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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND EIGHT OTHER STATES FOR PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

Does collective bargaining in the public sector implicate matters of public concern, or does it "pertain[] mostly to private concerns" involving only the government's interests as an employer, rather than as a sovereign? *Harris* v. *Quinn*, 134 S. Ct. 2618, 2654 (2014) (dissent). The answer to that question is significant to the states, and it is simple: it *does* implicate matters of public concern. Consider, for example, Detroit's recent bankruptcy: Detroit's $3.5 billion in unfunded pension liabilities was a matter of great public concern not just for the city, but for all of Michigan.

In *Abood*, the Court concluded that state interests in labor peace and preventing free-riding, which purportedly justified allowing a *private* employer to coerce private-employee speech on matters that largely have *no* public policy implications, equally justified allowing *the government* to coerce public-employee speech on matters with *significant* public policy implications. The Court thus held that it is constitutional to require a public-sector employee to fund union collective bargaining. At the same time, however, the Court recognized that it is unconstitutional to require the employee to fund the union's other political activities. This distinction assumes either that the core subjects addressed in public-sector bargaining lack any public-policy implications, or that sufficient state interests exist to justify over-riding public employees' First Amendment rights.

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[1] Consistent with Rule 37.1, the amici States provided notice to the parties' attorneys more than ten days in advance of filing.

Neither premise is true. It is time to abandon the meaningless distinction between collective bargaining and other political activity. In the public sector, core collective bargaining topics such as wages, pensions, and benefits inherently implicate public policy, and in ways that matter. Like lobbyists, public-sector unions obtain binding agreements from the government that have enormous public impact—all without the natural counterweight of a financial market that exists in the private sector. In the public sector, it is taxpayers, not business owners and consumers, who foot the bill—and the bill is often steep.

The issue presented in the petition merits this Court's review. It is significant to the states, and *amici* States support Petitioners' arguments. *Amici* States have a vital interest in protecting the First Amendment rights of public employees, and in the fiscal health of state and local governments. But rather than re-urge Petitioners' arguments here, *amici* States limit their discussion to the direct and substantial public impact that public-sector bargaining has regarding core employment issues, and to the illusory nature of *Abood*'s distinction between that activity and other political or ideological activity, as illustrated by recent examples from the State of Michigan. As these and countless other examples make clear, collective bargaining in the public sector is at core a political activity with direct and significant implications for the public at large—not merely a "private concern[]" between employer and employees. The constitutional analysis should reflect the reality of public-sector bargaining.

ARGUMENT

I. In the public sector, core collective-bargaining topics implicate policy matters of great public concern.

In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), this Court drew a line between, on one hand, union expenditures for political or ideological purposes unrelated to collective bargaining, and, on the other, expenditures for collective bargaining, contract administration, and grievance adjustments. *Id*. at 225–37. The *Abood* Court held it unconstitutional to force public-sector employees to contribute to the former category of union expenditures, reasoning that "in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id*. at 234. Citing the principle that the state cannot compel an individual to associate with a political party as a condition of public employment, the Court held that the First Amendment likewise prohibits a state "from requiring [public employees] to contribute to the support of an ideological cause he may oppose as a condition of holding a [public] job[.]" *Id*. at 235.

In contrast, the *Abood* Court held that the First Amendment is not offended by requiring public employees to subsidize a union's collective bargaining activity. While the Court noted several distinctions between collective bargaining in private versus public employment, the Court ultimately held that a public employee does not have "a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation." *Id*. at 229.

A. The State coerces political speech when it requires government employees to pay for public-sector bargaining.

As this Court recognized both in *Abood* and recently, however, public- and private-sector bargaining are not analogous. For one, it is the state, not a private employer, that is directly forcing subsidization of union speech in the public sector. *Id.* at 250 (Powell, J., concurring); *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014). For another, the public significance of coerced speech differs in the private and public sectors, though the core bargaining topics may at first blush appear to be the same.

It is largely undisputed that collective bargaining in both the public and private sectors touches on hot-button political issues. As *Abood* recognized, "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222. "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative":

> His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . The examples could be multiplied. [*Id.*]

The *Abood* Court noted that under *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), and *Machinists* v. *Street*, 367 U.S. 740 (1961), the problems of labor peace and free-riding justified compelling private employees to contribute to the costs of exclusive union representation. And the *Abood* Court reasoned that such rationales applied equally in the public sector. *Id.* at 222–30.

But aside from overlooking the significance of the different actors involved, the *Abood* Court failed to account for the difference between the core union speech—*i.e.*, speech on basic levels of wages, pensions, and other employment benefits—involuntarily subsidized by dissenting *private*-sector employees and that subsidized by their counterparts in the *public* sector. *Harris*, 134 S. Ct. at 2632. In the public sector, these bread-and-butter bargaining topics are important public policy issues because of their impact on the public fisc and the allocation of resources, whereas those same topics in the private sector are generally *not* of public interest. *Id.*

When the party on the opposite side of the table is the government, bargaining is unavoidably about the use of public resources and about how elected officials will govern. Bargaining concessions affect fundamental public policy issues such as wages, merit pay, pensions, hours, benefits, and other terms of public employment, the balancing of which affects, for example, the level of public services, priorities within state and local budgets, creation of bonded indebtedness, and tax rates. *Abood*, 431 U.S. at 258 (Powell, J., concurring). And "[p]ublic-employee salaries, pensions, and other benefits constitute a

substantial percentage of the budgets of many States and their subdivisions." *Knox* v. *Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2295 (2012).

These are topics about which employees as voters are likely to hold strong personal views. See Section II. Contra *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("[U]nlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views."). As this Court has recognized, such topics are "a matter of great public concern" in the public sector. *Harris*, 134 S. Ct. at 2642–43. In the public sector, we are all shareholders. A government employee might have strong policy objections to a position advanced by the union on a core collective bargaining topic, in a way for which there is no analogy for an employee of a private business. The government's relationship to its employees is inextricably intertwined with issues of public policy.

Thus, the public significance of the collective-bargaining speech at issue—wages, pensions, benefits, and other terms and conditions of employment—is entirely different in the public and private sectors, though the topics abstracted from their contexts may appear to be the same.

B. The policy debates in public-sector bargaining concern more than just topics incidental to the core mission of bargaining.

Moreover, the core of collective-bargaining activity in the public sector strikes at the heart of critical

public policy issues in a way that private-sector bargaining simply does not. The purpose of collective bargaining is to reach agreement that is favorable to employees as employees on such basic topics as the levels of wages, pensions, benefits, and other terms and conditions of employment. These matters are the very essence of bargaining. While working to reach agreement on these matters may at times require addressing hot-button political topics such as abortion or religion, in both the public and private sectors, those topics often arise as incidents to the union's core function in bargaining: to set the basic levels of wages, pensions, and benefits, and other terms and conditions of employment.

But in the public sector, intrusion into debated policy matters ceases to be just a small side effect of bargaining, but instead becomes the essence of the activity itself. Setting basic levels of wages, pensions, benefits, and other terms and conditions of employment—the very essence of bargaining—is of great public concern in the public sector. The policy debates that arise are not merely details, such as whether company health insurance will cover birth control, in a larger scheme that lacks public implications. Instead, the basic question of how much the State will pay its employees is a public policy question unto itself.

Even if the interests in labor peace and preventing free-riding could justify incidental incursions into employees' free speech rights, in the name of fostering the larger, policy-neutral activity of collective bargaining, those state interests cannot justify an activity the very essence of which intrudes

on policy beliefs. *Cf. Harris*, 134 S. Ct. at 2654 (dissent) ("On the one side, *Abood* decided, speech within the employment relationship about pay and working conditions *pertains mostly to private concerns* and implicates the government's interests as employer; *thus, the government could compel fair-share fees for collective bargaining*. On the other side, speech in political campaigns *relates to matters of public concern* and has no bearing on the government's interest in structuring its workforce; *thus, compelled fees for those activities are forbidden*." (emphasis added)).

C. Collective bargaining affects public policy in ways not meaningfully different from lobbying.

The nature of core bargaining speech is not only different in the public and private sectors, but it is indistinguishable from "other political or ideological" speech by unions, the coerced support of which is prohibited in *Abood*. In the public sector, both collective bargaining and "political advocacy and lobbying" are directed at the government. *Harris*, 134 S. Ct. at 2632. And, just like lobbying, bargaining results in binding agreements from the government on those matters. In either case, "public employee unions attempt to influence governmental policy-making." *Abood*, 431 U.S. at 231. Indeed, "[t]he collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." *Abood*, 431 U.S. at 252–53 (Powell, J., concurring).

II. The policy consequences of public-sector bargaining are direct and significant.

Core public-sector bargaining activity affects public policy in ways that are direct, concrete, and often large—not merely in the indirect sense that any decision by an elected official affects public resources. Contra *Harris*, 134 S. Ct. at 2655 (dissent) ("[T]his Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern."). As this Court has recognized, a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. The impact of collective bargaining on matters of public concern is not merely abstract or theoretical; instead, it has enormous consequences for, among other things, the fiscal solvency of state and local governments. These consequences demonstrate why issues at the heart of public-sector bargaining are matters of great public concern, and are not merely employment issues between employee and employer.

For one thing, while bargaining in the private sector naturally has the counterweights of supply and demand and financial self-interest, public-sector unions and their bargaining partners lack those constraints. *Abood*, 431 U.S. at 228 (recognizing that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases"). In theory, a government official's interest in keeping votes and winning re-election should provide some counterweight against acceding to unsustainable

benefits in response to union demands. But experience has shown that this often does not occur.

What is more, collective bargaining also has extreme policy effects in the public sector that exacerbate the First Amendment problems created by forcing employees to subsidize such speech. In many instances, the existence of collective-bargaining agreements creates a policy bottleneck that makes it difficult, if not impossible, for elected officials to address important policy matters through legislation. Public-sector unions not only take positions on politically charged issues in the course of bargaining, but in some cases that bargaining becomes the only mechanism by which those policy issues can be addressed. Where public problems are resolved solely through the collective-bargaining process, a dissenting employee who disagrees with his union's collective-bargaining position not only has to subsidize the union's advocacy of that policy position, but he also has little or no recourse in the general political process. Forcing the employee to fund his union's policy monopoly permits the union to "use each dissenter as an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Lehnert*, 500 U.S. at 522 (internal quotations omitted).

While the examples abound of bargaining directly implicating hotly debated political issues, amici States draw this Court's attention specifically to occasions in which political positions taken on central topics in public-sector bargaining have had direct, intense, and far-reaching public effects.

A. Collective bargaining was a contributing cause of Detroit's municipal bankruptcy.

The circumstances in Detroit are extreme in degree, but not atypical in kind: collective bargaining and the decisions that state and local governments make regarding benefits to unionized employees are key elements of fiscal health for any local government. The claim that these issues are on the periphery of public policy or confined to the employment relationship is belied by the reality of collective bargaining. Detroit's experience is a case study.

For many years, the City of Detroit's workers enjoyed steady rates of return on their Annuity Savings Plan investments, regardless of how the investments actually performed. Under the terms of the Plan, active city workers could invest a percentage of their salaries into a defined contribution plan that earned interest based on a rate of return established at the discretion of fund trustees. The trustees invested the annuity plan contributions along with fund pension assets.

Instead of crediting to employees' accounts the actual or assumed rate of return, however, the fund trustees "essentially operated the Annuity Savings Plan as a guaranteed investment contract with a guaranteed floor investment return approaching 7.9%." (City of Detroit, No. 13-53846, Bankr. E.D. Mich., Dkt. 4391, Fourth Am. Discl. Stmt. ("Disc. Stmt."), May 5, 2014, at 106; Union testimony, MERC Hrg., Feb. 8, 2013 ("MERC Hrg."), at 14-15.) In 2009, for example, the General Retirement

System fund lost 24.1% of the value of its assets, yet it credited Annuity Savings Plan accounts with a positive investment return of approximately 7.9%. (Disc. Stmt. at 106.) The fund paid the inflated rates by diverting hundreds of millions of dollars from fund assets that were intended to support the traditional defined pension benefits. (Bankr. Dkt. 13, Charles Moore Decl., Jul. 18, 2013 ("Moore Decl."), ¶ 18.)

On the flip side of this coin, in years when fund investments outperformed annual expectations, instead of retaining and reinvesting the "excess," the City's general pension fund paid out a portion of the excess to retired pensioners and to the annuity accounts of active employees. These bonus checks became known as the "13th check" program, because the additional check was in excess of the twelve monthly pension checks the retiree would normally receive in one year. (Discl. Stmt. at 106.) Unlike a healthy investment system in which gains one year make up for losses in the last, Detroit's pension practices "ensur[ed] that the net performance of the [fund] would never exceed the assumed rate of return in any given year and that [unfunded liabilities] would continue to increase." *Id*. These practices "deprived the [fund] of assets that would be needed to support liabilities[.]" (*Id*.; Moore Decl. ¶ 19.)

Alarmed, Mayor Dennis Archer tried in the mid-1990s to amend the "13th check" program through the political process. The City proposed a charter revision that would have altered the program, but city unions obtained an injunction on the ground that such action "represented unilateral changes in

the collective bargaining agreements . . . concerning matters that are mandatory subjects of collective bargaining." *Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 553 N.W.2d 679, 682 (Mich. App. 1996). While the injunction was later reversed because "all parties agree[d] that the challenged provisions [could not] be implemented, even if enacted by the voters, without bargaining," *id*. at 683, the ballot proposal ultimately failed.

In November 2011, the City Council banned the 13th checks and ceased to guarantee minimum interest rates for annuity accounts after an outside statistician estimated that the practices had cost the City $1.9 billion. (Bankr. Dkt. 1066-1, Joseph Esuchanko Rep., Mar. 8, 2011, at 9.) But city unions again fought the action, citing Michigan law that pension plans are mandatory subjects of collective bargaining. The Michigan Employment Relations Commission agreed, but the City filed for bankruptcy in the interim and the matter was stayed.

The public impact of the pension fund practices—a mandatory collective bargaining topic—is clear. In addition to the cost of the practice to the City of almost $2 billion, the decades-long bonus and annuity payments increased the amount the City needed to contribute each year to keep the pension fund solvent, and in 2005 the City borrowed $1.44 billion at high interest to plug the unfunded pension liabilities gap. (Bankr. Dkt. 11, Kevyn Orr Decl., Jul. 18, 2013 ("Orr Decl."), ¶¶ 45–48.)

Detroit's unfunded pension liabilities ballooned to one-fifth of its total debt at the time of its bankruptcy filing in July 2013—the largest

municipal bankruptcy in this nation's history. Of over $18 billion in accrued obligations, the City's $3.5 billion in unfunded pension liabilities topped its list of the 20 largest unsecured claims. (Bankr. Dkt. 15, List of Creditors Holding 20 Largest Unsecured Claims, Jul. 18, 2013; Orr Decl. Ex. J, at 3; Eligibility Op. at 8.) In addition, the City had between $5.7 to $6.4 billion in other post-employment benefit liabilities, almost entirely unfunded. (Orr Decl. Ex. J, at 3–4; Eligibility Op. at 16.)

The City's Emergency Manager, Kevyn Orr, explained the central role that collective bargaining played for the City. Orr informed the bankruptcy court that "the negotiation of changes to pension and retiree benefits" was "critical to any restructuring," given the "approximately $9 billion owed to these constituencies," and that such changes were impracticable, "if not impossible," outside of bankruptcy. (Orr Decl. ¶ 106.)

In addition to the pension problems specifically, Detroit's high labor costs in general—also a subject of collective bargaining—contributed to its bankruptcy. Labor costs for General Fund active employees (*i.e.*, wages, pension, and benefits) represented more than 41% of the City's estimated gross revenues for 2013. And onerous work rules enshrined in bargaining agreements hampered the City's efficient functioning, including staffing based on seniority rather than merit; "bumping" rights based again on seniority; limitations on management rights that impaired the City's ability to manage policies, goals, and the scope of operations for City

departments; arbitration rights that allowed arbitrators to uphold future grievances based on expired bargaining agreements or past practice; and lack of reimbursement rights from unions. (Discl. Stmt. at 116–17.)

Far from being analogous to a private employment matter, issues at the heart of Detroit's collective bargaining contributed directly and significantly to the City's financial distress. Detroit's financial shortfalls and inefficiencies—of which pension and other employment-related debts constituted a large percentage—had enormous public impact on the people of Detroit, the State of Michigan, and beyond.

As Bankruptcy Judge Steven Rhodes found, Detroit's financial situation "caus[ed] its nearly 700,000 residents to suffer hardship" and "danger[]." (Eligibility Op. at 139.) Detroit's municipal taxes were at the highest legal limit, yet Detroiters received greatly diminished public services as the City diverted money away from such basics as maintaining street lights and emergency response times. (Bankr. Dkt. 1, Petition, Jul. 18, 2013, Ex. A, at 3; Orr Decl. ¶¶ 29–30.) In 2013, for example, the average response time for top-priority emergency calls was 58 minutes, compared to the national average of 11 minutes. (Eligibility Op. at 21.) Forty percent of the City's streetlights were not working. (*Id.* at 20.) The crime rate was five times the national average, and equipment for police, EMS, and fire services was outdated and inadequate. (*Id.* at 20, 139.)

The State also felt the effects of Detroit's collective-bargaining shortfalls specifically, pledging $350 million to cover the City's pension shortfalls. (Bankr. Dkt. 8272, Order Confirming Eighth Amended Plan, Nov. 12, 2014, App. 1, at 55.)

The City of Detroit's dispute with unions about controversial pension fund practices illustrates the direct and far-reaching public consequences of policy topics at the heart of collective bargaining. Contra *Harris*, 134 S. Ct. at 2655 (dissent) ("[T]his Court has never come close to holding that any matter of public employment affecting public spending (which is to say most such matters) becomes for that reason alone an issue of public concern."). Because of their significant fiscal impact, the public, including public employees, might well have strong views about the City's pension practices. Contra *Lehnert*, 500 U.S. at 521 ("[U]nlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views."). Compulsory agency fees force public employees to fund very specific points of view on these deeply important questions of fiscal policy. In short, collective bargaining affects public policy no less than does the supporting of candidates or parties.

But as daunting as $3.5 billion in unfunded public liabilities is, collective bargaining's impact on the public interest is not limited to financial matters.

B. Collective bargaining can also create roadblocks impeding environmental compliance.

The Detroit Personnel Department provides the following job description for the official Horseshoer of the city water department: "Under general supervision, to shoe horses and to do general blacksmith work in connection therewith"; "[h]aving charge of a small blacksmith shop where horse shoeing is the most important work done; individually performing such work as removing old shoes; forging, shaping, hardening, tempering, fitting and setting shoes to horses; welding corks to shoes; trimming up hooves before and after shoeing; making repairs to stable equipment, saddles, bridles and other equipment requiring blacksmith work." (Detroit Personnel Dep't, Code 71-31-31. See also Master Agmt. between the City of Detroit and Michigan Council 25, AFSCME and AFL-CIO, Jul. 1, 2008–Jun. 30, 2012, at 137 (listing horseshoer position).)

The water department has no horses. Yet city unions objected to the elimination of the Horseshoer and other superfluous positions in 2012, following an audit report that recommended cutting 81% of the department's work force over a five-year period and outsourcing billing, maintenance, and other functions. See John Wisely, *Detroit water department to cut 81% of workers under new proposal*, Detroit Free Press, Aug. 9, 2012, available at http://archive.freep.com/article/20120809/NEWS05/308090260/Detroit-water-department-to-cut-81-of-workers-under-new-proposal (last visited Feb. 25, 2015).

The outside audit firm found staggering levels of inefficiency and waste in the Detroit Water and Sewerage Department ("DWSD"), including an average cost of $86,135 per employee for close to 2,000 employees, when fewer than 400 would suffice. The report also concluded that the Department's 257 job classifications—containing three to five skill levels per classification—could be reduced to 31. Auditors estimated that the recommended reduction and outsourcing measures would save the Department roughly $900 million over a decade. (Brian Hurding & Denise O'Berry, Organization Assessment Presentation of Results, EMA, Aug. 2012, slides 26, 32, 35, 38.)

The DWSD's inefficiencies, combined with the department's backlog in needed maintenance and upgrades, and debt (the service of which took up 44% of revenues), all led to dramatically inflated water rates for the residents of the Detroit metropolitan area. (*Id*. at slides 4–6; Stephen Henderson, *Intolerable waste in Detroit's Water Department*, Detroit Free Press, Aug. 9, 2012, available at http://www.freep.com/article/20120809/COL33/308090096/Stephen-Henderson-Intolerable-waste-in-Detroit-s-Water-Department (last visited Feb. 25, 2015).)

But the public impact of this waste was not merely financial. In a September 9, 2011 order, United States District Judge Sean Cox found that the DWSD's collective bargaining-induced inefficiencies were preventing it from meeting its minimum environmental requirements under the federal Clean Water Act. Noting that the department

had remained in a recurring cycle of non-compliance for over thirty years, Judge Cox listed several "root causes" for the continued non-compliance, including: "excessive and unnecessary delays in hiring qualified personnel"; "the DWSD's required use of the City's Human Resources Department, resulting in significant delays in filling critical positions at the DWSD"; "the City's personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel"; and "obsolete job descriptions and qualifications." *United States* v. *City of Detroit*, No. 77-71100, 2011 WL 4014409, at *22 (E.D. Mich. Sept. 9, 2011).

Finding specifically that "certain CBA [collective bargaining agreement] provisions and work rules" were "impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its NPDES permit and the Clean Water Act," the court struck and enjoined then-in-force CBA provisions or work rules that threatened compliance and prohibited future CBAs from containing terms that threaten long-term compliance. *United States* v. *City of Detroit*, No. 77-71100, Dkt. 2410, at *4–6 (E.D. Mich. Nov. 4, 2011). In particular, the court:

- enjoined CBA provisions regarding "bumping" rights (*i.e.*, "any provisions in current CBAs that allow an employee from outside the DWSD to transfer ('bump') into the DWSD based on seniority");

- struck prohibitions on subcontracting or outsourcing;

- limited excused hours for union activities to attending grievance hearings and union negotiations;

- ordered a review of employee classifications to reduce their number and increase workforce flexibility;

- ordered promotions to be based on skill, knowledge, and ability, before taking seniority into account; and

- enjoined provisions that prevented management from assigning overtime work to the most capable employees.

Id. at 7. Put simply, the court found that without "fundamental corrective measures . . . to address the institutional and bureaucratic barriers to compliance," environmental compliance "will simply not occur." *Id.* at 2.

Like Detroit's pension problems, the DWSD's collective-bargaining activities directly created problems of public concern. The effects of bloating and bureaucracy in the water department were not merely private concerns that implicated the government's interests as employer—instead, the waste and inefficiency raised water rates for the public at large and directly impacted the health of Lake Erie. And while the optimum staffing levels to achieve federal environmental compliance remain subject to debate, there is no question that the debate is about a matter of great public concern.

* * *

These examples show not only that public-sector unions advocate contentious policy positions on topics at the heart of collective bargaining, but also that those bargaining positions often have direct and far-reaching public consequences. Detroit's $3.5 billion in unfunded pension liabilities was not merely a private concern that implicated the City's interests as an employer, just as its high water bills and thirty years of environmental non-compliance were not merely private concerns. These issues are instead of great concern to the public at large.

Nor can it be assumed in the public sector that the policies unions advocate in bargaining provide a benefit to all employees. While it may seem elementary in the private sector that a higher salary or increased pension is an individual good that all employees would view as a benefit, that is not always true in the public sector, where such benefits are inextricably tied up with the public interest. To say that core collective-bargaining topics like wages and hours pertain mostly to private concerns minimizes the public employee's interest in responsible government, and it also assumes that every such employee is only self-interested—i.e., that he necessarily views a personal pay raise as a benefit, to the exclusion of any other community-oriented preferences on how public resources should be allocated. While it is not uniformly true, many public servants are motivated by interests beyond their own individual interests. And many would be concerned about a ballooning $3.5 billion debt and decades-long pollution of Lake Erie.

The above examples also illustrate that, in some instances, collective bargaining not only involves contentious policy choices with large consequences—it also becomes a policy bottleneck as the only available outlet for addressing a policy problem. The City of Detroit made multiple attempts to address its growing pension problem, including through the political process, but it was stopped every time with claims that the pensions could only be addressed in collective bargaining. Similarly, the water department tried and failed for thirty years to achieve environmental compliance, to the point that a federal judge felt it necessary to free the department from some of its collective-bargaining obligations. In such instances, public employees who must pay agency fees are forced not only to fund policy positions with which they disagree, on topics that are core to collective bargaining, and which have enormous public consequences, but they are also forced to subsidize the union's policy monopoly in collective bargaining, with virtually no other recourse in the general political process.

In short, given the enormous power of the modern public-sector union and the often-vast public policy consequences of its collective bargaining activities, requiring a public employee to subsidize those activities is materially indistinguishable from the forced subsidization of a political party. *Abood*, 431 U.S. at 256 (Powell, J., concurring) ("[T]he public-sector union is indistinguishable from the traditional political party in this country."); *id.* at 243–44 (Rehnquist, J., concurring) ("I am unable to see a constitutional distinction between a governmentally imposed requirement that a public

employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."). The Constitution does not permit this type of coerced political speech. "Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, [] the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. at 522. That should be the end of the matter.

CONCLUSION

This Court should grant the petition, overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and hold that compulsory agency fees to public-sector unions, including for activities related to the union's role as exclusive bargaining representative, violate the First Amendment.

Respectfully submitted,

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