California's Civil Service System 51 (1979) (hereafter Deliver Us

From Evil). Although that strike lasted only a few days, it sent "shock waves throughout the government and the general public." *Id.*

California's then-existing system for managing public workplaces was ineffective at addressing the causes of this unrest. Under a state law adopted in 1961, workers were permitted to form or join employee organizations, and public employers were required to "'meet and confer'" with those organizations and consider their requests as "'fully as [the employer] deem[ed] reasonable.'" To Meet and Confer 19 (discussing George Brown Act of 1961). In the following years, the State adopted some other measures also designed to give employees a greater voice in setting the terms and conditions of their employment. *Id.* at 19-23. Although these changes were initially heralded as major achievements, employees came to view them as mere "paper victor[ies]," guaranteeing them only the right to have their representatives consulted before management took unilateral action. Deliver Us From Evil 50.

California's then-existing system also failed to serve public employers' interests in efficiently managing their workforces. In local school districts, for example, different unions represented different groups of employees. Because no one representative was charged with speaking for all employees, school boards "spent much of their time hearing the claims of different organizations." Darrell Johnson, Note, *Collective Bargaining and the California Public Teache*r, 21 Stan. L. Rev. 340, 356 (1969). The lack of an exclusive representative also made it more difficult for employers to discern employee preferences, as employers were presented with different demands from different organizations. *Id.* at 356-357. Other forms of non-exclusive representation also proved unsuccessful. *See*

id. (describing shortcomings of "negotiating council" in promoting effective communication and minimizing burdens on management).

By 1972, California's leaders feared that public sector labor unrest would soon reach a "crisis stage." Cal. Assemb. Res. 51. In response, the state Legislature established the Advisory Council on Public Employee Relations to make recommendations for improving the situation. *Id.* A year later, the Council issued a report recommending a series of reforms. *See* Final Report of the Assembly Advisory Council on Public Employee Relations (1973) (hereafter Final Report). Chief among them was a recommendation that public employers adopt the same type of collective bargaining system used by many of their private sector counterparts. *Id.* at 9-10, 59-83. That system had led to "peaceful labor relations in the private sector," and promised to do the same for public employers. *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168, 175-177 (1981).

In particular, the Council recommended that, if a majority of employees wished to unionize, the Legislature provide for the designation of one organization to represent all employees in a particular bargaining unit. Final Report 64-65. Majority decisions in such matters and the designation of one exclusive bargaining representative, the Council concluded, were "firmly established" features of the American collective bargaining system. *Id.* at 60-62. The absence of any mechanism for electing an exclusive representative under the law as it then stood posed a "major obstacle to the development of an equitable and enduring employer-employee relationship within the public sector in California." *Id.* at 64.

The Council recognized that designating one representative and imposing on it a legal obligation to represent all employees in a bargaining unit would

lead to "free rider" problems. Final Report 241. Collective bargaining required employee representatives to incur "unavoidable financial costs," including to perform "economic research" and to employ "skilled professionals such as lawyers, accountants, statisticians, and actuaries." *Id.* The Council therefore recommended that the Legislature require public employers and employees to bargain over "organizational security" arrangements, under which the exclusive representative would be able to collect a pro rata portion of its bargaining and administration expenses from all employees in the bargaining unit, whether or not they chose to become members of that organization. *Id.* at 244-248, 263-265. Such a system would eliminate free rider concerns with respect to the legitimate costs of bargaining, while leaving actual membership in or other association with any organization "completely voluntary"—thereby striking a "reasonable balance between the union's need for security and the individual's right of freedom of choice and conscience." *Id.* at 265.

Over the next several years, the Legislature implemented many of the Council's recommendations by extending collective bargaining rights to different segments of the public sector workforce. *See Pac. Legal Found.*, 29 Cal. 3d at 177. In 1977, the Legislature adopted the State Employer-Employee Relations Act (later renamed the Ralph C. Dills Act), granting state workers the right to bargain collectively, using an exclusive representative, over prescribed terms and conditions of employment. Cal. Stats. 1977, Ch. 1159, § 4. The new Act did not, however, provide for bargaining over organizational security agreements. *Id.* As originally adopted, it provided that a union chosen to act as exclusive representative could collect "maintenance of membership" fees only from those represented employees who chose to become members of the union. *Id.*

Five years later, the Legislature amended the Dills Act to allow public employers and exclusive representatives to agree to include in collective bargaining agreements a provision requiring all employees in the bargaining unit to pay a "fair share" fee that would spread the cost of contract negotiation and administration across the entire group of covered employees. Cal. Stats. 1982, Ch. 1572, § 4. That change was prompted in part by the fact that, at that time, only 44% of state employees were dues-paying members of a union. Dep't of Finance Analysis of SB 1419, 1981-1982 Reg. Sess. (Cal. 1982). Without a fair share requirement, a minority of employees could end up paying the full cost of negotiating and administering the contract that set the terms and conditions of employment for all employees—even though the negotiating union was required by law to fairly represent all employees, without any preference for those who agreed to join the union and bear part of the cost of the representation. *See* Staff Analysis of SB 1419, Senate Committee on Governmental Organization, 1981-1982 Reg. Sess. (Cal. 1982).

Today, California law authorizes similar "fair share" or "agency" fee arrangements in public workplaces throughout the State. Cal. Gov't Code §§ 3502.5 (local government employees), 3515.7(a) (state employees), 3583.5 (public higher education), 3546 (public schools).

B. Collective Bargaining with One Counterparty, Representing and Funded by All Employees, Provides Significant Benefits to California Public Employers

California's system of exclusive representation, funded by mandatory agency fees, serves important interests of the State's public employers. Exclusive

representation facilitates the effective identification and resolution or mitigation of issues that could otherwise generate dissatisfaction in the workplace—and it relieves the employer of the burden of attempting to reliably assess employee concerns and priorities by itself. A single union takes responsibility for reconciling or choosing among sometimes-competing demands and priorities, developing collective positions, and making the trade-offs normally required in negotiation. The union, moreover, discharges this responsibility subject to the duty of fair representation, which ensures the employer that it is hearing positions developed to serve the interests of the unit as a whole. *See infra*, 14-15 (discussing duty of fair representation). Thus, instead of being presented with a multitude of conflicting voices, a public employer can receive and react to "only one collective view of its employees." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291-292 (1984); *see also id.* at 291 (recognizing a 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").

A system of exclusive representation also helps management build employee support for its own priorities. Bargaining provides public employers with the opportunity to communicate their needs and objectives to a single representative, and to secure that representative's acceptance of new policies. That representative, in turn, can more credibly explain management's view, or explain what was gained in exchange for a negotiated term that might be unpopular by itself.

The State's system of exclusive representation also enables the efficient resolution of individual employee disputes that arise while a contract is in effect.

If an employee complains about the application of a term in a collective bargaining 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).

Importantly, the State's goals in constructing its collective bargaining system can be achieved only through a bargaining "forum" with very particular characteristics. The purpose of the exercise—reaching and administering a workable agreement over certain terms and conditions of employment in a particular workplace—is defined and limited to achieve important interests of the State. As discussed more fully below, California law imposes restraints on how that bargaining will be conducted and defines its scope. *See infra*, 14-17. The State also specifies that a public employer will negotiate with one, but only one, organization representing a given unit's employees—again, a practical limitation, based on historical experience, to serve the State's own ends.

Having set these conditions for the bargaining forum, however, the State needs something else to make the system work: independent and credible counterparties for its public employers to bargain *with*. In that regard, some entity wholly independent of the State or other governmental entity must be charged with representing the views and interests of employees. Although state law defines the subjects of bargaining, any attempt to control the *views* or *positions* expressed on behalf of employees in contract negotiations or administration would defeat the entire purpose of the system. For the same reason, the putative employee bargaining representative could not be

funded by the employer or the State and retain the credibility and independence needed to make the system work. *Cf. Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 545-546 (1937) (in private sector, employer's maintenance of employer-funded "company unions" had been a "prolific source of dispute" between labor and management). Any "bargaining" arrangement in which the employees' representative was funded or could otherwise be influenced by the employer, rather than by the represented employees themselves, would be (and be perceived as) little more than a return to the setting of employment terms by unilateral management action. As California's history proves, any such approach would not serve the State's vital interests in effectively managing its workforce and delivering services to the public.

II. AGENCY FEES ARE PERMISSIBLE BECAUSE THEY SUPPORT A SPECIALIZED FORUM THAT SERVES IMPORTANT GOVERNMENT INTERESTS WITHOUT BURDENING THE EXPRESSIVE INTERESTS OF INDIVIDUAL EMPLOYEES

As respondents argue, mandatory agency fees to support collective bargaining in the public sector are consistent with the wide latitude this Court has long permitted state employers in effectively managing the public workplace. Illinois Br. 36-50; AFSCME Br. 31-40. California writes separately to highlight that such fees are also consistent with the Court's recognition that a State may, in unusual circumstances, constitutionally rely on mandatory fees to support the operation of a specialized forum serving an important government interest that could not be effectively served by using government-controlled or government-funded speech.

A. Agency Fees Support Specialized Activities That Are Not Analogous to General Lobbying or Political Advocacy

Petitioner's central thesis is that mandatory agency fees for collective bargaining and contract administration are no different from compelled subsidies for unions' private political and ideological activities: a government effort to coerce citizens to affirm beliefs and utter messages they find offensive. Pet. Br. 10-14, 19-21. This contention does not correspond to the practical reality of agency fees and the activities they support.

Courts are rightly concerned if a government seeks to require individuals to pay for the political activities of others in a public forum, to include unwanted ideological messages in their own public expressive activities, or to use their own voices to express putative agreement with a government-preferred message. Mandatory fees in the collective bargaining context are quite different. They support activities that occur in a limited and highly specialized forum. The expression involved is necessary to achieve the important government objective of concluding and administering workable labor agreements. And the expression is not—and must not be—the government's own speech, the expressions of any individual employee, or even the unconstrained views of the exclusive representative itself.

When serving as exclusive bargaining representatives, unions are bound by distinct legal duties that do not apply elsewhere. Critically, the union is not free to speak simply for itself or its members. It is legally required to fairly represent all employees in the bargaining unit—union member and nonmember alike. *E.g.*, Cal. Gov't Code § 3515.7(g). The union cannot,

for instance, propose contract terms that privilege members at the expense of nonmembers; it must represent the interests of the bargaining unit as a whole.

In practical terms, moreover, a union's bargaining proposals, compromises, and final agreements represent a melding of various views, interests, and priorities, all in the service of reaching one collective, overall result. The positions advanced or agreed to by bargaining representatives are understood as not necessarily reflecting the personal views of any individual negotiator or union leader, of the union itself, or of any union member—let alone of any represented employee who has declined to join the union. That is, a union's speech during collective bargaining is not even necessarily the speech of the union qua union. In bargaining, the union speaks not for itself as an entity, but rather expresses a unique sort of collective, representational speech in which individual views or points of agreement or disagreement are intentionally and necessarily subordinated to the goals of reaching one practical set of negotiating positions and then one workable compromise agreement.

California's on-the-ground experience confirms this understanding of collective bargaining. At the outset of negotiations with state employee unions, in addition to an initial "sunshine" period, *see* Cal. Gov't Code § 3523, representatives of labor and management typically agree to a set of formal ground rules for how the negotiations will be conducted. Along with addressing basic logistics (such as the times and dates for bargaining sessions), these rules may include binding commitments—including, significantly, a commitment by the union to give its full support to any agreement reached, irrespective of any reservations that union negotiators or leaders might have about the deal that is ultimately struck.

When negotiations begin, representatives from the union and from the public employer sit across the table from one other and "pass" formal proposals back and forth. The proposals are "marked" with a number, discussed, and then either accepted by both sides, rejected by one, or modified to accommodate competing concerns. If a proposal is tentatively accepted, it is signed and dated by both sides. Negotiators keep a running tally of the resolution of each side's proposals. Notes are taken throughout the negotiations and become part of the official record, available for consultation in case of a dispute.

In these negotiations, the union is bound not only by the duty of fair representation (*supra*, 14-15), but also by a state-law duty to bargain in good faith. Cal. Gov't Code §§ 3517, 3519.5(c). The union is required to approach collective bargaining with a "genuine desire to reach agreement." *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 8 (1979). It cannot come to the negotiating table with a "'take-it-or-leave-it' attitude." *Cal. Corr. Peace Officers Ass'n*, PERB Dec. No. 2111-S (2010), 2010 Cal. PERB LEXIS 26, at *16. A union may not 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.

Exclusive bargaining representatives must also participate in good faith in prescribed procedures in the event the parties fail to reach agreement on a contract. Cal. Gov't Code § 3519.5(d); *see also* Cal. Gov't Code § 3518 (permitting Governor and union to "agree

upon the appointment of a mediator mutually agreeable to the parties," or either party unilaterally to request the appointment of a mediator).

At the same time, the subjects of collective bargaining are limited by state law. Collective bargaining with California state employees may cover "wages, hours, and other terms and conditions of employment"; but other topics are expressly taken off the table, such as "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Cal. Gov't Code § 3516; *see also id.* §§ 3504 (scope of bargaining with local government employees), 3543.2 (public school employees), 3562.2 (higher education employees).

These distinct features of collective bargaining illustrate why the representational activities funded by mandatory agency fees cannot reasonably be compared to lobbying or other forms of non-bargaining political advocacy. Whereas a union's non-representational political and ideological activities may address broad issues of public policy, unrelated to the workplace, the scope of bargaining is limited by law. At the same time, the union's position on any given issue in collective bargaining is constrained by the duty of fair representation—which means that a union's stance on subjects of bargaining must reflect not its *own* perspectives as a voluntary expressive association, but rather the composite practical interests of the bargaining unit it has been selected by employees to represent. And whereas in lobbying or other political activities a union is free to talk without listening and to assume no responsibility for actually resolving issues on its advocacy agenda, the same is not true in collective bargaining. By law the union must listen, take a position on management proposals, and consider contrary views in good faith. In many

cases it will bind itself to give its full support to a final agreement, including some provisions contrary to the firmly held views of the union as an organization or of at least some of its negotiators, leaders, or members. These features of collective bargaining are all in place to ensure that the system satisfies the public *employer's* need to arrive at a workable set of employment terms that will apply uniformly across a broad and diverse workforce. Collective bargaining is not the same as union lobbying or electioneering.

Similarly, the special characteristics of collective bargaining demonstrate why mandatory agency fees impose only a limited burden on the First Amendment interests of nonunion member employees. In contract negotiations, the principal audience for the bargaining representative's speech is the management of a public employer, in private sessions. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522, 528-529 (1991) (plurality opinion) (First Amendment interests more burdened when speech funded by compulsory fees is in public forum). When consideration of a collective bargaining agreement reaches a public forum—namely, when the Legislature considers whether to approve a tentative contract reached in private negotiation sessions, as California law requires, *see* Cal. Gov't Code § 3517.5—all employees and members of the public are free to express their views, whether in support of or in opposition to the proposed employment terms.

Furthermore, many matters addressed in bargaining will not realistically 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). And even if a subject of bargaining is controversial, agency fees do not compel any employee to personally adopt

or endorse any message. Unlike a state requirement that school children salute the flag or recite the Pledge of Allegiance, payment of an agency fee does not involve an "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. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (rejecting requirement that funding recipients "pledge allegiance to" government policy). Nor does imposition of an agency fee 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).

Indeed, the bargaining representative's positions cannot reasonably be perceived as those of any individual employee. As discussed above, in bargaining 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. 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 v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997) (advertising funded through compelled assessments not attributed to individual fee payers but to collective).

Agency fees fund a highly specialized mechanism that enables public employers to address and resolve real-world management needs. They are wholly unlike government efforts to compel dissenting individuals to endorse an unwanted ideological message or to

pay for the political activities or expression of others in a public forum.

B. The Court Has Previously Permitted Use of Mandatory Fees Where Government Interests Can Only Be Served by Creating a Limited Forum That Includes Non-Government Speech

While collective bargaining is unique, this Court has previously considered—and upheld—mandatory fees in another unusual context in which an important public interest could only be served by creating a limited forum for non-governmental speech. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Court considered a First Amendment challenge to a public university's decision to charge students an activity fee to fund a program supporting student extracurricular speech. *Id.* at 220-221. By design, the program did not subsidize speech by the university itself. *Id.* at 229. Rather, the fee "create[d] the mechanism for" students' own extracurricular speech. *Id.* at 233. "The University's whole justification for fostering the challenged expression," the Court explained, "is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors." *Id.* at 229. At the same time, because the fee was used to support a variety of student activities, it was "all but inevitable" that some students would be compelled to subsidize speech that they found "objectionable and offensive to their personal beliefs." *Id.* at 232.

The Court concluded that the university's mandatory fee mechanism was permissible so long as the collected funds were distributed on a viewpoint-neutral basis. *Southworth*, 529 U.S. at 229-230, 233-234.

Drawing on forum analysis, the Court held that this focus on viewpoint neutrality adequately safeguarded the First Amendment interests of objecting students, while permitting the university to carry out a program that served its important educational mission. *Id.* at 229-230, 232-233. The university was not required to adopt an "optional or refund system," in which students could list causes they were or were not willing to support. *Id.* at 232. Constitutionalizing such a requirement, the Court concluded, could render the university's program "ineffective," and the "First Amendment does not require the University to put the program at risk." *Id.*

Mandatory agency fees supporting public sector collective bargaining are similar in important respects to the mandatory forum-support fees sustained in *Southworth*. As discussed above, agency fees are imposed to fund a system that serves significant government interests by creating a limited, highly specialized forum in which the government specifies the topics for discussion, but must not control or influence the views developed and expressed by non-government speakers. As in *Southworth*, if the funded speech were (or were perceived or suspected to be) "government speech," conveying a government message, the forum could not serve its special purpose. And in both circumstances, the fair and sensible way to ensure adequate funding for the forum while maintaining clear and complete separation between the government and the funded private expression is to spread the cost across all those who are expected to benefit from operation of the system—even though that will inevitably require some individuals to subsidize some activities, including speech, that they would not otherwise choose to support.

As in *Southworth*, the fees at issue here meet the critical standard of viewpoint neutrality. Under California law, agency fees are authorized for any organization that is designated as the exclusive representative for a bargaining unit. Cal. Gov't Code § 3515.7(a). The State may not favor any employee organization over another based on the organization's viewpoints (or for any other reason). Cal. Gov't Code § 3519(d). While the organization selected by a majority of a bargaining unit's employees is entitled to all the fees collected from that unit, that "benefit" is based not on any government choice or viewpoint preference, but on the exclusive representational duties that the organization alone has been designated (by the employees) to perform. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48-49 (1983) (no viewpoint discrimination in school policy granting access to certain facilities to exclusive bargaining representative); *cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682-683 (1998) (no viewpoint discrimination in denying candidate access to debate forum where based on lack of public support).

Unlike the activity fees at issue in *Southworth*, agency fees to support collective bargaining are not aimed at promoting a diversity of viewpoints. Indeed, the opposite is true. As explained above, central to the functioning of a collective bargaining system is the employer's ability to rely on a single employee bargaining representative to collect, prioritize, and choose among the diverse and sometimes-conflicting views or positions of the rank and file. But that difference simply reflects the different purposes of the two special mechanisms. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-544 (2001) (drawing on forum cases in analyzing challenge to restrictions on single, defined group of speakers).

What is salient for First Amendment purposes is not those differences, but the similarity of the underlying situations. In each instance, a State reasonably concludes that the best way to address an important interest is to create a specialized forum that will involve participation by representatives from a specific group of private parties—in *Southworth* students, here employees. The mechanism is intended to benefit everyone in the private group—through educational enhancement, or by facilitating the negotiation of labor agreements that effectively reflect the collective preferences of the employees in a given bargaining unit. And for the mechanism to operate properly, it is essential that the particular type of private expression the forum was created to accommodate—whether diverse, as in *Southworth*, or unified, as in collective bargaining—be independent of government influence over viewpoint or position. Under these special circumstances, *Southworth* supports the conclusion that the government does not offend the First Amendment by requiring that all employees who are represented by an exclusive representative in the special forum of collective bargaining also bear a proportional share of the cost of that representation.

III. OVERRULING *ABOOD* WOULD UNNECESSARILY DISRUPT CALIFORNIA'S LONGSTANDING SYSTEM OF LABOR RELATIONS

The use of mandatory agency fees to support collective bargaining provides important benefits to public employers without improperly burdening any individual expressive interests. In contrast, overruling *Abood* would cause significant disruption to California public employers.

Agency fees are a critical component of California's longstanding system of collective bargaining. Among other things, they ensure that exclusive bargaining representatives have the resources necessary to discharge their responsibilities to all employees—and thus that the system can provide the benefits to public employers 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*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part, dissenting in part). And by preventing that inequity, mandatory agency fees head 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. Petitioner's proposal to overrule *Abood* ignores these critical state interests and would deprive California and other States of a tool they have deemed important to their core responsibilities in managing the public workplace.

Overturning *Abood* would also cause immediate practical problems for public employers in the State. Today, California has several different statutes regulating public sector labor relations that impose the duty of fair representation on any organization selected as exclusive bargaining representative and then, under prescribed circumstances, permit that representative to collect agency fees from employees who choose not to join the union. *See* Cal. Gov't Code §§ 3515.7(a), (g) (state employees); *id.* §§ 3544.9, 3546 (public school employees); *id.* §§ 3578, 3583.5 (public higher education employees); *id.* § 3502.5; *Amalgamated Transit Union, Local 1704*, PERB Dec.

No. 1898-M (2007), 2007 Cal. PERB LEXIS 29, at *2 (local government employees). The State alone negotiates with twenty-one different bargaining units representing employees providing a broad range of different services to the public. *See* California Department of Human Resources, Bargaining/Contracts, http://www.calhr.ca.gov/state-hr-professionals/Pages/bargaining-contracts.aspx (last visited Jan. 18, 2018). The State's agreements with twenty of these twenty-one bargaining units authorize the exclusive bargaining representative to collect agency fees from nonunion employees. *Id.* Each of those agreements also requires the State to administer the fees through payroll deductions from employee pay warrants. *Id.*

If the Court were to hold that such arrangements violate the Constitution, the State would not only face the administrative task of adjusting payroll deductions for a vast state-employee workforce, but would also likely confront demands to undertake new negotiations with each bargaining unit. Under California law, when a provision of a collective bargaining agreement is declared unlawful, the State must notify the exclusive representative and then meet and confer regarding the change. *See* Cal. Gov't Code § 3516.5; *see also Claremont Police Officers Ass'n v. City of Claremont*, 39 Cal. 4th 623, 630-631 (2006) (describing when employers must bargain when there is a unilateral change to a collective bargaining agreement); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-677 (1981) (same). The State's collective bargaining agreements also include savings clauses that require the parties to meet and confer when a provision of the contract is held unlawful, and to renegotiate the invalidated provision. *E.g.*, Agreement Between State of California and SEIU – Local 1000 covering Bargaining

Units 1, 3, 4, 11, 14, 15, 17, 20, and 21, http://www.calhr.ca.gov/labor-relations/Documents/mou-20160702-20200101-master.pdf (last visited Jan. 18, 2018). A decision from this Court declaring agency fee provisions unconstitutional would trigger these requirements, and lead to demands by state-employee unions that California conduct "impact negotiations" to address the claimed effects of the invalidation of agency fee provisions. Many local governments would likely face the same demands. *See* Cal. Gov't Code § 3504.5; *Claremont Police Officers Ass'n*, 39 Cal. 4th at 630-631.

None of these burdens on public employers can be justified by the First Amendment interests that petitioner invokes. Agency fees do not require anyone to endorse ideological messages with which they disagree or to associate themselves with positions expressed in collective bargaining by the union they have declined to join. Under these circumstances, the Court should not overrule *Abood*.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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