No. 14-915

IN THE
Supreme Court of the United States

REBECCA FRIEDRICHS *et al.*,
Petitioners,
v.
CALIFORNIA TEACHERS ASSOCIATION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
WILLIAM L. MESSENGER
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org
wlm@nrtw.org

Counsel for Amicus

QUESTIONS PRESENTED

Twice in the past three years this Court has recognized that agency shop provisions—which compel public employees to financially subsidize public sector unions' efforts to extract union-preferred policies from local officials—impose a "significant impingement" on employees' First Amendment rights. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012); *see also Harris v. Quinn*, 134 S. Ct. 2618 (2014). California law requires every teacher working in most of its public schools to financially contribute to the local teachers' union and that union's state and national affiliates in order to subsidize expenses the union claims are germane to collective bargaining. California law also requires public school teachers to subsidize expenditures unrelated to collective bargaining unless a teacher affirmatively objects and then renews his or her opposition in writing every year. The questions presented are therefore:

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

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

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INTEREST OF THE AMICUS

The National Right to Work Legal Defense Foundation, Inc.,[1] is a nonprofit organization that provides free legal aid to individuals whose rights are infringed upon by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements.

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of the Foundation's intention to file this brief. Letters evidencing consent to file this brief from all respondents who entered an appearance in the court of appeals have been filed with the Clerk of Court. Pursuant to Rule 37.6, the Foundation affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Foundation, its members, or its counsel made a monetary contribution to its preparation or submission.

Currently, Foundation staff attorneys represent workers in more than 100 federal, state and administrative cases involving forced union fee requirements. Foundation attorneys have represented individual workers in almost all of the compulsory union fee cases that have come before this Court.[2] This includes the case at issue here, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and the two recent cases that put the validity of *Abood* in doubt, *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014). The Foundation submits this brief to urge the Court to grant certiorari to overrule *Abood*.

SUMMARY OF ARGUMENT

This case is a suitable vehicle for reconsidering *Abood* because it involves full-fledged public employees, and the record in this case and facts subject to judicial review provide a sufficient basis for overruling *Abood* on the grounds posited in *Harris*, 134 S. Ct. at 2632-34.

This case is also a suitable vehicle for declaring unconstitutional union requirements that nonmembers object to the seizure of nonchargeable fees in order not to pay those fees. These "opt-out" requirements are intrinsically unlawful because unions lack the lawful authority to seize nonchargeable fees from nonmembers in the first place.

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[2] *See* http://www.nrtw.org/en/foundation-cases.htm (last visited Feb. 19, 2015).

REASONS FOR GRANTING THE WRIT

I. This Case Is a Suitable Vehicle for Reconsidering *Abood*.

A. This Case Squarely Presents the Issue Wrongly Decided in *Abood*.

This Court has already identified *Abood*'s legal infirmities. *See Harris*, 134 S. Ct. at 2632-34; *Knox*, 132 S. Ct. at 2288-90. And whether *Abood* is correctly decided is an issue of great importance, because "an agency-fee provision imposes 'a significant impingement on First Amendment rights,'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289), and more than an estimated five million public employees are subject to agency-fee provisions.[3]

Thus, the dispositive question is whether this is a suitable vehicle for reconsidering *Abood*. It is. The case involves California statutes that authorize the Respondent Unions to seize compulsory fees from thousands of public school teachers as a condition of their employment, including fees for indisputably po-

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[3] There are 11,675,000 union-represented employees in the twenty-six states that do not have right to work laws prohibiting agency fees. *See* Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 5, http://www.bls.gov/news.release/union2.t05.htm) (last visited Feb. 19, 2015). Roughly half of those employees are in the public sector. *See id.*, tbl. 3, http://www.bls.gov/news.release/union2.t03.htm (last visited Feb. 19, 2015) (showing 8,224,000 and 7,927,000 union-represented employees nationwide in the private and public sectors, respectively).

litical and ideological expenses unless teachers annually object to the seizure during a window period. This case squarely presents the compulsory fee issue wrongly decided in *Abood*.

The record in this case provides sufficient basis for reconsidering *Abood*. The case is before the Court on a judgment on the pleadings under Federal Rule of Civil Procedure 12(c) in Respondents' favor. In this procedural posture, the record consists of the pleadings, which must be construed in Friedrichs' favor,[4] attachments to the Complaint, and matters subject to judicial notice. *See* 2 Moore's Fed. Practice § 12.38, at 12-135 (3d ed. 2014).

The Court has decided cases before it on Rule 12(c) judgments, *e.g.*, *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 251 (2008); *Central Green Co. v. United States*, 531 U.S. 425, 427-28 (2001), including First Amendment cases, *see Eldred v. Ashcroft*, 537 U.S. 186, 196 (2003), and cases involving motions for judgment on the pleadings in favor of the defendant, *id*. (cross motions); *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (same). The Court has also heard many cases before it on Rule 12(b)(6) dismissals, *e.g., Harris*, 134 S. Ct. at 2627, which are subject to the same standards as

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[4] Any argument propounded by Respondents that their answer must be accepted as true, because Friedrichs moved for the judgment on the pleadings, fails because judgment was entered *for the Respondents*. Pet. 6a, 8a. Respondents' own pleadings cannot be the basis for a judgment in their favor.

Rule 12(c) judgments. *See* 2 Moore's Fed. Practice § 12.38, at 12-143 (3d ed. 2014).

The material facts here are not in dispute. The Unions admit, as they must, that they are seizing compulsory fees from nonmember teachers, including fees for political and other nonchargeable expenses, unless a teacher makes an annual objection during a specified window period. *See* Unions' Am. Answer, ¶¶ 52-64, Pet. 126a-132a. The parties' factual disagreements in the pleadings generally concern characterizations of undisputed facts. For example, "the Unions deny that teachers wishing to avoid contributing to nonchargeable expenditures 'must write a letter each year expressing that wish,'" as alleged in the Complaint, but "aver that objecting feepayers need only complete and return a simple form in order to register the objection." *Id*. at ¶ 83, Pet. 144a. This is just a different spin on the same undisputed fact that nonmembers must object in writing each year in order not to pay for nonchargeable activities. Of course, this Court is not required to accept either party's spin on the underlying facts.

Importantly, the Complaint includes, as exhibits, financial statements from both the California Teachers Association and National Education Association ("NEA") that breakdown the expenses the Unions deem chargeable and nonchargeable to nonmember teachers. Compl., Exs. C & D (8:13-cv-676 Doc. 1) (C.D. Cal. Apr. 30, 2013). These documents are part of the pleadings, and thus part of the record. *See* Fed. R. Civ. P. 10(c). The Court thus has before it a de-

tailed record of the activities that nonmember teachers are being forced to subsidize.

B. The Record Permits the Court to Determine Each Factor *Harris* Identifies.

More specifically, this case provides a record sufficient for the Court to overrule *Abood* on each of the seven grounds identified in *Harris*, 134 S. Ct. at 2632-34.

First, this Court criticized *Abood* for not giving "a First Amendment issue of this importance . . . better treatment." 134 S. Ct. at 2632. This is a flaw intrinsic to *Abood*. The *Abood* majority inexplicably failed to apply the exacting constitutional scrutiny that this Court consistently applies in cases of compelled expressive association, namely that the mandatory association "serve a '"compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms."'" *Id.* at 2639 (quoting *Knox*, 132 S. Ct. at 2289 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))); *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976). Justice Powell recognized in *Abood* itself that the majority there failed to apply the requisite constitutional scrutiny. *See* 431 U.S. at 259 (concurring in judgment). This case is a suitable vehicle to finally subject compulsory union fee requirements to the proper First Amendment test, and to find those requirements lacking.

Second, *Harris* found that "[t]he *Abood* Court fundamentally misunderstood" the difference between government merely authorizing compulsory fee arrangements between private parties, which was at issue in *Railway Employes' v. Hanson*, 351 U.S. 225 (1956), and government *itself* seizing compulsory fees from individuals, which is the issue in the public sector. 134 S. Ct. at 2632. *Abood*'s misreading of *Hanson* is legal error that requires no factual record other than the imposition of forced fees by a governmental agency. That requirement is met here, because this case involves direct governmental seizures of compulsory fees from public employees. *See* Cal. Gov't Code § 3546(a) (requiring that a public school "*shall deduct* the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization") (emphasis added); Unions' Am. Answer, ¶¶ 57-58, Pet. 129a (admitting to fee deductions by public school districts).

Third, *Harris* found that "*Abood* failed to appreciate" that collective bargaining with government concerns "important political issues." 134 S. Ct. at 2632. The record in this case supports that conclusion. California law provides that union representation extends to "matters relating to wages, hours of employment, and other terms and conditions of employment," including "health and welfare benefits," "class size," and "procedures to be used for the evaluation of employees." Cal. Gov't Code § 3543.2(a). Additionally, a union "has the right to consult on the

definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent those matters are within the discretion of the public school employer under the law." *Id*. These issues are all political in nature, and are matters over which individuals may have different opinions.[5] Indeed, "[t]he Unions admit that, in the course of collective bargaining, they sometimes take positions that may be viewed as politically controversial or may be inconsistent with the

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[5] That these are controversial political issues can be confirmed by taking judicial notice of numerous news articles concerning political disputes over school budgets, public pensions, class size, and teacher tenure. *See, e.g.*, Amy B. Dean, *Are Street Protests Next in the Fight Over Education Reform?*, The Nation (July 31, 2013) (*available at* http://www.thenation.com/article/175532/are-street-protests-next-fight-over-education-reform) (last visited Feb. 19, 2015); Dale Kasler, *Public pensions in California pass another bankruptcy test*, The Sacramento Bee (Nov. 18, 2014) (*available at* http://www.sacbee.com/news/politics-government/article3995709.html) (last visited Feb. 19, 2015); Associated Press, *Teacher protections weakened even before California ruling*, CBS News (June 12, 2014) (*available at* http://www.cbsnews.com/news/teacher-tenure-protections-weakened-before-california-judges-ruling/) (last visited Feb. 19, 2015); Stephanie Simon, *The fall of teachers unions*, Politico.com (June 13, 2014) (*available at* http://www.politico.com/story/2014/06/teachers-union-california-court-decision-107816.html) (last visited Feb. 19, 2015); Troy Senik, *The Worst Union in America, How the California Teachers Association betrayed the schools and crippled the State*, City Journal (Spring 2012) (*available at* http://www.city-journal.org/2012/22_2_california-teachers-association.html) (last visited Feb. 19, 2015).

beliefs of some teachers." Unions' Am. Answer, ¶ 7, Pet. 117a.

Fourth, *Harris* held that *Abood* failed to recognize the "conceptual difficulty" of distinguishing collective bargaining with government from political advocacy and lobbying, as all are speech "directed at the government." *Harris*, 134 S. Ct. at 2632-33. This legal conclusion requires no factual record. In fact, *Abood* itself acknowledged that "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political." 431 U.S. at 231; *see id.* at 256-57 (Powell, J., concurring in judgment) (finding "no principled distinction" between public sector unions and political parties because the objective of both "is to influence public decisionmaking in accordance with the views and perceived interests of its membership"). The Court made similar observations on subsequent occasions. *See Knox*, 132 S. Ct. at 2289 (a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences"); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion) ("[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one.").

The Court has simply not followed this premise to its inevitable conclusion. Given that "[a] State may not force every person who benefits from [a lobbying] group's efforts to make payments to the group," *Har-*

ris, 134 S. Ct. at 2638, and that bargaining with government is indistinguishable from lobbying, it follows that it is unconstitutional to force employees to support bargaining with government.

Fifth, *Harris* recognized that "practical administrative problems" exist in distinguishing chargeable from nonchargeable expenses under *Abood*. 134 S. Ct. at 2633. This conclusion is amply supported by both case law and the pleadings.

"In the years since *Abood*, the Court has struggled repeatedly with this issue." *Id*. (citing several cases). Lower courts and government agencies have also struggled with this issue. For example, this Court has held that union lobbying expenses are constitutionally nonchargeable, except for "contract ratification or implementation." *Lehnert,* 500 U.S. at 522 (plurality); *accord id*. at 559 (Scalia, J., concurring). Nonetheless, the chargeability of lobbying expenses remains a contested issue. *See, e.g., Knox,* 132 S. Ct. at 2294-95 (reversing Ninth Circuit decision that unions could charge nonmembers for "lobbying . . . the electorate"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997) (holding nonchargeable pilot union's expenses in lobbying federal agencies); *United Nurses & Allied Prof'ls*, 359 NLRB No. 42, at *7 (Dec. 14, 2012) (National Labor Relations Board deems lobbying expenses chargeable to nonmembers if the "specific legislative goal [is] sufficiently related to the union's core representational functions"). Here, California law expressly declares chargeable "the cost of lobbying activities designed to

foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment." Cal. Gov't Code § 3546(b).

Similarly, this Court held in *Ellis v. Railway Clerks*, 466 U.S. 435, 451-53 (1984), that union organizing activities are nonchargeable, in part because "[a]ny free-rider problem . . . is roughly comparable to that resulting from union contributions to pro-labor political candidates." Yet, some unions continue to force workers to pay for their recruitment activities, and defend that in court, with varying degrees of success. *See, e.g., Scheffer v. Civil Serv. Empls. Ass'n*, 610 F.3d 782, 790-91 (2d Cir. 2010) (reversing district court decision finding union organizing expenses chargeable); *UFCW v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc) (upholding NLRB decision that organizing expenses are partially chargeable to nonmembers); *Bromley v. Mich. Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (holding defensive organizing nonchargeable to employees).

Distinguishing chargeable from nonchargeable expenses was made even more difficult by *Locke v. Karass*, 555 U.S. 207 (2009), which held that extraunit activities of union affiliates are chargeable to nonmembers if they (1) "bear[ ] an appropriate relation to collective bargaining" and (2) "the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organi-

zation.'" *Id.* at 218 (quoting *Lehnert*, 500 U.S. at 524). However, the Court did not "address what is meant by a charge being 'reciprocal in nature,' or what showing is required to establish that services 'may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 221 (Alito, J., concurring). Nor did the Court resolve what accounting method, if any, can properly calculate the exact percentage of a national union's services that are available to each local union and affiliate in a given year.

This unresolved standard for extraunit expenses will only sow more uncertainty and litigation. Indeed, it may be an impossible standard to administer, given that national unions have many locals and affiliates. For example, the International Brotherhood of Teamsters alone has 1,900 affiliates in the United States, Canada and Puerto Rico.[6] The NEA "has affiliate organizations in every state and in more than 14,000 communities across the United States." *About NEA*, http://www.nea.org/home/2580.htm (last visited Feb. 19, 2015). And the American Federation of State, County, and Municipal Employees (AFSCME) "has approximately 3,400 local unions and 58 councils and affiliates in 46 states, the District of Columbia and Puerto Rico," and "[e]very local writes its own constitution, designs its own structure, elects its own officers and sets its own dues."

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[6] *See* http://teamster.org/about (last visited Feb. 19, 2015).

About AFSCME, http://www.afscme.org/union/about (last visited Feb. 24, 2015).

The difficulty in separating the wheat from the chaff under *Abood* is also illustrated in the pleadings here. Friedrichs asserts that the California Teachers Association and NEA charge nonmembers for numerous activities that have only a tenuous relation to collective bargaining, including, among others, 100% for a "Gay/Lesbian Program," 78.4% for CTA's magazine, 73.38% for "[a]ffiliate programs and services that increase membership," 80.9% to "[f]acilitate[ ] the development of NEA strategy and operations" and "implement workplace cultural initiative," and 36.76% to "[p]artner with ethnic minority, civil rights, and other organizations to advance NEA's commitment to social justice." Compl., ¶¶ 74-76; Pet. 66a-68a. The Unions admit to the charges, but offer a variety of justifications for them. Unions' Am. Answer, ¶¶ 74-76, Pet. 138a-143a. Adjudicating just these disputes under *Abood*'s framework would be a difficult task, which highlights the larger problems with *Abood*.

In all, experience has proven Justice Black prophetic in his dissent in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). There, he recognized the futility of trying to separate union bargaining expenses from political expenses: "while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers

whose First Amendment freedoms have been flagrantly violated." *Id.* at 796.

Sixth, *Harris* held that "*Abood* . . . did not foresee the practical problems that would face objecting nonmembers." 134 S. Ct. at 2633. The record and case law also support this conclusion.

Here, the Unions deliberately make it onerous for nonmembers to avoid paying full union dues by requiring that they affirmatively object each and every year during a narrow window period to opt out of paying indisputably nonchargeable fees. Pet. 6-7. Many other unions employ the same burdensome annual objection tactic. *Id.* at 35-36. And the vast majority of unions require at least an initial affirmative objection to stop the seizure of full union dues.

In addition to initial and annual objection requirements, employees face other union obstacles to exercising their rights under *Abood*. These include union failures to provide nonmembers with the notice, financial disclosures, and procedures required under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Foundation attorneys have litigated hundreds of cases before the courts and administrative agencies concerning union failures to comply with *Hudson*'s requirements. *See*, *e.g.*, *Cummings v. Connell*, 402 F.3d 936 (9th Cir. 2005); *Harik v. California Teachers Ass'n*, 326 F.3d 1042 (9th Cir. 2003); *UFCW Local 700 (Kroger Ltd. P'ship)*, 361 NLRB No. 39 (2014), *petition for review filed*, No. 14-1185 (D.C. Cir. 2014).

Even when employees make objections, to determine if the agency fee seized from them is properly chargeable under *Abood* is a difficult undertaking, as established above. *See supra* pp. 10-14. And the Unions' financial reports validate *Harris'* finding that "auditors do not themselves review the correctness of a union's categorization" of chargeable and nonchargeable expenses. 134 S. Ct. at 2633.[7]

Moreover, litigating compulsory union fee "cases is expensive." *Id*. For example, the attorneys' fees and expenses awarded in *Knox* were $1,021,176 and $15,412.93, respectively. *Knox v. Chiang*, No. 2:05-CV-02198, 2013 WL 2434606, at *15 (E.D. Cal. June 5, 2013). And in *Beck v. Communications Workers*, which challenged compulsory fees in the private sector, there were more than "six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions" in the district court alone. 776

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[7] *See* Compl,. Ex. C, CTA Financial Statement at *27 (8:13-cv-676 Doc. 1, Page ID # 153 (C.D. Cal. Apr. 30, 2013)) ("Based on relevant federal and state judicial and administrative decisions, *the Association* [CTA] analyzed its expenditures and determined which of those expenditures were nonchargeable to objecting agency fee payers and which were chargeable to objecting agency fee payers.") (emphasis added); *Id*. at Ex. D, NEA Financial Statement at *41 (8:13-cv-676 Doc. 1, Page ID # 186 (C.D. Cal. Apr. 30, 2013)) ("The legal interpretations and standards that NEA currently utilizes to makes it determinations of chargeability have been developed by the NEA's Office of General Counsel based on relevant case law.").

F.2d 1187, 1194 (4th Cir. 1985), *aff'd on reh'g*, 800 F.2d 1280 (1986), *aff'd,* 487 U.S. 735 (1988).

These problems with administering *Abood* are *unresolvable* because of the underlying incentives at work. Unions have strong financial incentives to extract the greatest fee possible from nonmembers by pushing the envelope on chargeability, and imposing burdensome procedures on nonmembers. In contrast, employees have little financial incentive to challenge excessive union fees, or burdensome procedures, because the amount of money at stake for each particular employee is comparatively low and the time and expense of litigation is high.[8]

Although some employees will mount challenges on principle, and the Foundation can provide free legal aid to some of those employees, neither is enough to police the situation. In 2013, there were 11,190 unions with 100 or more members in the private sector.[9] And in the public sector, AFSCME alone has

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[8] For example, assume that a union annually seizes from 10,000 nonmembers a $500 agency fee. If 25% of that agency fee is actually nonchargeable, the illegal overcharge will cost each employee only $125, but the union will reap $1.25 million in additional revenue. The union thus has a large financial incentive to attempt the illegal overcharge, while each individual employee has little financial reason to challenge it given the time and expense of litigation.

[9] This is the number of labor organizations with over 100 members that filed reports with the Department of Labor in 2013. *See* http://kcerds.dol-esa.gov/query/getOrgQryResult.do (last visited Feb. 19, 2015).

3,400 locals, and the NEA an affiliate in every state and 14,000 communities. *See supra* pp. 12-13.

Given the underlying incentives, unions will inevitably press the limits of any framework that permits extraction of compulsory fees from nonmembers, leading to endless litigation and continual violations of employee First Amendment rights. No amount of tinkering with *Abood* can change that reality.

Seventh, *Harris* found that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at 2634. The validity of this conclusion is confirmed by taking judicial notice of the fact that exclusive representation functions without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and the nation's twenty-four right to work states.[10]

Exclusive representation can function without compulsory fee requirements not only because unions can solicit voluntary support for their activities, just like any other advocacy organization, but also because exclusive representation is itself an incredible *benefit* to unions that only *assists* them with recruiting members.

Exclusive representation is a boon to a union because it vests it with the extraordinary legal authori-

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[10] http://www.nrtw.org/rtws.htm (last visited Feb. 19, 2015).

ty to speak and contract for all employees in a bargaining unit, whether they approve or not. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees"). Exclusive representation also gives a union the sole right to deal with an employer for employees, to the exclusion of all other organizations. *See* Cal. Gov't Code § 3543.1(a) ("once an employee organization is recognized or certified as the exclusive representative of an appropriate unit . . . only that employee organization may represent that unit in their employment relations with the public school employer"). Overall, the power of an exclusive representative is "comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944).

The extraordinary power and privileges that come with being an exclusive representative are their own reward, which unions seek irrespective of whether they can extract compulsory fees from all employees subject to their reign. Instructive on this point are recent decisions by the Seventh Circuit and Indiana Supreme Court. Both held that Indiana's statutory ban on compulsory union fees does not unconstitutionally demand services from a union without just compensation because a union is "fully and adequately compensated by its rights as the sole and ex-

clusive member at the negotiating table," *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014), and "justly compensated by the right to bargain exclusively with the employer." *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014).

Moreover, the power of exclusive representation *assists* unions with recruiting dues-paying members. Simply posing the question makes this clear: are employees more likely to join a union if it has exclusive authority to deal with their employer, or if it does not? The answer is obviously the former. Employees are far more likely to join and support an organization that has control over their jobs, benefits, and relations with their employer than one that does not have that monopoly. *Abood* turned reality on its head in speculating that exclusive representation makes it more difficult for unions to recruit members and financial support. 431 U.S. at 222.[11]

For all of these reasons, this case is a suitable vehicle for reconsidering and overruling *Abood* on the grounds set forth in *Harris*.

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[11] *Abood* also erroneously assumed that union representation necessarily benefits all employees. As Justice Alito suggested at oral argument in *Harris*, a teacher who prefers to receive merit pay does not benefit from union-negotiated tenure. Transcript of oral argument, 2014 WL 297182, at *33 (U.S. Jan. 21, 2014). Nor, as Justice Alito also pointed out during that oral argument, do young workers who prefer a current wage increase to an increase in future pension benefits negotiated instead by a union. *Id*. at **44-45.

II. This Case Is a Suitable Vehicle to Strike Down Objection Requirements.

The Court should also take this case to determine the constitutionality of the Unions' "opt-out" requirements—*i.e.,* requirements that nonmembers object both initially and annually to the seizure of nonchargeable fees to be excused from paying those fees. The Court should resolve this issue because the Court questioned the validity of objection requirements in *Knox*, 132 S. Ct. at 2290-91, and the circuits are split concerning the constitutionality of annual objection requirements. *See* Pet. 35-36 (citing cases).

Objection requirements are intrinsically unlawful because unions lack the lawful authority to seize nonchargeable fees from nonmembers in the first place. An opt-out regime is a two-step process. First, a union seizes fees for political and other nonchargeable expenses from nonmembers without their prior consent. Second, the union stops that seizure, or provides a rebate, if an employee objects to the taking. *See* Cal. Gov't Code § 3546(a); Reg. of Cal. Pub. Emp't Relations Bd. § 32992. Step one is illegal *by definition*. If an expense is not chargeable to nonmembers under the First Amendment, a union has no lawful right or authority to seize fees from a nonmember for that expense. There is no lawful fee seizure from which to opt out.

For example, it would be unlawful for an individual to unilaterally take his neighbor's money and property unless and until the neighbor objects to the tak-

ing. The reason is not because objecting may be burdensome. It is because individuals have no right to take their neighbor's property without prior consent in the first place. The same principle applies here.

Accordingly, should the Court not take the first question presented, it should take the second. Even under *Abood*, the Unions' initial and annual objection requirements are invalid because the Unions lack the lawful right to seize money unilaterally for political and ideological expenses from nonmember teachers without their consent. The Court held in *Knox* that the union there could not take a special assessment or dues increase from nonmembers for constitutionally nonchargeable purposes "without their affirmative consent." 132 S. Ct. at 2295-96. Unions cannot, for the same reasons, exact any funds for constitutionally nonchargeable purposes without nonmembers' affirmative consent.

The Court should also take the second question if it takes the first question. If *Abood* is overruled, the Unions' objection requirements necessarily fall with it. Overruling *Abood* will render unconstitutional the California statutes that permit the seizure of agency fees from nonmembers, such as Cal. Gov't Code § 3546(a), and the Unions' agency-fee agreements with school districts. The Unions will thereafter lack lawful authority to seize *any* fees from nonmember teachers without their prior consent.

The Court should make clear that objection requirements are invalid if *Abood* is overruled because, otherwise, unions will use opt-out requirements to subvert such a ruling. At least one union is already attempting to use an opt-out requirement to undermine this Court's ruling in *Harris* that non-employee homecare providers cannot be forced to pay compulsory union fees. *See* SEIU Healthcare 775NW Opp. to Mot. for S.J., at **5-7 (2:14-cv-200 Doc. 43) (W.D. Wash. Oct. 10, 2014) (stating that, after *Harris*, the union's policy is to seize fees from independent providers in Washington unless the provider objects to the seizure). If *Abood* is overruled, the Court should make clear that unions may only extract fees from individuals who affirmatively "opt in" to those fees.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.
Counsel of Record
William L. Messenger
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org
wlm@nrtw.org

Counsel for Amicus