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 *AMICI CURIAE* FIFTEEN UNIONS AND UMBRELLA ORGANIZATIONS THAT PROVIDE SERVICES TO AFFILIATED UNIONS AND ASSOCIATIONS REPRESENTING NEARLY HALF A MILLION PUBLIC SAFETY EMPLOYEES IN SUPPORT OF RESPONDENTS

PAMELA S. KARLAN
JEFFREY L. FISHER
DAVID T. GOLDBERG
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLINIC
559 NATHAN ABBOTT WAY
STANFORD, CA 94305

GREGG MCLEAN ADAM
COUNSEL OF RECORD
GARY M. MESSING
MESSING ADAM & JASMINE LLP
235 MONTGOMERY STREET
SUITE 828
SAN FRANCISCO, CA 94104
(415) 266-1800
GREGG@MAJLABOR.COM

JANUARY 19, 2018 *COUNSEL FOR AMICI CURIAE*

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INTERESTS OF AMICI[1]

Amici are unions and umbrella organizations that provide services to affiliated unions and associations.[2] They represent nearly a half million individuals who serve as peace officers, firefighters, and supporting public safety employees in communities throughout the Nation. In their capacity as the collective bargaining representatives for these public safety employees, amici or their member organizations have bargained for a wide variety of contractual provisions that not only improve working conditions for their members but also benefit the public at large. In amici's experience, the option to have fair-share fees contributes to the success of many states' collective bargaining processes.

Accordingly, amici believe that this Court should reject petitioner's challenge to the existing fair-share fee structure for public employees that has evolved based on the principles first announced in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

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[1] Letters from the parties consenting generally to the filing of briefs amicus curiae are on file with the Court. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] A description of each amicus appears in the Appendix to this brief.

SUMMARY OF ARGUMENT

Petitioner seeks a categorical rule eliminating the option for public employers to agree to fair-share fees. He asks the Court to reject almost forty years of precedent and, in some states, more than fifty years of consistent practice. His rule would undercut principles of federalism that allow states to authorize fair-share agreements for public sector unions and would thereby frustrate those states' interests in effectively providing a broad range of public services. Petitioner obscures the consequences of his proposed rule by painting a distorted picture of public sector unions. But a proper understanding of how unions function, and particularly of how public safety unions function, reinforces the wisdom of this Court's decision in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

Petitioner's categorical rule could deprive many unions of the membership and resources they need to perform their essential public functions. The elimination of fair-share fees would create an all-or-nothing choice for the workers whom unions represent: pay union dues or pay nothing but still receive the benefits a union provides. In that world, many rational employees will choose to become free riders. This risks setting in motion a union "death spiral": as membership drops, the union will have to increase dues to cover its expenses, which will create further incentives for additional workers to quit the union.

1. Petitioner offers a cramped view of what public sector unions do. In his account, unions do little more than stymie needed government reform and transfer

taxpayers' wealth into the pockets of undeserving public employees.

But public safety unions provide a powerful example of why petitioner is wrong. In amici's experience, well-funded unions use the collective bargaining process to ensure safety, provide adequate training, and promote the cohesion among public safety employees essential to making split-second decisions under dangerous conditions. Likewise, states rely on public safety unions to collect information from officers across the state, to determine the relative strength of officers' needs, and to make the bargaining process more efficient. Categorically prohibiting fair-share fees threatens the efficacy of public safety unions, and ultimately public safety itself.

2. This Court should respect the important interests that states have in maintaining their chosen labor relations systems. As this Court has consistently recognized, "[t]he federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society," and "permits innovation and experimentation." *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted)). Thus, this Court has accorded states wide latitude in determining how to manage their unique public agency workforces. The very fact that states manage their public employees using different systems—from fair-share systems like Illinois' here to right-to-work structures in other states—shows that states need leeway to take into account their distinctive geographies, populations, and workforce needs.

Here, Illinois, like many other states, has chosen to allow fair-share fees because alternative arrangements would undercut its ability to manage its workforce. This Court should respect its choice.

3. This Court has recognized that the First Amendment applies differently when governments regulate their employees rather than the general public. And the Court has recognized that the efficient provision of public services can justify significant control over employees' expression. Thus, the fair-share fee at issue in this case does not violate the First Amendment. This Court should reaffirm *Abood*.

ARGUMENT

I. THIS COURT CANNOT FULLY UNDERSTAND STATES' INTERESTS IN ALLOWING FAIR-SHARE FEES WITHOUT UNDERSTANDING THE DISTINCT NATURE OF PUBLIC SAFETY WORK.

The rule that this Court announced in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), wisely gives states wide latitude in how to structure their labor relations. It neither requires nor forbids them from having public sector unions. Nor does it prescribe whether, if governments choose to have public sector unions, those unions are required, permitted, or prohibited from charging a fair-share fee to employees whom they represent. That latitude makes sense given the diversity among different states and the broad range of public sector employment, even within a single state.

A. This Court Should Not Overrule *Abood* Based on a Bare Record.

The *Abood* framework affects millions of public sector workers in a wide range of jobs. In 2016, for example, approximately 7.8 million public sector employees were represented by unions, and 7.1 million of those workers were union members. Bureau of Labor Statistics, *Union Members—2016*, tbl. 3 (2017), http://1.usa.gov/1jszQkB.[3] These members worked in diverse occupations, including library services, healthcare, job training, and more. *See id.* Petitioner's brief ignores these workers completely but nonetheless asks for a rule that would fundamentally alter their professional lives.

To properly evaluate petitioner's demand for a categorical ban on fair-share fees, this Court needs to understand all of the contexts in which that rule would operate. This Court's prior decisions have followed that approach, paying close attention to real-world details. In *Harris v. Quinn*, 134 S.Ct. 2618 (2014), for example, the Court analyzed particular provisions of Illinois' rehabilitation program, including the nature of the daily work of personal assistants. *See id.* at 2623-26, 2634. And the Court's decision turned on its fact-specific conclusion that the assistants were "not full-fledged public employees." *Id.* at 2638. So too in *Knox v. Service Employees International Union*, 567 U.S. 298 (2012), where the Court devoted considerable attention to the details and implementation of the union's mid-year special dues assessment. *Id.* at 317-22.

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[3] All websites last visited on January 15, 2018.

As it was litigated below, this case provides the Court with no real understanding of how fair-share rules actually operate. Petitioner created no record. As the district court explained in its order dismissing petitioner's second amended complaint for failure to state a claim, petitioner "brought the suit hoping that *Abood* would be reversed in a matter then pending before the Supreme Court in which the continued validity of *Abood* was challenged." Order at 1, *Janus v. AFSCME*, No. 15 C 1235 (N.D. Ill. Sept. 13, 2016), ECF 150. Both the district court and the Court of Appeals resolved the case entirely in reliance on *Abood*, without making any additional findings of fact or conclusions of law.

Petitioner now cherry picks a few examples in which the union that represents his bargaining unit negotiated over controversial issues. *See, e.g.*, Petr. Br. 7, 12. Based on those examples, petitioner asks for a categorical rule that forbids all public sector unions from entering into fair-share agreements, regardless of the scope, structure, and context in which they bargain. This Court should not adopt a rule that destabilizes collective bargaining relationships of thousands of public employers based on petitioner's few anecdotes.

B. States' Public Safety Workforces Exemplify the Diversity of Public Sector Employers and Employees.

One of a state's most important responsibilities is keeping its citizens safe. States therefore have a critical interest in how their police departments, fire departments, and other public safety agencies operate.

California provides one valuable illustration of both the distinctive nature of public safety work and the range of contexts in which that work is performed.

1. Public safety officers are a large and important segment of the public sector workforce. Across the United States, there are more than 687,000 fulltime public police and law enforcement officers and nearly 303,000 fulltime firefighters. U.S. Census Bureau, 2016 Annual Survey of Public Employment & Payroll, https://tinyurl.com/16-1466bsac1. In Illinois, nearly ten percent of public sector workers are police officers or firefighters. *Id.* And hundreds of thousands of public safety officers and first responders protect California. They constitute approximately 15% of California's 2.3 million state and local employees. Robert Fellener & Edward Ring, *Evaluating Public Safety Pensions in California*, Cal. Pol'y Ctr. (Apr. 25, 2014), http://bit.ly/1k10i3d. They include more than 70,000 state and local police officers and nearly 29,000 firefighters. U.S. Census Bureau, 2016 Annual Survey of Public Employment & Payroll, https://tinyurl.com/16-1466bsac1.

This segment of the public sector workforce performs a range of important functions, from patrolling the streets to guarding prisoners to putting out fires to resuscitating unconscious individuals. For example, police departments across California receive more than 14 million 9-1-1 calls annually. This translates into approximately 3,500 to 4,000 calls per day in major cities like San Francisco. Laura O'Reilly-Jackson, *A Day in the Life of a 911 Dispatcher*, 36 S.F. Police Officers Ass'n J., Feb. 2004, at 10, http://bit.ly/1LMQGqI. Firefighters of the California Department of Forestry and Fire Protection ("CAL FIRE") combat over 5,000 wild-

land fires across the state each year and deal with over 400,000 emergency incidents. Cal. Dep't of Forestry & Fire Prot., *CAL FIRE at a Glance* 1 (2016), http://bit.ly/1GvQJbx. And firefighters for the City of Davis, California, respond to more than 4700 calls each year. City of Davis, *About DFD*, https://tinyurl.com/16-1466bsac2.

To keep the public safe, each department must have officers on duty or on call at all times. This requirement translates to atypical work shifts, including 24-hour shifts for firefighters and night shifts for police officers. These schedules, coupled with the dangerous nature of the job, impose special burdens on public safety officers.

2. Although they share a common responsibility to protect the public, public safety personnel work in a wide range of agencies and departments. In Illinois, these can include police departments, fire departments, and special fire protection districts. *See* U.S. Census Bureau, 2012 Census of Governments, Individual State Descriptions 80 (2013), https://tinyurl.com/16-1466bsac3 ("Illinois rank[ed] first among the states in number of local governments with 6,963 active as of June 30, 2012.") In California, peace officers work in 509 state and local law enforcement agencies. Brian A. Reaves, U.S. Dep't of Justice, *Census of State and Local Law Enforcement Agencies, 2008*, at 15 (2011), http://1.usa.gov/1yz3e0F.

Not surprisingly, given the diversity of large states, individual jurisdictions may differ dramatically in the nature of their public safety workforces. For example, amici represent safety officers in diverse locales, including firefighters in the City of Davis (pop. 66,000) and

police officers in Los Angeles County (pop. 10.2 million). Officers' duties are not uniform throughout a state. In rural towns, officers serve different functions than their counterparts stationed in urban areas. In light of this diversity, many states have concluded that flexibility in labor-management relations is necessary to best meet their public safety needs. A decision to use fair-share arrangements is one aspect of that flexibility.

II. PUBLIC SAFETY UNIONS PLAY A VITAL ROLE IN ENSURING THAT THE WORKERS THEY REPRESENT CAN PROTECT THE PUBLIC.

Many states have longstanding reliance on public sector unions' participation in labor relations. California's, for example, stretches back to 1961 with the passage of the George Brown Act. *See Glendale City Emps. Ass'n v. City of Glendale*, 540 P.2d 609, 611 (Cal. 1975) (en banc). Amici's experience representing a variety of public safety and law enforcement personnel shows how unions contribute to the effective provision of public services and to harmonious labor relations.

A. Unions Improve the Safety and Training of Public Safety Employees.

Public safety depends on first responders themselves being safe and well trained. However, the people who make critical decisions affecting the safety and training of public safety employees are often laypersons who lack relevant expertise. For example, city council members or state human resources officials are seldom selected because they know how to fight fires or equip police officers. Public safety unions can help to bridge this information gap by ensuring that public employers both understand employees' safety and train-

ing needs and are aware of best practices across jurisdictions.

1. Davis, California, and its Fire Department is a case in point. When the Davis Professional Firefighters' Union was first established, entry-level firefighters received no formal training. But trial by fire is no way to operate a first-rate department. At the request of line-level firefighters, the union bargained for and secured six weeks of preliminary training for every entry-level firefighter. *See Davis Professional Firefighters Memorandum of Understanding* 46 (2006), http://bit.ly/1RdhJNn.

The California Department of Insurance provides another example. Its investigators often conduct enforcement raids alongside other law enforcement personnel. Unlike those colleagues, who were all properly equipped with protective headgear, the Department's investigators were left unprotected, making them obvious targets. Amicus California Statewide Law Enforcement Association showed the Department that its investigators were especially vulnerable, and successfully bargained for them to receive ballistic helmets.

2. Because unions communicate with one another, they are instrumental in sharing best practices and securing standardized training. This is especially valuable in the public safety context because many situations require collaboration among employees from different jurisdictions.

As an example, public safety unions partnered with the Office of the California State Fire Marshal to create California's Joint Apprenticeship Committee. *About JAC*, Cal. Fire Fighter Joint Apprenticeship Committee, http://bit.ly/1XxvGtr. This partnership

enabled public safety employees from different departments to train under the same umbrella organization, leading to more consistent training. In 2015, this coordination was invaluable to the ability of hundreds of firefighters from across California to coordinate a successful month-long battle against the Valley Fire, *Valley Fire Incident Information,* Cal. Dep't Forestry & Fire Protection, http://bit.ly/1ULIazJ, one of the most destructive fires in state history, Cal. Dep't of Forestry & Fire Prot., *The Top 20 Most Damaging California Wildfires* (2017), https://tinyurl.com/16-1466bsac5. Similarly, the Rim Fire, in 2013, required the coordination of nearly 5,000 firefighters. Lisa Fernandez, *Rim Fire Near Yosemite Surpasses 224,000 Acres, 45 Percent Contained*, NBC Bay Area (Aug. 30, 2013), http://bit.ly/1Hnc01V. The huge wildfires California confronted during 2017 once again put a premium on coordination across departments.

Along the same lines, the state-wide firefighters' union in California, CAL FIRE Local 2881, has been instrumental in getting Californians to think more broadly and proactively about wildfires. In 2014, it convened a first-of-its-kind symposium on the "Future of Fighting Wildfire," which brought together stakeholders and experts at the federal, state, and local levels. Experts discussed issues ranging from changes in the frequency, intensity, and distribution of wildfires, to risks posed by new building materials, to innovative training techniques. The symposium resulted in a comprehensive report that provides guidance for decision-makers. *See* Matt Rahn & Terence McHale, *CAL FIRE Local 2881 Symposium: A Comprehensive View on the Future of Fighting Wildfires by a Team of Experts* (2015), http://bit.ly/1PPtdcy.

B. Unions Foster Vital Solidarity Among Public Safety Employees.

1. Solidarity and confidence in one another is essential for professionals like public safety employees who must work together in life-or-death situations. Peace officers and firefighters seldom operate alone. Rather, they must act as a team to effectively confront emergencies. Empirical studies have demonstrated that team cohesion saves lives. For example, "[p]oor intercrew and intracrew cohesion" was found to be "a major factor in wildland fire fatalities." Jon Driessen, USDA Forest Serv., *Crew Cohesion, Wildland Fire Transition, and Fatalities* 12 (2002), http://1.usa.gov/18qsw5a. Accordingly, solidarity "not only contributes to firefighters and police officers' sense of individual and collective fulfillment, but also helps them to carry out their risk-fraught work as effectively and safely as possible." Tovia G. Freedman, *Voices of 9/11 First Responders: Patterns of Collective Resilience*, 32 Clinical Soc. Work J. 377, 389 (2004), https://tinyurl.com/16-1466 bsac8. In the experience of amici, strong morale and cohesion also decrease turnover, increasing effectiveness.

2. Unions are a major force in fostering solidarity among public safety employees. The participatory democracy of electing local union leaders and discussing job-related issues in a structured setting improves understanding and respect among workers. Moreover, successfully resolving concerns about their safety or training by working together—through their union—gives employees a sense of collective agency. *See, e.g.*, Cal. Prof'l Firefighters, *Strength Through Solidarity: California Professional Firefighters at 75*, 22 CPF

Newspaper, no. 1, 2014, at 2, https://tinyurl.com/16-1466bsac6.

Unions also reinforce solidarity by taking care of officers and their families in times of need. Public safety unions help organize funerals and memorials for officers who fall in the line of duty. They regularly provide financial and emotional support to police officers or firefighters who have experienced personal tragedies. For example, CAL FIRE Local 2881 made emergency donations to the families of eight firefighters who lost their own homes to fire while they were battling fires elsewhere. Ruben Dominguez, *State Firefighters Lose Their Own Homes While Fighting Fires*, FOX 40 (Sept. 14, 2015), http://bit.ly/1k7HSCz. This produces solidarity because firefighters and peace officers know that their colleagues have committed to helping their families in the event that they cannot.

3. In contrast to fair-share regimes, petitioner's rule would foment dissension by creating incentives for public safety workers to become free riders on the backs of their union-member colleagues. *See infra* at 23-25. Union members would know that they had paid dues to finance bargaining for safety and training measures from which nonmembers were benefitting while paying nothing. This erosion of solidarity could play out on the job, posing a threat to both workers and public safety. Fair-share fees avoid this problem because union members maintain confidence that their non-union counterparts are not free riders.

C. Unions Improve the Recruitment and Retention of High-Quality Public Safety Employees.

1. Petitioner writes as if wages and benefits for public sector employees are unreasonably high and do nothing but waste taxpayer money. *See* Petr. Br. at 13 n.5. Not so. As in all things, you get what you pay for. Particularly when it comes to jobs in law enforcement and firefighting, unions ultimately benefit the public when they obtain terms and conditions of employment that attract and retain high-quality workers.

The fallacy in petitioner's reasoning is illustrated by the hiring crisis that police and sheriff's departments nationwide have experienced: too few qualified applicants are attracted to the profession, especially given the less dangerous or demanding alternatives available. Oliver Yates Libaw, *Police Face Severe Shortage of Recruits*, ABC News (July 10, 2013), http://abcn.ws/1M0xFCs. To be sure, departments could fill positions without increasing wages or benefits if they were willing to lower their standards. But making that tradeoff would compromise public safety and harm the profession as a whole. Particularly now that public safety officers are called upon to use new and more complex technologies on the job, departments cannot afford to make this tradeoff. *See, e.g.*, John S. Hollywood et al., RAND Corp., *High-Priority Information Technology Needs for Law Enforcement* 52-53 (2015), http://bit.ly/1WlA6kL; *Police See Crime Fighting Software as Way to Combat Drug & Gang Crime*, Police Mag. (Nov. 20, 2015), https://tinyurl.com/16-1466bsac10.

Unions have bargained for skills pay that contributes to recruiting and retaining especially qualified officers. For example, public safety unions in Cal-

ifornia have successfully secured additional pay for officers with proficiency in multiple languages. *See, e.g.*, *Fresno Deputy Sheriff's Association Unit 1 Memorandum of Understanding* 6 (2017), http://bit.ly/1M0NUPY; *San Francisco Police Officers Association Memorandum of Understanding* 36-37 (2007), http://bit.ly/1M75bnr. The higher pay puts peace officers on the street who can interact effectively with the State's multilingual population.[4]

Likewise, unions often negotiate fair overtime protections for their workers. *See Davis Professional Firefighters Memorandum of Understanding* 11-12 (2006), http://bit.ly/1RdhJNn. Overtime provisions are easy targets for critics who do not understand the nature of public safety work. In reality, public safety officers are more likely to make life-threatening mistakes if departments require them to work past the point of exhaustion. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Impact of Sleep Deprivation on Police Performance* (2009), https://tinyurl.com/16-1466bsac9. Unfortunately, employers face the temptation to load more hours on fewer people. (This was one of the contentious subjects in the Illinois collective bargaining negotiations that immediately preceded the filing of this suit. *See Illinois Dep't of Central Management Servs. v. AFSCME Council 31*, 2016 WL 7645201 (ILRB, Dec. 12,

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[4] California has 6.8 million residents with limited English proficiency. Jie Zong & Jeanne Batalova, *The Limited English Proficient Population in the United States*, Migration Pol'y Inst. (July 8, 2015), http://bit.ly/1Ln4mIh. In fact, this limited-English population is so significant that 27 counties in California are required to provide multilingual election materials. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602, 63,603-04 (Oct. 13, 2011)

2016).) Unions protect against this risk by bargaining for overtime caps, which directly limit hours, and for increased overtime premiums, which deter departments from piling too many hours on their employees rather than employing the right number of workers.

Finally, obtaining fair wages and benefits is only one way in which unions help public employers attract a high-quality workforce. As amici have already explained, unions contribute to the safety, training, and solidarity of public safety officers, all of which makes these jobs more attractive.

2. Petitioner's characterization of union handling of grievances as "just" a "political" act, Petr. Br. at 14, is misplaced. Petitioner ignores entirely the way in which arbitration serves to protect officers who have been treated unfairly. For example, in 2014, arbitration led to the reinstatement of a Burbank, California, detective who was wrongly fired for reporting wrongdoing by other officers. Alene Tchekmedyian, *Arbitrator Rules in Favor of Fired Burbank Police Officer*, Burbank Leader (Jan. 10, 2014), http://bit.ly/1MRs4Lc. Another example involves an arbitrator reinstating a deputy sheriff with a ten-year unblemished record who was wrongly terminated for his off-the-job romantic relationship. *Stanislaus Cty. Sheriff's Dep't v. Mack*, No. C043029, 2004 WL 188318 (Cal. Ct. App. Feb. 2, 2004).

More fundamentally, unions bargain to ensure that peace officers will not be distracted from their duties or deterred from joining police departments in the first place. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court pointed out that the prospect of having to defend good-faith actions against accusations of

wrongdoing can deter "able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible." *Id.* at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). This Court has developed an entire doctrine of qualified immunity precisely to ward off the risk of "unwarranted timidity." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (quoting *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997)).

Unions likewise play a critical role in minimizing that risk. Their direct representation of workers in various proceedings offers a powerful example. California Statewide Law Enforcement Association provides legal representation for law enforcement officers accused of wrongdoing. *Legal Defense Fund*, Cal. Statewide L. Enforcement Ass'n, http://cslea.com/legal/legal-defense-fund/. Similarly, although public employees have "course and scope" (of employment) indemnification as a matter of state law, many unions independently offer civil defense funding.[5] This additional coverage can be quite important. It reassures officers that they will not be deprived of a defense if their employer makes a politically motivated decision not to defend them in a high-profile case. And it can be indispensable in situations where their employer invokes a statutory exception to the duty to defend: for example, section 995.2 of the California Government Code provides such

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[5] For example, the California Statewide Law Enforcement Association, the Police Officers Research Association of California, and the San Francisco Police Officers' Association all have legal defense funds. Since 1974, the Peace Officers Research Association of California Legal Defense Fund has defended peace officers accused of misconduct; it now boasts more than 100,000 members, in California and many other states.

an exception where the employer claims that there is a specific conflict of interest between it and the employee.

III. States Have a Strong Basis for Authorizing Fair-Share Fees as Part of Public Sector Collective Bargaining Agreements.

States' labor relations systems are carefully constructed to further a complex set of state goals and priorities. Many states, including Illinois and California, have concluded that they can best manage their workforces by engaging in collective bargaining. In California, the Ralph C. Dills Act recognized a half-century ago the right of state employees to unionize. That Act sets out the procedure for collective bargaining across the State, describing this bargaining as a tool to "promote the improvement of personnel management and employer-employee relations." Cal. Gov't Code § 3512. That same statute is the source of local jurisdictions' authority to institute fair-share fees. Cal. Gov't Code § 3515. In fact, California considers fair-share fees such an essential tool that it allows public sector workers to institute them by vote of the members themselves even when the employer refuses to agree to fair-share fees in negotiations. Cal. Gov't Code § 3502.5(b).

Petitioner may claim that "[t]o the extent government has any interest in dealing with a designated employee representative, it would be with a weak and submissive one." Petr. Br. 61. But California's experience gives the lie to that bald assertion. The public safety context demonstrates that California has good reason to structure its labor relations to include vibrant unions. Public safety unions have a comparative advan-

tage over other actors in gathering information from, and bargaining on behalf of, the employees they represent in a way that serves both those employees and the public interest. Barring fair-share fees would undermine unions' ability to obtain the resources they need to perform these roles. In California, the potential alternatives to strong, well-funded public safety unions would be both less effective and no cheaper. Given that the Court has afforded states wide latitude when managing their workforces in the face of other First Amendment-based claims, there is no basis for restricting states' options here.

A. States Have Good Reasons for Using Collective Bargaining with Robust Unions to Manage Public Safety Workforces.

1. State and local governments rely on unions like amici, and union members of amici, to gather the information that they need to meet their public safety responsibilities. It would be unrealistic to expect workers to generate this information without a union in light of their demanding and unpredictable work schedules. In addition, without professional union negotiators, public safety employees would be required to spend significant time on activities such as conducting the cross-jurisdictional salary surveys that often underlie collective bargaining. This would leave local departments undermanned unless public employers were to hire additional personnel.

This is particularly so because public safety employees often do not work consistent hours in a single location. Rather, they must stagger shifts, and they often work in far-flung locations, particularly if their employer is the State. Gathering an entire public safety

workforce together simultaneously cannot be done. Whereas other public employers, such as school districts, can hold "service days" during which employees are relieved of all other duties, it would be irresponsible for any public safety department to do the same. Thus, it makes sense that California relies on unions to perform information-gathering tasks so that public safety employees can focus on their responsibility to the public.

The structure of public safety unions facilitates communication between employees and employers. Local union "site representatives," sitting directly within a station or firehouse, have daily contact with officers. As trusted representatives, they gather information that employees may feel uncomfortable discussing directly with their employer. Moreover, union officials visit jurisdictions across a State. *See, e.g.*, *CSLEA Visits DOJ and DCA in Fresno*, Cal. Statewide L. Enforcement Ass'n, https://tinyurl.com/ 16-1466bsac7. These visits give local jurisdictions the ability to tap into the unions' statewide knowledge bases. At the same time, unions get a sense of multi-or cross-jurisdictional problems that should be addressed in bargaining. Finally, public safety unions solicit formal suggestions from employees that can form the basis for future negotiations. Rank-and-file participation in this process is significant; for example, amicus California Statewide Law Enforcement Association alone receives 300 to 350 such suggestions per round of negotiation from employees with 180 different job classifications, *About CSLEA*, Cal. Statewide L. Enforcement Ass'n, http://cslea.com/about-us/.

2. Once unions have shepherded public safety employees' feedback, they can work with governments to pursue goals that benefit both sides. Unions are especially valuable when they negotiate for workplace improvements that employers might otherwise overlook.

Petitioner and their amici suggest that unions bargain only for provisions that increase costs at the public's expense. To the contrary, as parties with a long-term stake in the financial health of the public employer, unions are also sensitive to employers' budgetary constraints. They frequently partner with governments to craft benefits for workers that also reduce costs. This win-win approach is exemplified by amicus Davis Professional Firefighters, which bargained for a "Back Safety Maintenance Program." The program paired firefighters with local physical therapists to learn techniques for avoiding back injuries. Within a short time, back injuries were at their lowest levels in years and workers' compensation claims had decreased dramatically.

Unions have also bargained for innovations that improve public safety while saving money. For example, amicus Fresno Deputy Sheriff's Association negotiated the "Take Home Patrol Vehicle Program" in 2003. *See Fresno Deputy Sheriff's Association Unit 1 Memorandum of Understanding* 19-20 (2013), http://bit.ly/1M0NUPY. The program allows patrol officers and investigators to drive their police vehicles to and from work. Officers can deploy from home, significantly shortening response times so officers can spend more time on actual law enforcement. The program also increases the visibility of peace officers in the community, which improves public safety. Finally, because

each officer takes responsibility for a single vehicle, the vehicles last four to seven years longer saving on maintenance and replacement costs.

Public safety unions are especially valuable in developing comprehensive plans that minimize adverse impacts on the communities they serve during times of fiscal distress. When budgets must be cut, unions can help employers understand how to structure the cuts to do the least damage to public safety. In 2009, for instance, the Fresno Deputy Sheriff's Association successfully approached the County with a proposal for salary givebacks and unpaid furloughs to avoid cutting the number of officers in the department.

3. Petitioner claims unions are "hypocritical" in pointing to their obligation to represent even non-members in grievance proceedings as a justification for fair-share fees. Petr. Br. 45. Petitioner misunderstands the point. Grievance proceedings can be time-and resource-consuming. Because unions are repeat players in front of adjudicators, and because they have their own resource constraints, they have strong incentives to act as gatekeepers and ensure that only strong claims move forward. This saves time and money for all parties: employees, adjudicators, employers, and the unions themselves.

B. Categorically Prohibiting Fair-Share Fees Would Threaten Public Safety by Weakening Public Sector Unions.

Eliminating state and local governments' option of agreeing to a fair-share system would reduce both the human and financial resources available to unions. The consequence will be less effective unions and ulti-

mately less effective law enforcement and public safety departments.

1. As it stands, a public safety employee's choice whether to join a union is not primarily driven by out-of-pocket costs. It often costs only slightly more to become a union member than to pay a fair-share fee. (Indeed, petitioner seems to think this is an argument against fair-share fees. *See* Petr. Br. 27-30.) But in a world where fair-share fees were prohibited, public safety employees would face a stark economic choice between paying union dues and paying nothing at all. Even public safety employees entirely supportive of union activities would often rationally decide to forgo membership. *See* Jeffrey Keefe, Econ. Policy Inst., *Eliminating Fair Share Fees and Making Public Employment "Right-to-Work" Would Increase the Pay Penalty for Working in State and Local Government* 6-8 (2015), http://bit.ly/1MtMd9D. This Court recognized that dynamic in *Davenport v. Washington Education Association,* 551 U.S. 177 (2007), when it said that the "primary purpose" of fair-share arrangements "is to prevent nonmembers from free-riding on the union's efforts." *Id.* at 181.

Thus, the categorical ban on fair-share fees petitioner seeks would confront public safety employees with a textbook prisoner's dilemma, where each individual will have strong economic incentives to leave the union, even though weakening the union will harm employees collectively. Worse still, as membership declines, revenues will drop as well, while unions' legal responsibilities—and thus their costs—will remain unchanged. Because unions will retain their role as exclusive bargaining representatives, they will still have to gather

information on public safety employees' needs, engage in collective bargaining, and enforce collective bargaining agreements, even when particular violations only involve nonmembers. Consequently, many unions risk a "death spiral": unions will have to raise dues to make up the budget shortfall attributable to the elimination of fair-share fees, causing membership numbers to fall, which will necessitate raising dues further, and so on. As this Court recently observed, this phenomenon—rising costs causing costs to rise—can destabilize entire economic sectors. *See King v. Burwell*, 135 S.Ct. 2480, 2485-86 (2015). Public safety unions would be no different.

To be sure, some collective bargaining agreements —even in California—do not contain fair-share provisions. But amici's site representatives report that both employees and unions make decisions in the shadow of the *Abood* framework. For employees, the mere possibility of fair-share fees results in high membership rates and thus in unions having the resources they need to improve the safety, training, and solidarity of public safety employees. And because unions, for their part, have the ability to obtain fair-share provisions if the currently high level of union membership were to decline, the fair-share system helps all public sector unions remain strong.

2. Categorical prohibitions on fair-share fees would have consequences beyond the financial. The reduction in union membership would undermine unions' utility to the governments with which they bargain. Unions have a comparative advantage vis-à-vis the State in gathering information because their large membership gives them direct access to a repre-

sentative cross section of rank-and-file employees. *See supra* at 9-12. With fewer members comes less information. In addition, cooperative labor-management relations depend on public sector employees accepting the results of collective bargaining. Workers are more likely to accept these results if they think that their exclusive bargaining agent is legitimate. A union with few members lacks that legitimacy.

Finally, without access to fair-share fees, attracting members will become unions' first priority. Unions will have to shift significant time and money towards recruiting—and those resources will come from the budget for information gathering, bargaining, and other public functions. A categorical bar on fair-share fees would thus diminish unions' utility to governments even if membership levels were to remain unchanged.

C. States Have a Strong Basis for Choosing Unions Supported by Fair-Share Fees Over Any of the Alternatives.

In reliance on *Abood*, many states have built their labor relations system on a partnership between fair-share-fee-supported unions and public employers. If this Court were to eliminate fair-share fees, the most likely consequence is that these states will be stuck with less effective public sector unions. Currently, in the public safety context, union negotiation teams consist of both professionally trained experts, often with decades of experience in agenda setting and negotiation, and rank-and-file members. If unions are left without the resources to employ or retain these experts, they will have only amateur negotiators at the table. These negotiators will almost certainly be less effective at presenting the employees' case. Moreover, they

may not have the expertise to filter out rank-and-file proposals that are economically or operationally infeasible or simply off the table due to controlling legislation. The upshot is that the parties will be less likely to reach an agreement or to get that agreement ratified.

1. California provides a clear example of how states will not be able to achieve their labor-management goals by switching to some other structure. Neither unilateral "command and control" nor government-funded bargaining representatives can serve California's interest in "improvement of personnel management." Cal. Gov't Code § 3512. And both run the risk of threatening public safety.

Unilateral command and control. States can have good reason to conclude that authorizing public employers to unilaterally set the terms of employment would be detrimental to public safety. First, such unilateral statewide action is a nonstarter in a state as diverse as California. A uniform statute passed in Sacramento would fail to account for the circumstances of both urban and rural firefighters, or both anti-gang and tax enforcement officers. And government agencies, both public safety and non-public safety, also vary dramatically depending on their functions, their locations, and their sizes. These practical difficulties would be exacerbated by state constitutional and statutory limits on setting local terms of employment for public employees. *See, e.g.*, *County of Riverside v. Superior Court*, 66 P.3d 718 (Cal. 2003).

Second, local public agencies trying to set terms unilaterally would face their own challenges. For reasons amici have already described, elected officials

likely lack the specialized knowledge to set appropriate terms on their own. *See supra* at 9-10. A well-intentioned official may spend money on superfluous benefits for firefighters while inadvertently ignoring basic necessities. To make informed decisions, cities would have to gather information themselves. At the same time, if public agency officials were to rely solely on input from department managers, and ignore ground-level employees, they would undermine California's commitment to cooperation between labor and management. *See* Cal. Gov't Code § 3512.

"Company" unions. Faced with the financial weakness of traditional unions, California could conceivably turn to collective bargaining agents funded by the State or municipalities, akin to private sector "company unions." This option would be beset by actual and perceived conflicts of interest.

With respect to the actual conflict of interest, Congress long ago banned company unions in the private sector, 29 U.S.C. § 158(a)(2), precisely because it recognized that company unions sacrificed workers' interests to serve their paymasters instead. *See* Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2),* Electromation, *and the Specter of the Company Union*, 68 N.Y.U. L. Rev. 1127, 1133-42 (1993). In fact, employers who make payments to unions are subject to criminal sanctions under 29 U.S.C. § 186 for this very reason. *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 394 (1982). The same risk would arise in the public sector if a bargaining representative were paid by the State instead of by the public safety workers on whose behalf it was formally negotiating.

But even if the government-funded bargaining representative were a faithful agent, it might lack legitimacy in the eyes of its ostensible constituents. If, for example, a government-funded bargaining agent were to agree to the kinds of givebacks amici described earlier, *see supra* at 22, employees might conclude that it had done so not because that was the best available resolution, but because it best served the negotiator's own interests. This same mistrust might deprive government-funded agents of the comparative advantage that current union leaders have with respect to information gathering. Employees could well choose not to share honest reactions with someone they believe is a proxy for their employer.

When these alternative arrangements fail in a state like California, the public will be less safe. As discussed above, much of what public safety unions bargain for is protective equipment and training. Here, the absence of well-funded professional union negotiators will translate into a less safe workplace. Over time, some public safety employees will resign because their work will have become unreasonably dangerous. These same issues will also adversely impact recruiting, particularly of the most qualified potential candidates, who will have more attractive and safer alternatives. Rising turnover and falling recruiting will directly impair agencies' ability to protect the public.

2. Moreover, any alternative to the existing robust public safety unions will itself create costs to public employers that will be passed on to employees and taxpayers. If public employers were to decide to unilaterally set the conditions of employment, they would need to set up and pay for their own information-gather-

ing processes. If they were to fund bargaining representatives directly, they would of course have to pay them. This money has to come from somewhere. Governments can only pay for these expenditures by raising taxes, by cutting government service to the public, or by expecting employees to do more with less.

Put another way, the costs of managing a large, diverse, and far-flung public workforce are always ultimately borne by employees and taxpayers. In light of this inevitable fact, California has good reason to conclude that strong unions with a fair-share option are the best means of pursuing its most important state interest: securing the safety of its citizenry.

D. This Court Has Consistently Upheld States' Efforts to Manage Their Workforces, Even in Cases Involving Employees' Speech Interests.

Petitioner claims that the First Amendment somehow prohibits the government from requiring that he participate in funding the collective bargaining process. But in light of states' interest in managing their workforces, petitioner's claim must fail.

As this Court has recognized, each state has a significant interest "in promoting the efficiency of the public services it performs through its employees," *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), and thus must be accorded "broader discretion to restrict speech when it acts in its role as employer," *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *see also Rankin v. McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting) ("[N]o law enforcement agency is required by the First Amendment to permit one of its employees to ride with the cops and cheer for the

robbers." (internal quotation marks omitted)). In a number of contexts, this Court has approved restrictions on the speech rights of government employees that it would not countenance if those restrictions had been imposed on members of the general public. *See, e.g.*, *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011) (police chief); *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion) (public hospital nurse); *Connick v. Myers*, 461 U.S. 138 (1983) (prosecutor).

Nowhere has this doctrine had greater effect than in the context of law enforcement officers. This "wide degree of deference to the employer's judgment" is especially warranted when "close working relationships are essential to fulfilling public responsibilities," *Connick*, 461 U.S. at 151-52, as they are with police and fire departments. In *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), for example, this Court upheld the San Diego Police Department's decision to discipline an officer for selling homemade videos that were produced and distributed while he was off duty. *Id.* at 78. Such a punishment would likely have been an unconstitutional prohibition of speech if it had been applied to an ordinary citizen. nonetheless, the Court upheld it because permitting the officer to express himself in this manner undermined the ability of the police department to perform its law enforcement functions. *Id.* at 84-85. The Federal Reporters are marbled with cases upholding similar restrictions. *See, e.g.*, *Foley v. Town of Randolph*, 598 F.3d 1 (1st Cir. 2010) (fire chief disciplined for criticizing funding levels for fire department at press conference); *Singer v. Ferro*, 711 F.3d 334 (2d Cir. 2013) (correctional officer disciplined for creating flyer implying certain prison officials were corrupt); *Nixon v. City of Houston*, 511 F.3d 494

(5th Cir. 2007) (officer fired for authoring racially charged newspaper columns); *Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008) (officer fired for maintaining sexually explicit website); *Oladeinde v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) (officers fired for refusing to report suspicious activity by fellow officers).

It would be perverse to say simultaneously that, under the First Amendment, a law enforcement agency's operational needs can justify prohibiting officers from engaging in core expressive activity, but cannot justify authorizing a fair-share fee critical to upholding those operational needs.

The First Amendment claim here is weaker than the one in *Roe*. Under *Abood*, petitioner or other public employees who object to the union's demands or positions retain their full First Amendment rights to speak publicly on those issues. Indeed, they can speak publicly about their objection to the fair-share system itself or even to the existence of public sector unions. Petitioner treats the fair-share fee as if it were an exaction that requires him to subsidize another private speaker's views—as if he were being forced to fund ACLU litigation or National Right to Life advertisements. In the context of states' labor relations systems, he is just wrong. The communications to which his fair-share fees go are an integral part of the State's chosen means—union-assisted labor management—of serving a public end: serving Illinois's citizens.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GREGG MCLEAN ADAM
COUNSEL OF RECORD
GARY M. MESSING
MESSING ADAM & JASMINE LLP
235 MONTGOMERY STREET
SUITE 828
SAN FRANCISCO, CA 94104
(415) 266-1800
GREGG@MAJLABOR.COM

PAMELA S. KARLAN
JEFFREY L. FISHER
DAVID T. GOLDBERG
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLINIC
559 NATHAN ABBOTT WAY
STANFORD, CA 94305

COUNSEL FOR AMICI CURIAE

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APPENDIX A
DESCRIPTION OF AMICI

Peace Officers Research Association of California ("PORAC")

The Peace Officers Research Association of California ("PORAC") is a professional federation of local, state, and federal law enforcement associations. It represents over 65,000 public safety members in over 900 associations, predominantly in the State of California. Most of PORAC's member associations are exclusive bargaining representatives. PORAC's Legal Defense Fund ("PORAC LDF") is a legal defense fund for peace officers (and some firefighters) with over 100,000 members in over 30 states and over 55,000 participants in California alone. PORAC-LDF provides representation in civil, criminal, and administrative matters arising out of the course and scope of the participant's employment.

National Association of Police Organizations ("NAPO")

The National Association of Police Organizations ("NAPO") is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers. Founded in 1978, NAPO represents more than 1,000 police unions and associations, 241,000 sworn law enforcement officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement. Substantially all of NAPO's member associations are state or local unions and duly authorized collective bargaining agents that

bargain on behalf of and represent publicly employed law enforcement officers.

Police Benevolent & Protective Association of Illinois ("PBPA")

The Police Benevolent & Protective Association of Illinois ("PBPA") is a police association consisting of 7500 full-time and retired sworn police officers in 189 local bargaining units. Substantially all of PBPA's member associations are local unions and duly authorized collective bargaining agents that bargain on behalf of and represent publicly employed law enforcement officers. The Association is a member of NAPO.

New York State Association of Police Benevolent Associations

The New York State Association of Police Benevolent Associations is a coalition of police unions representing approximately 45,000 police and law enforcement officers throughout New York City, New York State, the Port Authority Police, the Metropolitan Transportation Authority Police, Park Police, and the Waterfront Commission Police. The Association's function is to lobby at the state capital in Albany, NY and to protect the well-being and rights of law enforcement officers. All member organizations are state or local unions representing sworn police and law enforcement officers.

California Correctional Peace Officers' Association

The California Correctional Peace Officers' Association is the exclusive bargaining representative for approximately 35,000 correctional peace officers employ-

ed by the California Department of Corrections and Rehabilitation in their labor relations with the State and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

California Statewide Law Enforcement Association

The California Statewide Law Enforcement Association is the exclusive bargaining representative for approximately 7,000 state-employed peace officers (including Special Agents of the Department of Justice, Park Rangers, and Investigators of the Departments of Motor Vehicles and Alcohol and Beverage Control) and non-sworn law enforcement related classifications (including Criminalists, Non-Sworn Investigators, and Communications Operators). It represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

Detectives' Endowment Association of the New York City Police Department

The Detectives' Endowment Association of the New York City Police Department is a labor union representing 5,500 active NYPD detectives and 12,000 retired detectives. Established originally as a fraternal group in 1917 for detectives, the union became the exclusive bargaining agent for NYPD detectives in 1963, representing its members on all collective bargaining issues, health benefits, pensions, and other related benefits.

Los Angeles Police Protective League (LAPPL)

The Los Angeles Police Protective League (LAPPL) is the bargaining unit representing over 9,900 sworn members of the Los Angeles Police Department in Los Angeles, California. The LAPPL negotiates on behalf of its members and represents them in disputes concerning unfair labor practices, grievances, and discipline; and protects, promotes, and improves the working conditions, legal rights, compensation, and benefits of its Officers.

San Francisco Police Officers Association

The San Francisco Police Officers Association is the exclusive bargaining representative for approximately 2,200 San Francisco Police Officers (including all sworn officers in the department from Police Officers through the ranks of Deputy Chiefs and Commanders) in their labor relations with the City and County of San Francisco and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

San Jose Police Officers Association

The San Jose Police Officers Association is the exclusive bargaining representative for approximately 1,100 San Jose, California, Police Officers (including all sworn officers in the department from Police Officers through the ranks of Deputy Chiefs and Commanders) in their labor relations with the City of San Jose, and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

Fresno Deputy Sheriff's Association

The Fresno Deputy Sheriff's Association consists of approximately 500 deputy sheriffs and related law enforcement classifications including Dispatchers, Deputy Coroners, and Community Service Officers employed by the County of Fresno, California. The Fresno Deputy Sheriff's Association is the exclusive bargaining representative for those members on all matters relating to wages, hours, and other terms and conditions of their employment.

Deputy Sheriffs' Association of Santa Clara County

The Deputy Sheriffs' Association of Santa Clara County is the exclusive bargaining representative for approximately 425 Santa Clara County Deputy Sheriffs (including all sworn deputies, sergeants, and lieutenants) in their labor relations with the County of Santa Clara, California, and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

San Francisco Deputy Probation Officers Association

The San Francisco Deputy Probation Officers Association is the exclusive bargaining representative for approximately 220 Probation Officers in the San Francisco Adult and Juvenile Probation Departments in their labor relations with the City and County of San Francisco and represents their members on all matters relating to wages, hours, and other terms and conditions of their employment.

Roseville Firefighters, Local 1592

The Roseville Firefighters, Local 1592, is the exclusive bargaining representative for approximately 95 firefighters employed by the City of Roseville, California. It is an affiliated local of the International Association of Firefighters and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

Davis Professional Firefighters Association Local 3494

The Davis Professional Firefighters Association Local 3494 is the exclusive bargaining representative for approximately 60 firefighters employed by the City of Davis, California. It is an affiliated local of the International Association of Firefighters and represents its members on all matters relating to wages, hours, and other terms and conditions of their employment.

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