Constitutional and Labor Rights: Across the Border Hedge

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The Deregulatory First Amendment at Work

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INTRODUCTION

It has been more than seventy years since Justice Hugo Black wrote that First Amendment rights were "essential to the poorly financed causes of little people."[1] Since then, the well-financed causes of the powerful have discovered the First Amendment as well, deploying it to crowd out the little people in electoral politics and undo their legislative successes in the courts. The seeds for this project were planted in the 1970s—the decade in which Justice Lewis Powell joined the Court, and in which the Court decided both *Buckley v. Valeo*[2] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*[3]—and they are now in full bloom.

In this Article, I discuss a new generation of deregulatory First Amendment theories, and their potentially calamitous effects on workers if courts accept them. This is not to suggest deregulatory First Amendment cases are missing from other areas of life; to the contrary, consumer protection, public health, securities regulation, and election law are also targets.[4] But it is illuminating to examine challenges arising in the workplace context for two reasons: first, the great (or terrible) variety of forms that the challenges take; and second, the close analogy to the *Lochner*-era substantive due process cases that struck down workplace regulations in the name of freedom of contract. However, there is also at least one key difference between these emerging First Amendment theories and *Lochner*—only the former are

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[1] Martin v. Struthers, 319 U.S. 141, 146 (1943).

[2] 424 U.S. 1 (1976).

[3] 425 U.S. 748 (1976).

[4] *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1443 (2014) (striking down Federal Election Campaign Act's aggregate limit on individual contributions to federal candidates and party committees); Edwards v. Dist. of Columbia, 755 F.3d 996 (D.C. Cir. 2014) (holding that proffered interest in ensuring that consumers receive a quality experience was insufficient D.C. licensing requirement for tour guides); Wagner v. FEC, 793 F.3d 1, 26 (D.C. Cir. 2015) (rejecting First Amendment challenge to Federal Election Campaign Act ban on campaign contributions from government contractors); Am. Meat Inst. v. USDA, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (en banc) (upholding "country of origin" labeling requirement applicable to meat producers, and reversing prior D.C. Circuit opinions that struck down the SEC's conflict minerals disclosure rule, and the NLRB's notice-posting rule); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 & n.13 (2015) (accumulating cases).

linked to an enumerated part of the Constitution, which may be important in marshaling the support of some conservative judges and justices for the greater deregulatory project.

That project is broad in scope, and it is increasingly well received by conservative judges.[5] For instance, Judge Janice Rogers Brown of the District of Columbia Circuit recently authored a concurring opinion that argued in favor of resurrecting heightened scrutiny for economic rights in a case involving the USDA's regulation of milk prices.[6] In Judge Brown's view (as well as that of Judge David Sentelle, who joined the opinion, and possibly even Judge Thomas Griffith, who did not join but nonetheless wrote that he was "by no means unsympathetic"[7]), Article III courts should be able to step in when "the government has thwarted the free market" to protect a faction.[8] Putting a finer point on it, Judge Brown added that these market interventions "just *seem[ ]* like a crime."[9] Judge Brown's opinion did not come in a labor case, but her disdain for "collectivization" schemes would translate easily into the labor context—as evidenced by her earlier remarks arguing that New Deal precedent such as *NLRB v. Jones & Laughlin Steel Corporation*[10] represented "the triumph of our socialist revolution," and analogizing the liberal welfare state to "slavery."[11]

Yet, as Judge Brown acknowledged, these arguments are squarely closed off; with the exception of Justice Thomas, no modern Supreme Court justice has been willing to revisit them.[12] But, to proponents of the theories described in this Article, the First Amendment provides a possible workaround, if only courts can be convinced to apply it frequently and robustly to protect businesses' day-to-day activities involving speech. If these advocates

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[5] *See* Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 574–77 (2015).

[6] Hettinga v. United States, 677 F.3d 471, 475 (DC Cir. 2012) (Brown, J., concurring). The USDA's rule eliminated an exemption for certain vertically integrated milk producers, meaning that they would have to comply with the "pricing and pooling requirements of federal milk marketing orders." Judge Brown's opinion was remarkable, beginning with the observation that the Hettingas no doubt would have wished to make the long-foreclosed argument that "the operation and production of their enterprises had been impermissibly collectivized."

[7] *Id.* at 483.

[8] *Id.*

[9] *Id.* (emphasis in original).

[10] 301 U.S. 1 (1937); *see also id.* at 30 (upholding National Labor Relations Act as valid exercise of Congress's Commerce Clause authority).

[11] David D. Kirkpatrick, *New Judge Sees Slavery in Liberalism*, N.Y. TIMES (June 9, 2005), http://www.nytimes.com/2005/06/09/politics/09brown.html, archived at https://perma.cc/KRE7-GDP2.

[12] Justice Clarence Thomas's view of the Commerce Clause already has much in common with pre-New Deal Constitutional principles. *See* United States v. Lopez, 514 U.S. 549, 597–99 (Thomas, J., concurring) (characterizing the "substantial effects" test as "but an innovation of the 20th century"). And, while Justice Thomas rejects modern substantive due process, *e.g.*, Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., concurring), he has also called for reinvigoration of the Fourteenth Amendment's Privileges and Immunities Clause; in that regard, he has argued that the *Slaughterhouse Cases*, in which the Court rejected the argument that that clause secured economic rights, were wrongly decided. Saenz v. Roe, 526 U.S. 489, 522–23 (Thomas, J., dissenting).

succeed, important workplace protections will be lost for many; as one scholar put it, "[b]ecause nearly all human action operates through communication or expression, the First Amendment poses near total deregulatory potential."[13]

The purpose of this Article is primarily to identify emerging First Amendment theories aimed at deregulating the work place, many of which have escaped notice thus far.[14] In addition, it urges that, although many of these theories are a stretch for now, individual deregulatory First Amendment cases should not be viewed as outliers: the outward push is occurring simultaneously on multiple fronts, and its standard-bearers include some exceedingly well-respected and influential lawyers. In that regard, the Article also urges greater attention to the potential consequences of the deregulatory First Amendment in the information economy.

Part I of this Article discusses the recent history of the deregulatory First Amendment, beginning with the Supreme Court's adoption of First Amendment protections for commercial speech in 1976 before discussing key recent deregulatory cases. This Part is intended to provide a working overview of the deregulatory First Amendment, and to identify certain themes that are relevant to Part II of this Article. Then, Part II turns to the future: what might the deregulatory First Amendment look like if its proponents are victorious in the courts? Here, I identify three themes, which are mutually reinforcing and overlapping: First, that compelled speech and subsidization of speech, including commercial speech, should be more robustly protected than it currently is; second, that more business activities that implicate speech—even very indirectly—should be covered by the First Amendment; and third, that changing statutory baselines that alter incentives to speak can implicate the First Amendment.

I. Laying the Groundwork

A. The Emerging Deregulatory First Amendment at the Supreme Court

The deregulatory First Amendment began to emerge in the 1970s, with the Court holding that commercial speech was entitled to First Amendment protection,[15] that attempts to equalize election spending were constitutionally suspect,[16] and that a for-profit, non-expressive corporation had its own First Amendment rights.[17] Thus, in 1987, Cass Sunstein wrote that cases like

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[13] Amanda Shanor, *The New* Lochner, 2016 Wis. L. Rev. 133, 133 (2016).

[14] Thus, the Article does not undertake a detailed analysis or rebuttal of each argument; rather, it provides a foundation for others to engage in such work in the future.

[15] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[16] Buckley v. Valeo, 424 U.S. 1, 19 (1976).

[17] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). By "expressive corporation," I refer to a corporation formed for the purpose of conveying a substantive message. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238, 264 (1986) (holding that restriction on

Buckley—and not substantive due process-based privacy or reproductive autonomy cases—were the true descendants of *Lochner*.[18] In support of his thesis, Sunstein identified key similarities between *Lochner*, and *Buckley*, as well as cases arising in other areas of law: "The key concepts here are . . . government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law."[19] More recently, other scholars have also noted a deregulatory or Lochnerian turn in constitutional law, and especially in First Amendment law.[20]

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independent political spending could not be applied to corporation that "was formed for the express purpose of promoting political ideas").

[18] 198 U.S. 45, 57 (1905) (striking down state law maximum hours law on grounds that it impermissibly interfered with the individual "right of free contract"). Sunstein was not the first to identify the Lochnerian strains in the Court's commercial speech decisions. *See* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-31 (1979) (discussing *Virginia Board of Pharmacy*, and stating that "the Supreme Court has reconstituted the values of *Lochner v. New York* as components of freedom of speech"); *see also* Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 28 (1980) (noting that comparisons of the Court's commercial speech cases to *Lochner* are "hardly surprising").

[19] Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987). Sunstein explained further that, for the *Lochner* Court, as well as for the Court in more recent decisions:

> Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal constrict, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.

Id. at 874.

[20] *See, e.g.*, Shanor, *supra* note 13; Rebecca Tushnet, *Cool Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015) (describing First Amendment objections to country-of-origin labeling requirements as "perhaps the clearest example of the way in which the First Amendment has become the new *Lochner*"); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453 (2015); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1212 (2015) (discussing "striking parallels between the traditional understanding of Lochnerism and the First Amendment critique" of privacy regulations); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding 'We the People's' Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. (2016); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109–110 (1993) ("The generalization and universalization of freedom of speech, and the Court's concomitant devotion to its abstract doctrine of 'content neutrality,' however, have combined to produce a Lochnerization of the First Amendment."); Neil M. Richards, *Why Data Privacy Law is (Mostly) Constitutional)*, 56 WM. & MARY L. REV. 1501, 1530 (2015) ("[I]f the lessons of the twentieth century are that government regulation is sometimes necessary in an industrial economy, we should not forget those lessons in our information economy."); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207 (2015); Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 661 (1999) ("The courts have increasingly begun to use the First Amendment to restrict economic regulation and enforce a vision of the market freed not from politics 'gone bad,' but rather from all politics altogether."); Post & Shanor, *supra* note 4, at 179 ("If the regulation of every speech act is a constitutional question, we . . . must abandon the possibility of meaningful self-determination and turn back our democracy to the juristocracy that controlled society in the days of *Lochner*.").

The origin of this deregulatory turn in First Amendment law is sometimes attributed to Justice Powell,[21] both because he authored key opinions extending First Amendment rights for corporations, and because of his now-infamous "Powell memo." That memo, drafted in 1971 while Powell was in private practice, urged "a broad, multi-channel effort at mobilizing corporations and their resources to defend capitalism and the 'free enterprise system'" on college campuses, in the media, among politicians, and in the courts.[22] As to the last, Powell urged the Chamber of Commerce to model itself after the ACLU, labor unions, and civil rights groups by strategically initiating lawsuits and filing amicus briefs—a role that the Chamber took on with gusto and continues to pursue today.[23] But the Powell memo was light on specifics. The memo contained no blueprint for what a pro-business First Amendment might look like; that plan came from elsewhere, developed by lawyers and academics.[24]

During that same period, some conservative Supreme Court litigators displayed a certain ambivalence—or even skepticism—about expanding the First Amendment to advance commercial speech interests. For example, consider the case that first clearly announced First Amendment coverage for commercial speech: *Virginia State Board of Pharmacy*, in which the Court invalidated on First Amendment grounds a Virginia statute forbidding the advertisement of prescription drug prices.[25] The plaintiffs in *Virginia State Board of Pharmacy* were represented not by a conservative or pro-business group, but instead by Alan Morrison of the liberal Public Citizen Litigation Group, which he co-founded with Ralph Nader in 1972.[26] Moreover, this

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[21] *See, e.g.*, Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating* Lochner*'s Error in* Citizens United v. Fed. Election Comm'n, 15 COMM. L. & POL'Y 311, 314 (2010); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, & Implications*, 30 CONST. COMMENT. 223, 242 (2015); Shanor, *supra* note 13 at 155.

[22] Coates, *supra* note 21, at 242; John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 74–75 (2011–12) (emphasizing Justice Powell's role in deregulatory First Amendment cases); *see also* Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 2, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation, *archived at* https://perma.cc/75J6-LLCA.

[23] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 760–61 (2000).

[24] *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) *see also* TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 84 (reporting Center for Applied Jurisprudence panel on the First Amendment as "mostly on commercial speech; dominated, intellectually, by Mike McConnell and Lillian BeVier").

[25] *See* 425 U.S. at 761–62 (stating that "the speech whose content deprives it of protection cannot simply be speech on a commercial subject"). The Court had disposed of a handful of other cases involving commercial advertisements before *Virginia Bd. of Pharmacy*, but it was the first to plainly overrule *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court held that "the Constitution imposes no such restraint on government as respects purely commercial advertising," *id.* at 54. *See* Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L. REV. 2166, 2182 (2015).

[26] Tony Mauro, *Moving On: A Nader Protégé With Friends in High Places*, 27 LEGAL-TIMES 21 (May 24, 2004).

was not a case of strange bedfellows; amazingly, by today's standards, the case drew almost no amicus brief submissions at all, and none from either conservative or liberal movement groups.[27] (This lack of amicus interest partially reflects the fact that fewer amicus briefs were filed in prior decades than today; still, amicus briefs were becoming increasingly common by the time Public Citizen litigated *Virginia State Board of Pharmacy*.[28])

This relative disinterest might be shocking to a modern-day observer, but it was at the time consistent with much academic and judicial thought about commercial speech among both liberals and conservatives.[29] For example, in 1971, Robert Bork, who would become a District of Columbia Circuit Judge and Supreme Court nominee, wrote that "[c]onstitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[30] It is telling that Judge Bork felt no need even to list "advertising" as a form of speech outside First Amendment protection, as though that point was self-evident. Similarly, throughout his career, Chief Justice William Rehnquist authored dissents in key cases that advanced commercial speech rights, including in *Virginia State Board of Pharmacy* and *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[31] where he charged that by elevating the First Amendment status of commercial speech, the Court "returns to the bygone era of *Lochner v. New York*."[32] This is not to say this view was unanimous; liberal-leaning Martin Redish famously argued in 1971—the same year that Justice Powell wrote his memo—that commercial speech could be as equally valuable to listeners as other types of speech and therefore deserved similar First Amendment protection, and some movement conservatives made similar arguments.[33]

This skepticism was in part linked to doctrinal concerns. Much of the conservative legal movement of the 1970s and 1980s responded to perceived

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[27] *See* Docket, *Virginia State Bd. of Pharmacy*, No. 74-895 (U.S.) (reflecting amicus briefs filed by the American Association of Retired Persons & National Retired Teachers Association; Osco Drug, Inc. and the Association of National Advertisers, Inc.).

[28] Kearney & Merrill, *supra* note 23 at 751.

[29] *See* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 982 (2009) (discussing history of scholarship and judicial opinions regarding commercial speech); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 355 (1978) (criticizing *Virginia Pharmacy* as "not justified either by principle or by pragmatic or institutional concerns related to principle"); Jackson & Jeffries, *supra* note 18 at 5–6 (arguing that *Virginia Pharmacy* was "decided wrongly" because commercial speech does not advance First Amendment values).

[30] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

[31] 447 U.S. 557 (1980).

[32] *E.g.*, *id.* at 591; *see also* Earl M. Maltz, *The Strange Career of Commercial Speech*, 6 CHAP. L. REV. 161, 167 (2003) (discussing Chief Justice Rehnquist's views on commercial speech and noting that "[i]n 1976, then-Justice Rehnquist's views were seen as epitomizing conservative jurisprudence").

[33] *See generally* Redish, *supra* note 24; Shanor, *supra* note 13, at 140–42.

excesses of the Warren and Burger Courts by calling for more restraint in constitutional interpretation; arguments for First Amendment coverage for commercial speech would have sat in tension with this approach.[34] Additionally, Stephen Teles has posited that conservatives' initial lack of attention, and even hostility, to the deregulatory First Amendment was because "[t]he most mobilized interest of conservatives in the early 1970s was business, a problematic ally for the cause because of its unreliable opposition—and frequent support—for state activism."[35] In other words, business supporters of newly forming conservative legal activist groups had learned to work within existing regulatory frameworks (perhaps even concluding that they benefitted from those frameworks), and therefore felt little need to prioritize toppling those frameworks through litigation. Relatedly, many conservative attorneys and scholars simply had other First Amendment priorities. Thus, when President Ronald Reagan's Office of Legal Policy generated a pair of lengthy documents about the Department of Justice's positions on a variety of constitutional issues, they contained nothing about advancing business interests under the First Amendment. Instead, they focused more closely on "culture war" issues, such as religious freedom and the right of groups to exclude unwanted members.[36]

Moreover, some key early cases involving commercial First Amendment rights arose in the context of "culture war" issues, in which the socially conservative position was not aligned with the pro-speech position. *Virginia State Board of Pharmacy* is not such a case—but it followed on the heels of *Bigelow v. Virginia*,[37] in which the Court struck down on First Amendment grounds the conviction of a newspaper editor under a criminal ban on the advertisement of abortion services.[38] The two amicus briefs filed in *Bigelow* are telling. In one brief, Public Citizen previewed the argument that it would successfully make in *Virginia State Board of Pharmacy*: that the advertising restrictions at issue in the case harmed listeners' interests in obtaining information.[39] In the other brief, the group Virginia Right to Life argued that "commercial advertisement . . . has no protection under the First

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[34] *See, e.g.*, BeVier, *supra* note 29 at 304 (arguing that "the only legitimate sources of constitutional principle are the words of the Constitution itself, and the inferences that reasonably can be drawn from its text, from its history, and from the structure of government it prescribes").

[35] TELES, *supra* note 24, at 58.

[36] *See* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988), http://www.ialsnet.org/documents/Patersonmaterials2.pdf [hereinafter GUIDELINES], *archived at* https://perma.cc/Y98J-GQ4D; U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988), http://www.scribd.com/doc/7888685/The-Constitution-in-the-year-2000-choices-ahead-in-constitutional-interpretation, *archived at* https://perma.cc/P35D-HZ97.

[37] 421 U.S. 809 (1975).

[38] *See id.* at 825.

[39] Brief for Public Citizen and Center for Women Policy Studies as Amici Curiae Supporting Petitioner, *Bigelow*, 421 U.S. 809 (No. 73-1309), 1974 WL 186260.

Amendment."[40] Then, the following year, the Court rejected a First Amendment challenge brought by "operators of two adult motion picture theaters" to an "anti-skid row ordinance."[41] Again, amicus participation was scant, with just the American Civil Liberties Union and the Motion Picture Association of America weighing in on the theaters' side.[42] Arising in these contexts, First Amendment protections for commercial speech must have seemed like a mixed bag, at best, to many conservatives.

Still, *Virginia State Board of Pharmacy* represented a turning point, providing a toe-hold for deregulatory and pro-business First Amendment cases, which soon (and inevitably, given our common law system[43]) began to emerge.[44] By 1980, when Justice Powell announced the primary test applicable to the regulation of commercial speech in *Central Hudson*,[45] the players in the deregulatory First Amendment landscape had begun to line up in a way that would be more recognizable today. In that case, three conservative movement groups and the Chamber of Commerce filed amicus briefs in opposition to New York's ban on advertising by electric utilities;[46] environmental and consumer groups filed amici in support of the state.[47] Academics, too, developed creative new ways to push at the boundaries of the First

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[40] Brief for Va. Right to Life, Inc. as Amicus Curiae Supporting Respondent, *Bigelow*, 421 U.S. 809 (No. 73-1309), 1974 WL 186261 at *4.

[41] Young v. American Mini Theatres, Inc., 427 U.S. 50, 55 (1976).

[42] Docket, Young v. American Mini Theatres, Inc., 127 U.S. 50 (2007) (No. 75-312).

[43] Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM & MARY L. REV. 1613, 1625–26 (2015) (discussing why lawyering is "opportunistic," in the sense that when courts embrace novel First Amendment theories, litigants will tend to recast their claims in First Amendment terms).

[44] For example, several conservative groups and the Chamber of Commerce filed amicus briefs in support of the petitioners in *Bellotti*, in which the Court struck down a Massachusetts law prohibiting banks and corporations from making contributions or expenditures to influence certain voter referenda, *see* 435 U.S. at 768. *See, e.g.*, Motion of the Chamber of Commerce of the United States of America for Leave to File a Brief Amicus Curiae and Brief Amicus Curiae in Support of Appellants, *Bellotti*, Case No. 76-1172, June 2, 1977; Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae Northeastern Legal Fdn. And Mid-America Legal Fdn. In Support of Appellants, *Bellotti*, Case No. 76-1172, June 10, 1977.

[45] Justice Powell wrote:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[46] Brief for Mid-Atlantic Legal Foundation and Donald Powers as Amici Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1980 WL 339968; Brief for Washington Legal Foundation as Amicus Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 200000; Brief for New England Legal Foundation as Amicus Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 2000011979.

[47] Brief for the Natural Resources Defense Council, Friends of the Earth et al., as Amici Curiae Supporting Respondent *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 200002.

Amendment, while establishing closer ties to conservative legal groups—especially the Federalist Society—and allowing new theories to more easily be put into practice.[48] Ultimately, even Judge Bork took a more favorable view of First Amendment protection of commercial speech, concluding that "evidence makes clear that the 'the freedom of the press' protected by the Constitution extends to that which we now characterize as 'commercial speech.'"[49]

Whatever the reasons, advances under the First Amendment by business interests have been inexorable over the past two decades. As an empirical study by John Coates IV recently concluded, "[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals."[50] Further, these pro-business cases do not involve core expression, but rather entail "attacks on laws and regulations that inhibit 'speech' . . . in areas of activity incidental or instrumental to their core profit-making activity."[51]

While Justice Powell's early call to action and later First Amendment jurisprudence helped begin the process of deregulation by First Amendment, the Roberts Court has significantly furthered the project, as discussed below. This trend is consistent with the generally pro-business orientation of the Roberts Court, which was found to be "much friendlier to business than either the Burger or Rehnquist Courts" in a study by Lee Epstein, William M. Landes, and Judge Richard Posner.[52] Moreover, the study found that "five of the ten Justices who . . . have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices in our study."[53] Unsurprisingly, they are, in order, Justice Samuel Alito, Chief Justice John Roberts, Justice Clarence Thomas, Justice Anthony Kennedy, and the late Justice Antonin Scalia, with Justice Alito and Chief Justice Roberts in positions one and two, respectively of the thirty-six justices studied.[54] Justice Powell ranked number nine—ranking below four of the current Justices, and only one spot above Justice Scalia.[55]

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[48] *See* TELES, *supra* note 24, at 82–84 (noting that "by the mid-1980s the conservative movement had developed a cadres of activists and thinkers whose primary commitment was to a set of ideas rather than the defense of particular interests or constituencies," and describing a conference featuring panels "mostly on commercial speech[ ] dominated, intellectually, by [Michael] McConnell and Lillian BeVier").

[49] Robert Bork, *Activist FDA Threatens Constitutional Speech Rights*, AM. ENTERPRISE INST. (Jan. 19, 1996), http://www.aei.org/publication/activist-fda-threatens-constitutional-speech-rights/, *archived at* https://perma.cc/4VHT-SA6H (arguing that proposed FDA restrictions on cigarette advertising were unconstitutional); *see also* Jonathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. ECON. & POL'Y 615, 616 (2014).

[50] Coates, *supra* note 21, at 223.

[51] *Id.* at 249.

[52] Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013).

[53] *Id.*

[54] *Id.* at 1450 (table 7).

[55] *Id.*

B. Recent Cases: A Preview of Things to Come?

All this is to say that much has already changed in the last three decades of First Amendment jurisprudence. But, as the next section discusses, the new generation of legal challenges would expand First Amendment protections significantly beyond today's (already expanded) limits. These new challenges rely on several different strands of First Amendment law, but three cases, each authored by Justice Kennedy, deserve special mention: *United States v. United Foods, Inc.*,[56] *Citizens United v. FEC*,[57] and *Sorrell v. IMS Health Inc*.[58] Together, these cases: (1) expand the scope of activity to which the First Amendment applies, covering more economic activity that incidentally involves or affects speech; (2) embrace a more absolutist approach to the First Amendment than the balancing favored by many earlier Courts and Justices, including Justice Powell, by ratcheting up the level of First Amendment scrutiny for restrictions on commercial or economically motivated speech or compelled subsidization of speech; and (3) signal the Court's willingness to entertain new or aggressive forms of deregulatory First Amendment challenges, in turn prompting more litigants to advance novel free speech arguments. Given these cases' pivotal position in advancing the deregulatory First Amendment, it is worth briefly discussing their significance.[59]

First, in *United Foods*, the Court held that the Department of Agriculture could not require mushroom producers to contribute to a generic advertising fund when the contributions were not part of a comprehensive scheme of economic regulation. The Court decided the issue narrowly and avoided explicitly overruling any prior cases, including *Glickman v. Wileman Brothers & Elliott, Inc.*,[60] in which the Court upheld mandatory contributions to a slightly different generic advertising scheme.[61] Yet, the decision matters for two reasons relevant to this Article. First, the Court muddied the difference between compelled speech and compelled subsidization of speech, suggesting that the two were equivalent in at least some contexts.[62] (The Court later further elided that difference in *Knox v. Service Employees International Union, Local 1000*,[63] describing mandatory union fees as "a form of

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[56] 533 U.S. 405 (2001).

[57] 558 U.S. 310 (2010).

[58] 564 U.S. 552 (2011).

[59] I have previously discussed these cases in more detail. *See* Charlotte Garden, Citizens United *and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 585–86 (2014); Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 880–81 (2014).

[60] 521 U.S. 457 (2001).

[61] *See id.* at 474.

[62] *See* 533 U.S. at 410–11 (citing cases concerning compelled speech and compelled subsidization of speech); *cf. Glickman*, 521 U.S. at 470-71 ("The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths.").

[63] 132 S. Ct. (2012) 2277.

compelled speech and association" and citing *United Foods*.[64]) Then, once the Court had identified the challenged constitutional harm as tantamount to compelled speech, it decided heightened scrutiny should apply; in contrast, earlier decisions had suggested that, to the extent compelled subsidization of speech implicated the First Amendment at all, a more generous balancing test was appropriate.[65] Thus, *United Foods* is significant in large part because of its discussion of the level of scrutiny to be applied to claims involving mandatory subsidization of economic speech or association.

The second aspect of *United Foods* relevant to this Article is the Court's conclusion that, as a matter of "First Amendment values," the "general rule is that the speaker and the audience, not the government, assess the value of the information presented."[66] That is, courts cannot be entrusted to decide whether an objection to generic mushroom advertising contributes significantly to democratic deliberation and self-governance, the marketplace of ideas, or any other abstract First Amendment value;[67] instead, courts must leave it to speakers to decide what matters. Put another way, if a speaker concludes that a generic advertising assessment is worth making a federal case over, who is the court to say otherwise?[68]

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[64] *Id.* at 2289.

[65] *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977) (holding that "important government interests . . . presumptively support the impingement upon association freedom created by the agency shop"), *with Knox*, 132 S. Ct. at 2289 (stating that strict scrutiny applies to "mandatory associations" and citing *United Foods*); see also, *Glickman*, 521 U.S. at 469–70 (distinguishing agricultural advertising subsidies from previous compelled subsidization of speech cases including *Abood* because: "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views").

[66] 533 U.S. at 411 (quotation mark omitted) (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)). *Edenfield* itself is a significant case for the development of the deregulatory First Amendment; in that case, the Court, in an opinion authored by Justice Kennedy, struck down a Florida law banning certified public accountants from making direct personal solicitations to potential clients. *See* 507 U.S. at 763–64. Justice Kennedy wrote that the law "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard," *id.* at 767, though he also squarely applied traditional intermediate scrutiny in striking down the law, *see id.* at 767.

[67] *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 9–10 (2000) (arguing that First Amendment scrutiny "is brought to bear only when the regulation of communication affects a constitutional value specifically protected by the First Amendment"); Horwitz, *supra* note 20, at 113 ("Such a 'content neutral' approach [to the First Amendment] necessarily ignores what had originally been the central practical goal of modern First Amendment history: the use of free speech doctrine to 'level the playing field' in order to provide economically or socially weak political dissidents with a chance to engage in political debate.").

[68] *See* Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 Sup. Ct. Rev. 195, 216 (2005) (reasoning that the *United Foods* principle that "'First Amendment concerns apply' whenever the state requires persons to 'subsidize speech with which they disagree'" is "false" because "First Amendment concerns are not automatically aroused when persons are forced to speak in ways that they find objectionable"); Julie E. Cohen, *The Zombie First Amendment*, 56 Wm. & Mary L. Rev. 1119, 1122 (2015) (First Amendment decisions including *Sorrell* are "are infused with the neoliberal tropes of economic liberty and consumerist participation, and the label 'speech' has become a fig leaf

This approach is a significant turn from Justice Stevens' analysis in *Glickman*. For Justice Stevens, it was easy to conclude that a stone fruit subsidy did not "compel the producers to endorse or to finance any political or ideological views," or to refrain from expressing any views—even contrary ones—on their own dime.[69] With that conclusion, Justice Stevens took the compelled advertising scheme out of the realm of the First Amendment altogether, grouping it instead with other forms of ordinary market regulation that have been subject only to rational basis review since the Court's rejection of *Lochner* in 1937.[70] Thus, the mere fact that advertising involves speech was not enough to bring the First Amendment into play for the *Glickman* majority; instead, the Court looked to the general character of the regulation to assess whether it implicated genuine First Amendment concerns, or whether the case was instead an attempt at an end-run around the Court's rejection of heightened scrutiny for economic due process-type claims.

In declining to overrule *Glickman*, Justice Kennedy was left to backfill a basis to distinguish that decision. The one he chose was that the advertising order in *Glickman* was part of a more extensive scheme of economic regulation that prohibited certain market competition between producers.[71] Thus, after *United Foods*, governments may compel producers to subsidize private advertising only when it also restricts their market freedom in ways that do not involve speech.[72] Yet all market participants are restricted in innumerable ways that do and do not involve speech—for example, most market participants must comply with prohibitions on anticompetitive activity, with labor and employment law, and with deceptive advertising rules. Thus, Kennedy's *United Foods* rule must be more limited; presumably confined to those situations in which the same regulatory scheme both restricts market behavior and compels producers to subsidize advertising, with the restriction and the subsidy aimed at the same goal.[73] The upshot is that, under *United Foods*, more market regulation comes in for more rigorous

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strategically deployed to denote and legitimize proprietary claims over the patterns of information flow.").

[69] Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 469–70 (2001).

[70] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted . . . .").

[71] *See* 533 U.S. at 412 ("The California tree fruits were marketed 'pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity.' ").

[72] Alternatively, the government may assess fees if it then uses them to fund its own speech. *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 562 (2005) ("When . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.").

[73] 533 U.S. at 412 ("[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions.").

First Amendment scrutiny; in contrast, the *Glickman* rule left government a freer hand with respect to compelled subsidization of speech, provided that there was no recognizably ideological or political component involved. Or, as the *United Foods* dissenters put it, the majority's rule risks "creat[ing] through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect."[74]

Several years later, the Court in *Sorrell* compounded the effects of *United Foods* by holding that regulations targeting commercial dealings in information can be content- and speaker-based discrimination deserving of "heightened" First Amendment scrutiny.[75] Specifically, the Court struck down a Vermont law prohibiting pharmaceutical marketers from buying or using pharmacy records that revealed individual physicians' prescribing practices.[76] The statute did not prohibit pharmaceutical marketing—it simply made the marketing harder by depriving marketers of information that might allow them to better target their efforts at individual physicians. Thus, Vermont and some of its amici argued that the law did not regulate speech at all, but rather banned a species of commerce. That argument had been accepted by the First Circuit, which put it like this:

> [T]his is a situation in which information itself has become a commodity. The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech. We think that such an interpretation stretches the fabric of the First Amendment beyond any rational measure.[77]

The *Sorrell* majority, however, rejected that argument because "the creation and dissemination of information are speech within the meaning of the First Amendment."[78] Then, the Court focused on the fact that the law targeted a single type of market actor—pharmaceutical marketers—who wanted to use physician information to facilitate their speech.[79] Thus, the Court concluded not only that the law implicated the First Amendment, but also that it dis-

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[74] 533 U.S. at 425 (Breyer, J., dissenting).

[75] *See* 131 S. Ct. at 2659 (holding that a statute restricting on "sale, disclosure, and use of pharmacy records . . . must be subjected to heightened judicial scrutiny" because the statute targets "[s]peech in aid of pharmaceutical marketing").

[76] *Id.*

[77] IMS Health Inc. v. Ayotte, 550 F.3d 42, 53 (1st Cir. 2008), *abrogated sub nom Sorrell*, 131 S. Ct. at 2659.

[78] *Sorrell*, 131 S. Ct. at 2667.

[79] *See id.* at 2663 ("On its face, Vermont's law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.").

criminated based on viewpoint.[80] The result is at least a strong implication that laws targeting data-mining operations or otherwise protecting the privacy of certain information will now be subject to heightened First Amendment scrutiny.[81] As to what level of heightened scrutiny, the Court held that *at least* intermediate scrutiny would apply, but it intimated that something "stricter" might be called for when laws target commercial information purchasers or users only, leaving others (such as academics or non-profits) unregulated.[82]

Despite the Court's occasional protestations to the contrary, regulations that come in for heightened scrutiny are usually not long for this world,[83] and *Sorrell* was not an exceptional case. Much as he did in *Edenfield*, Justice Kennedy began by describing pharmaceutical marketing—the end result of the data trade in which the *Sorrell* respondents engaged—as "effective and informative."[84] Later in the decision, he wrote that "[i]f pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive."[85] For Justice Kennedy, then, physicians are presumptively *homo economicus*, immune to irrational responses to marketing efforts that could lead to worse outcomes for patients.[86] Thus, it would not be enough for Vermont to point to changes in physician behavior resulting from personalized marketing approaches; instead, the state would also have to demonstrate worse (or more expensive) patient outcomes as a result of pharmaceutical marketing. But the process of generating this data would be difficult and expensive. If generated, perhaps it would show that Vermont's premise was flawed all along. Perhaps not. The point, though, is that whereas Vermont's efforts to regulate the pharmaceutical industry would generally be subject to rational basis review, *Sorrell* stands for the proposition that some form of heightened scrutiny applies where the exchange of data is restricted; those restrictions will often wither under such scrutiny. The result will be not just

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[80] *See id.* ("'In its practical operation,' Vermont's law 'goes even beyond mere content discrimination, to actual viewpoint discrimination.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992))).

[81] *See* Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 867–68 (2012).

[82] *Sorrell*, 131 S. Ct. at 2667.

[83] *Cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) (concluding, based on empirical analysis of how often government prevails in cases in which strict scrutiny applies, that "strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right"); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 391 (2012) ("The U.S. Supreme Court has not upheld a commercial speech restriction since 1995.").

[84] 131 S. Ct. at 1663 (citing *Edenfield*'s description of in-person solicitation as having "considerable value").

[85] 131 S. Ct. at 2670.

[86] See also Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 927 (2007) (discussing the role of listeners in commercial speech law, and observing that "the Court is shifting attention away from the rights of an artificial, putatively profit-seeking entity, toward those of a much more sympathetic class—the audience").

less regulation of speech, but also less regulation of markets. To be sure, this result is, in a sense, a consequence of First Amendment protection for commercial speech generally,[87] but *Sorrell*'s broad language enables new arguments that (1) heightened scrutiny should apply to regulation targeting a particular set of commercial actors who are doing business via speech; and (2) regulation of the sale of raw data or data-mining services that might lead to commercial expression should be treated as equivalent to more direct regulation of speech.[88] Or, as Justice Breyer put it in his *Sorrell* dissent, "[b]y inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents."[89]

I have left for last *Citizens United*, which has the greatest symbolic importance of the cases discussed in this Part. *Citizens United* is sometimes wrongly characterized as having announced for the first time that "corporations are people" (which is in turn shorthand for the principle that corporations have First Amendment rights), or that "money is speech." Neither of those principles was original to *Citizens United*, though that case did apply them aggressively.[90] Obviously *Citizens United* matters a great deal to campaign finance law; among other things, the importance of its holding that only *quid pro quo* corruption can justify limits on political spending should not be understated.[91]

But beyond election law, *Citizens United* embraced the principle that speaker-based discrimination is offensive to the First Amendment: "Prohibited, too, are restrictions distinguishing among different speakers . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[92] That principle laid the groundwork for *Sorrell*,

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[87] *See* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech*, 47 U. RICH. L. REV. 1171, 1173–74 (2013) (discussing Supreme Court decisions that rejected "paternalistic" justifications for limiting advertising).

[88] *See* Pomeranz, *supra* note 83 at 422–23 & 424–25 (noting *Sorrell*'s concern with content-based regulation of speech, whereas "[c]ommercial speech is by its very definition content-based: speech that 'propose[s] a commercial transaction;'" and contrasting *Sorrell*'s treatment of speaker-based distinctions to that of other commercial speech cases); Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 20 (2016) (arguing that "that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content—commercial content). *Cf.* Richards, *supra* note 20 at 1501 ("Laws regulating the collection, use, and disclosure of personal data are (mostly) constitutional, and critics who suggest otherwise are wrong").

[89] 131 S. Ct. at 592 (Breyer, J., dissenting)

[90] *See* Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 955 (2011) (criticizing *Citizens United* because "the Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all" in support of that proposition).

[91] *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

[92] *Id.* at 898–99; *see also* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FL. ST. L. REV. 765, 766 (2015) (arguing that *Citizens United* "gave full-

where the Court was similarly distrustful of a speaker-based distinction. In addition, *Citizens United* served an important signaling function—namely, that five members of the Court were willing to reach major First Amendment holdings to strike down federal law, even when more narrow or incremental holdings were available.[93] Specifically, the Court rejected several narrow arguments that the Bipartisan Campaign Reform Act's ban on spending from corporate general treasuries on certain independent political advocacy did not apply (or could be construed not to apply) to Citizens United's proposed speech.[94] Instead, the Court concluded that an incremental approach would be time-consuming, leading to "an inevitable, pervasive, and serious risk of chilling protected speech" while the law was developing.[95] In contrast, the Court had previously proceeded in the more cautious manner that it eschewed in *Citizens United*.[96] In that sense, *Citizens United* made the First Amendment a more salient vehicle for challenging regulatory frameworks by suggesting that the Court viewed incremental or narrow holdings—usually a sign of desirable judicial restraint—as problematic when First Amendment rights are at stake. Thus, among *Citizens United*'s most important contributions to the greater deregulatory project may have been its signal that the Roberts Court is open for business, when business wants to advance new and aggressive First Amendment theories.[97]

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throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment, even when there is no content discrimination" and that "[t]his newly articulated doctrine has the potential to reshape free speech law far beyond the corporate and election contexts"); Charlotte Garden, *Citizens United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 10 (2012) (arguing that "*Citizens United* . . . rejected [the Court's] previous conclusion that a speaker's purpose or motivation, including profit motive, could be determinative of his or her First Amendment rights"); Piety, *supra* note 88, at 20 ("What . . . flowered in *Citizens United*, was this notion that regulation of a corporation is somehow discriminatory and that similarly, regulation of commercial speech on different terms than that of other protected speech is likewise discriminatory.").

[93] *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 183 (2009) ("In *Citizens United*, the Court failed to dispose of the case initially through a plausible reading of a statute, setting itself up to address a constitutional question head-on that was not properly presented to the Court.").

[94] 558 U.S. at 326–27.

[95] *Id.*

[96] *See, e.g.*, FEC v. Mass. Citizens for Life, 479 U.S. 238, 263–64 (1986) (holding that independent spending restriction could not be applied to non-profit entity because it was "formed for the express purpose of promoting political ideas," its fundraising "cannot be considered business activities," and it "was not established by a business corporation or labor union").

[97] Relatedly, Julie Cohen has observed that the *Citizens United* Court privileged the ownership of "the means of communication." As she put it, "[t]he invocation of media companies [by the *Citizens United* Court] as the paradigmatic example of corporate freedom of speech signals that the ultimate touchstone of expressive freedom is ownership of the means of communication. One who owns resources has the means to speak; one who owns the means of communication may speak most fully and completely." Cohen, *supra* note 68, at 1124.

The legal evolution described in Part I threatens something of a perfect storm for the deregulatory First Amendment in the workplace, given the combined effects of the Court's willingness to expand First Amendment coverage and the increase in "information work" in America. It is unsurprising, then, that employers and business advocacy groups like the International Franchise Association, the Chamber of Commerce, and the National Federation of Independent Business are aggressively pursuing novel First Amendment theories in the federal courts. Part II describes these theories.

II. Next Generation Themes of the Deregulatory First Amendment

As Professor Coates's research shows, there is a frequently invoked pro-business First Amendment "core," which encompasses application of ordinary commercial speech principles. This Part is not about those cases. Instead, it identifies a new wave of deregulatory and pro-business First Amendment arguments that push at the First Amendment's boundaries. This is not to predict that litigants will convince courts to adopt all of these theories—perhaps none of them will become law; perhaps some of them will, though their chances significantly decreased with Justice Scalia's death in February 2016. But it is nonetheless significant that these arguments are being made, particularly because they are often advanced by high-profile litigators who may hope to begin the process of moving arguments from "off the wall" to "on the wall." Further, it is an actuarial certainty that the composition of the Supreme Court will change significantly over the next ten years; future nominees, as well as the eventual confirmation of a Justice to fill Justice Scalia's seat, will determine whether or not these First Amendment theories gain traction.

The remainder of this Article discusses themes of the emerging deregulatory First Amendment. While the arguments overlap and reinforce each other, I have attempted to tease apart significant strands.

A. Compelled speech or subsidization of speech should routinely be subject to strict scrutiny, requiring detailed justifications for economic regulations that involve speech or spending.

First, a new generation of arguments seeks to expand the Court's precedents on compelled speech and subsidization of speech. Many of these cases involve the constitutionality of mandatory union fees or even union representation itself in the public sector, although novel uses of First Amendment compelled speech principles have also occurred outside of the union fees context. These arguments have had some success already, and until Justice Scalia's death, more successes were likely to come; now, the permissible scope of public sector labor relations likely rests with Justice Scalia's successor.

1. Public Sector Union Cases

In the previous Part, I argued that the Roberts Court's First Amendment decisions have put wind in the sails of advocates who would make novel and aggressive use of the First Amendment as a deregulatory tool. But there is a much more specific sense in which the Court has invited recent challenges to mandatory union fees in the public sector. It is not a stretch to say that Justice Alito is the primary architect of the legal theories advanced in these cases,[98] and that he has all but called for advocates to run with his ideas.

Justice Alito's invitation came wrapped in the Court's 2012 decision in *Knox v. SEIU Local 1000*. The pre-*Knox* baseline rules governing unions in the public sector—which, as discussed below, still apply—are roughly as follows. First, the National Labor Relations Act ("NLRA") does not apply to public sector employers,[99] leaving governments at the federal, state, and sometimes local levels to define the scope of their employees' collective bargaining rights.[100] The resulting legal regimes differ significantly; a small list of states have made public sector collective bargaining illegal, while others provide their public sector workers more robust bargaining rights than private sector employees enjoy under the NLRA.[101] However, most states allow at least some public sector workers to bargain collectively, as does the federal government.[102] Virtually all states that allow collective bargaining require elected unions to become the exclusive representative for an entire group of employees, with the union in turn required to fairly represent each worker in the bargaining unit.[103]

While governments have a range of options regarding the scope of public sector union representation, there are also some constitutional limits.[104] The First Amendment protects workers' rights to refrain from union membership, and to decline to contribute money to an elected union's activities

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[98] Justice Alito's role in inviting challenges to aspects of public sector collective bargaining was most evident in *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012), and is discussed below.

[99] 29 U.S.C. § 2(2) (definition of "employer" "shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof").

[100] Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 512–13 (2013).

[101] *Id.*; Ann C. Hodges, *Lessons From the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 735-36 (2009) (discussing "two of the jurisdictions at opposite ends of the legal spectrum, Illinois and Virginia").

[102] Slater, *supra* 100, 512–13 & 518–19.

[103] Only three states have ever experimented with a "members only" or "proportional representation" model, in which a union represents only the employees in the bargaining unit that choose to be so represented, allowing subsets of workers within a single bargaining unit to choose representation by different unions. MARTIN H. MALIN, ANN C. HODGES, & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES & MATERIALS, 340 (2d ed. 2011). The only state that currently allows proportional representation in Tennessee. TENN. CODE ANN. § 49-5-605 (2011) (permitting any representative chosen by fifteen percent of teachers to participate in "collaborative conferencing").

[104] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–34 (1977).

that are unrelated to its duties as the collective bargaining agent for a group of employees.[105] Thus, the law currently reflects a compromise—or, as Professor Cynthia Estlund puts it, a quid pro quo[106]—involving two parts. First, where required by a statute or a collective bargaining agreement, public sector workers can be required to pay an agency fee representing their pro-rata share of a union's costs associated with collective bargaining and contract administration. Second, they cannot be required to fund the union's other activities, including its political advocacy. Finally, where employees are required to pay an agency fee, the divide between chargeable and non-chargeable expenses is protected by a minimum set of procedures, known as *Hudson* procedures, which were first developed by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*.[107]

For decades, the "right to work" movement has fought agency fees in legislatures and the courts.[108] It received oblique encouragement in 2007, when Justice Scalia, upholding a state law requiring employees to affirmatively consent to contributing to union political activity, wrote that "it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."[109] But it was 2012's *Knox* that all but issued a request for claimants to bring cases seeking to undo *Abood*'s fundamental compromise. That invitation came in two forms. First, although the issue in *Knox* was whether a public sector union violated the First Amendment rights of represented workers when it levied a mid-year dues increase without providing a fresh *Hudson* notice, the majority characterized the *Abood* rule as "something of an anomaly."[110] Second, the Court granted more relief than the challengers sought: whereas the petitioners argued that they were entitled to a fresh *Hudson* notice and opportunity to opt out of non-mandatory fees when the union levied the dues increase,[111] the Court held that the First Amendment instead required that the union obtain affirmative consent before charging represented non-members for its expenses unrelated to collective bargaining.[112] Although the *Knox* Court for-

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[105] *Id.*; *see also* Cynthia Estlund, *Are Unions A Constitutional Anomaly?*, 114 MICH. L. REV. 169, 184–85 (2015).

[106] *Id.* at 169.

[107] 475 U.S. 292 (1986). These procedures require unions to issue an annual notice of the employees' right to opt out, a calculation of the agency fee based on the union's spending during the previous year, and the right to challenge that calculation before an impartial arbitrator. *Id.* at 305–06.

[108] Estlund, *supra* note 105, at 179–85; *see generally* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014).

[109] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 184 (2007).

[110] Knox v. SEIU Local 1000, 132 S. Ct. 2277, 2290 (2012).

[111] Br. for Petitioners, Knox v. Serv. Emps. Int'l Union, Local 1000, No. 10-1121, 2011 WL 4100440, at *i (stating that question presented is whether "a State, consistent with the First and Fourteenth Amendments, may condition employment on the payment of a special union assessment intended solely for political purposes—a statewide ballot initiative campaign—without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?").

[112] *Knox*, 132 S. Ct. at 2293.

mally limited its holding to mid-year dues increases, the implication was clear: this was an area of law in which challengers should think big.

I have argued elsewhere that the *Knox*'s conclusions were unsupported by existing caselaw or logic,[113] and I do not repeat those arguments here. Suffice it to say, the Court's invitation did not fall on deaf ears; many of the cases discussed in the remainder of this subsection were filed after, and apparently in response to, *Knox*. However, that was not strictly true of 2014's *Harris v. Quinn* decision, in which the Court held that Medicaid-funded home healthcare workers could not be required to pay an agency fee.[114] *Harris* was filed before *Knox*, although the Court took it up two Terms later.[115] Nonetheless, the *Harris* challengers significantly expanded the scope of their arguments between their *certiorari* petition and merits briefing, presumably in response to *Knox*'s encouragement.[116] Ultimately, the *Harris* Court ruled for the challengers on relatively narrow grounds, holding that the *Abood* compromise was not justified in the context of "partial" or "quasi" public employees, such as the state-funded, but privately supervised, home healthcare aides.[117] However, Justice Alito, again writing for the majority, devoted several pages to criticizing *Abood* even as applied to traditional public employees.[118] Given that this discussion was officially dicta, Supreme Court kremlinologists were left to speculate about its purpose: did it reflect that Justice Alito had tried and failed to win four additional votes to overrule *Abood* in *Harris*? Or was it that he was signaling that a future head-on challenge to *Abood* would meet a warm reception at the Court?[119]

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[113] *See generally* Garden, *Meta Rights*, *supra* note 59, at 895–98 & 899–906.

[114] 134 S. Ct. 2618, 2639–40.

[115] The timing of the grant of *certiorari* in *Harris v. Quinn* was, to use Justice Alito's word, anomalous. The Seventh Circuit ruled for the state and the union, and against the challengers, on Sept. 1, 2011, and the challengers filed their cert. petition on Nov. 29, 2011, several months after the Court granted cert. in *Knox*. *Compare* Docket, Knox v. SEIU Local 1000, No. 10-1121, *with* Docket, Harris v. Quinn, No. 11-681. That timing would have made it difficult (though not impossible) for the Court to have granted and heard *Harris* the same Term as *Knox*. However, not only did the Court not did not grant *Harris* for the same Term, it did not grant it for the following Term either; instead, it relisted the petition six times, ultimately granting it on Oct. 1, 2013 and hearing argument on Jan. 21, 2014.

[116] *Compare* Pet. for Writ of Cert., Harris v. Quinn, No. 11-681, at *11 (Nov. 29, 2011) (arguing that home health aides could not be compelled to financially support a labor union because they were not "actual government employees"), *with* Br. for Petitioners, Harris v. Quinn, No. 11-681 at *16 (arguing that "*Abood* should be overruled").

[117] Harris, 134 S. Ct. at 2638.

[118] *Id.* at 2630–34.

[119] See Laurence H. Tribe, *Supreme Court Breakfast Table*, SLATE (June 30, 2014) http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_harris_v_quinn_forgets_the_lesson_of_the_new_deal.html ("*Harris* could well portend a far broader decision in a future case"); Charlotte Garden, Harris v. Quinn *Symposium: Decision Will Affect Workers & Limit States' Ability to Effectively Manage Their Workforces*, SCOTUSBLOG (July 2, 2014), http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-decision-will-affect-workers-limit-states-ability-to-effectively-manage-their-workforces/, *archived at* https://perma.cc/Z7JY-KX8P ("I do not anticipate that it will be the precursor to overturning *Abood* in the next couple of years"); Terry Pell, *Harris v. Quinn*

In addition, Justice Alito offered a curious basis on which to distinguish *Harris* from other public employee speech cases, in which the Court had permitted government employers to limit the speech of their employees, even outside of work.[120] Specifically, he reasoned that whereas some other employee speech cases concerned an individual employee's grievance, *Harris* involved spending in support of union bargaining for raises for all home healthcare aids, which "would almost certainly mean increased expenditures in the Medicaid program."[121] Thus, he continued, only the latter was a matter of public concern.[122] This reasoning was remarkable for at least three reasons. First, it implies that collective speech is entitled to more First Amendment protection than individual speech, a principle that stands at odds with the Court's cases addressing labor union speech in other contexts.[123] Second, it seems to suggest that a single worker who asks for a raise for all workers would be entitled to more First Amendment protection than a single worker who asks for a raise only for herself—unless there is some additional limiting principle, such as that this rule applies only when the collective speech has some likelihood of success. Third, even assuming that speech that could result in greater public expenditures is more likely to be of public concern, *Harris* ultimately concerned individual workers' agency fees—any one of which, taken alone, is unlikely to have any effect on public expenditures.

Building on *Harris*'s dicta, a group of public employees—California teachers—soon called for the Court to overturn *Abood* and establish a constitutional "right to work" in the public sector by filing their complaint in *Friedrichs v. California Teachers Association*.[124] In addition, the *Friedrichs* plaintiffs built on *Knox* to argue that there should be a First Amendment right to an "opt in" default rather than an "opt out" default as to any nonmandatory portion of union dues.[125] If the Court had adopted the petitioners' arguments in their entirety, then it would have created a new First Amendment right not to contribute money to an elected public sector union repre-

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Symposium: A Preview of Things to Come (July 1, 2014), http://www.scotusblog.com/2014/07/214665/, *archived at* https://perma.cc/X2DZ-NNZU.

[120] *Harris*, 134 S. Ct. at 2642 (listing public employee speech cases in which the Court ruled for the government employer).

[121] *Id.*

[122] *Id.* at 2643.

[123] Many scholars have identified significant differences in the Court's treatment of speech by labor unions, as compared to other speakers, including other social movement groups. *See, e.g.*, James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a 'black hole' beneath the ladder.").

[124] 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, No. 14-915, 135 S. Ct. 2933 (U.S. 2015) (mem); Br. for the Petitioners, Friedrichs v. Cal. Teachers Ass'n, No. 14-915, at i, http://www.scotusblog.com/wp-content/uploads/2015/09/friedrichs-opening-brief.pdf, *archived at* https://perma.cc/RZB3-UAZ3.

[125] *Id.*

sentative, and required unions to obtain affirmative consent from represented non-members before charging them any money.

The Supreme Court heard argument in *Friedrichs* on January 11, 2016, and the five more conservative Justices' questions suggested a likely win for the challengers.[126] In particular, Justice Scalia—the most likely conservative swing vote based on his prior opinions as well as his skeptical questioning of the challengers in *Harris*,[127] seemed inclined to vote to overrule *Abood*.[128] However, a decision overturning *Abood* was not to be. After Justice Scalia's death in February 2016, the Court issued a single-sentence opinion stating that the Ninth Circuit's opinion (which had simply applied *Abood*) was "affirmed by an equally divided Court."[129] The unanimous consensus was that public sector unions had dodged a bullet, escaped a sword of Damocles, and escaped by the skin of their teeth.[130] Colorful metaphors aside, at the time this Article went to print, there was no end in sight to the Court's division over *Abood*, as Senate Republicans took the position that they would not act to confirm a new justice until after the 2016 presidential election.[131] For their part, the *Friedrichs* plaintiffs have sought to keep their case alive by filing a Petition for Rehearing,[132] presumably hoping the Court will hold the case until it is back to full strength.

In the meantime, other recent and pending cases ask the courts to go beyond overruling *Abood* and limit public sector union representation in even more fundamental ways. First, at least three cases litigated by the National Right to Work Legal Defense Foundation argue that exclusive representation—decoupled from the issue of who pays for that representation—is

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[126] Post-argument commentary generally shared this assessment. *E.g.*, Brian Mahoney & Josh Gerstein, *SCOTUS Signals Support for Anti-Union Plaintiffs*, POLITICO (Jan. 11, 2016), http://www.politico.com/story/2016/01/supreme-court-public-sector-unions-fees-217572, *archived at* https://perma.cc/A8PY-J26R; Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html.

[127] *See* Catherine Fisk, *Guest Post: Scalia May Be Critical Vote in Friedrichs v. California Teachers' Ass'n*, ONLABOR (June 30, 2015), https://onlabor.org/2015/06/30/guest-post-scalia-may-be-critical-vote-in-friedrichs-v-california-teachers-assn/, *archived at* https://perma.cc/9PYE-B7MA; Garden, Harris v. Quinn *Symposium*, *supra* note 119.

[128] For example, in the course of questioning the Solicitor General of California, Justice Scalia stated that "[t]he problem is that is everything is collectively bargained with the government is within the political sphere, almost by definition." Transcript of Oral Argument at 45, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016).

[129] 136 S. Ct. 1083 (2016).

[130] *See, e.g.*, Kevin Mahnken, *Public Sector Unions Dodge a Bullet in Friedrichs Case*, THOMAS B. FORDHAM INST. (Apr. 1, 2016), http://edexcellence.net/articles/public-sector-unions-dodge-a-bullet-in-friedrichs-case, *archived at* https://perma.cc/WUN8-259L; Richard Wolf, *Public Employee Unions Dodge a Supreme Court Bullet*, USA TODAY (Mar. 30, 2016), http://www.usatoday.com/story/news/politics/2016/03/29/supreme-court-public-employee-unions-mandatory-fees-scalia/81123772/, *archived at* https://perma.cc/R9UB-MK28.

[131] Ted Barrett & Manu Raju, *Senate Republicans Rule Out Garland Confirmation in Lame Duck Session*, CNN (May 10, 2016), http://www.cnn.com/2016/05/10/politics/merrick-garland-supreme-court-senate-republicans/, *archived at* https://perma.cc/W7JQ-V6ZM.

[132] Petition for Rehearing, Friedrichs v. California Teachers Association, No. 14-915 (Apr. 8, 2016).

illegal as to partial public employees.[133] That is to say, the Plaintiffs argue that, as to publicly funded but privately supervised workers, it is unconstitutional for a public employer to choose to bargain with an elected union official over state-determined pay and other working conditions. For example, in *Bierman v. Dayton*,[134] the plaintiffs' only claim is that certification of an exclusive representative for home healthcare workers is a First Amendment violation.[135] The plaintiffs' argument, in summary, is that exclusive representation is equivalent to forced association and petitioning and is therefore unconstitutional, at least with respect to partial public employees. As they put it in an appellate brief, "Minnesota is forcing individual providers to lobby the State over its Medicaid policies through an entity the State itself designated."[136]

To be clear, this argument has not prevailed to date,[137] nor is it likely to do so in the future. For one thing, several members of the Court seemed distinctly skeptical of this argument during oral argument in *Harris*.[138] In addition, the plaintiffs will have to distinguish or seek to have overruled the Court's decision in *Minnesota State Board for Community Colleges v. Knight*,[139] which upheld Minnesota's exclusive representation rule against argument by a group of employees that they should have the same rights as an elected union to meet and confer with their employer.[140] In their Eighth Circuit brief in *Bierman*, the plaintiffs argued that *Knight* was inapposite because, unlike in that case, the plaintiffs were not seeking bargaining rights of their own; they simply aimed to displace the union as their representative.[141] In other words, the plaintiffs' argument was that partial public employees have a constitutional right to have public employers set terms and conditions of employment unilaterally—an argument with undeniably Lochnerian overtones. Still, the gravamen of *Knight* was that government employers are free to consult whomever they choose (and to exclude others) in setting employ-

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[133] D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016) (holding exclusive representation of childcare providers does not violate the First Amendment); Bierman v. Dayton, 817 F.3d 1070 (8th Cir. 2016) (affirming denial of preliminary injunction); Complaint, Mentele v. Inslee, No. 15-cv-05134 (W.D. Wash. Mar. 4, 2015).

[134] No. 14-3021 (MJD/LIB), 2014 WL 4145410 (D. Minn. Aug. 20, 2014).

[135] *See* Amended Complaint, ECF No. 57, *Bierman*, 2014 WL 4145410.

[136] Appellants' Brief at 12, *Bierman*, No. 14-3468 (8th Cir. 2014). This brief was filed in connection with an interlocutory appeal of the District Court's decision to deny a preliminary injunction. *See Bierman*, 2014 WL 4145410.

[137] *D'Agostino*, 812 F.3d at 242–43 (distinguishing *Harris v. Quinn* to reject plaintiffs' arguments) Bierman v. Dayton, No. 14-3021 (MJD/LIB), 2014 WL 5438505 *1 (D. Minn., Oct. 22, 2014) (denying motion for preliminary injunction because "Plaintiffs are unlikely to succeed on the merits of their claim").

[138] Transcript of Oral Argument at 7–10, 19, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681).

[139] 465 U.S. 271 (1984).

[140] *See id.* at 280–87.

[141] *See* Appellants' Brief, *supra* note 136, at 30 ("*Knight* is not controlling here because the Providers do not allege that they are wrongfully excluded from union negotiation sessions.").

ment policies; it is not clear why it should matter that an employer decided with whom to consult based on a union election.

In other cases, advocacy groups seek to limit unions' member recruitment opportunities or strategies. For example, in *Bain v. California Teachers Association*,[142] the plaintiffs are targeting unions' abilities to offer membership incentives and limit the right to vote in union elections to members. The *Bain* challengers, represented by the high-profile appellate lawyer Ted Boutrous, argue that represented public sector employees "should not be forced to make the untenable choice of either (a) abandoning their First Amendment rights or (b) abandoning the employment-related benefits and voting rights that the State and the unions make available *only* to union members."[143] Instead, they argue that represented workers should be free to opt out of contributing to union political activity while still enjoying the benefits of union membership.[144] The district court rejected this argument—in my view, correctly—holding that the relationship between the union and its members did not implicate state action.[145] However, the District Court left open the possibility that the Plaintiffs could establish state action if they "establish[ed] a connection between the unions' relationship with a government actor and the specific decision to bundle membership requirements."[146] Accordingly, litigation may continue in this and other cases.

Alvarez v. Inslee involves a different issue, but also concerns opportunities for unions to convince represented workers to become union members. The plaintiff in *Alvarez* challenges provisions of the collective bargaining agreement between Washington state and the union that represents "quasi-public" home healthcare workers in bargaining with the state over terms and conditions of employment that the state sets.[147] Those provisions permit the union opportunities to make its case for membership during meetings and trainings that workers are required to attend, to post literature on bulletin boards likely to be seen by workers, and to display messages on the state payroll system.[148] The plaintiff's theory is that these opportunities for the union to convey its message constitute unconstitutional "compelled receipt of speech."[149] The plaintiff's further argue that strict scrutiny is appropriate because the provisions at issue are content based.[150]

Similar to the exclusive representation cases, the plaintiff acknowledges that the government may unilaterally subject workers to its own speech;[151] in

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[142] No. 15-cv-02465 (C.D. Cal. 2015).
[143] *Id.*, Second Amended Complaint *6, Dkt. 88 (Oct. 28, 2015).
[144] *Id.* at *38.
[145] Bain v. Cal. Teachers Ass'n, 156 F. Supp. 3d 1142, 1149–54 (C.D. Cal. 2015)
[146] *Id.* at *7.
[147] Complaint, Alvarez v. Inslee, Dkt. No. 3:16-cv-0511, at *5 (W.D. Wash., Feb. 11, 2016).
[148] *Id.* at *6-9.
[149] *Id.* at 1.
[150] *Id.* at 15.
[151] *Id.* at 16.

his view, the problem arises only when the entity engaged in speech is a private entity chosen by workers themselves. The novelty of the argument is illustrated by the Supreme Court case *Perry Education Association v. Perry Local Educators' Association*, in which an insurgent union challenged a collective bargaining agreement provision that allowed only the exclusive bargaining representative access to teacher mailboxes.[152] The claim was somewhat different in that case—the insurgent union wanted equal access to the mailboxes, rather than to preclude the exclusive representative's access.[153] Still, the Court did not seem to question that schools could allow "outside organizations" access to communicate with public employees in a manner similar to that challenged in *Alvarez*.[154]

Taken together, these cases illustrate the substantial resources devoted to challenging aspects of public sector union representation on First Amendment grounds. This focus should not be taken as a sign that public sector union representation is the primary context in which compelled speech or subsidization occurs—as Robert Post has shown, many instances of compelled speech and subsidization have escaped First Amendment challenge altogether.[155] So why the focus on public sector unions? To answer this question, one might look to unions' activity away from the bargaining table: as Daryl Levinson and Benjamin Sachs have written, "because unions are critical institutional supporters of the contemporary Democratic Party, undermining the efficacy of labor unions is a well-understood means by which incumbent Republican leaders can increase their reelection prospects."[156] Along those lines, Michael Carvin, who argued on behalf of the *Friedrichs* challengers before the Supreme Court, pointedly commented that the case "may impede [unions] ability to become the largest political contributors to the Democratic Party."[157] Similarly, the CEO of the Freedom Foundation, the group funding *Mentele v. Inslee*, reportedly "told supporters he wants to force unions to spend money playing defense," "because they bankroll liberal causes and Democratic candidates."[158] And, to the extent that decreased union participation in electoral politics means Democrats are less likely to be elected, *Friedrichs* and cases like it could have knock on effects beyond just

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[152] 460 U.S. 37 (1983).

[153] *Id.* at 44-45.

[154] *Id.* at 47.

[155] Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Ass'n*, 2005 SUP. CT. REV. 195, 211-12 (2005)

[156] Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 436 (2015); *see also* Linda Greenhouse, *Scalia's Putsch at the Supreme Court*, NY TIMES (Jan. 21, 2016), http://www.nytimes.com/2016/01/21/opinion/scalias-putsch-at-the-supreme-court.html ("It's no secret that in recent years, major segments of the Republican Party have declared open season on public employee unions.").

[157] Nina Totenberg, *Is it Fair to Have to Pay Fees to a Union You Don't Agree With*, NPR (Jan. 11, 2016), http://www.npr.org/2016/01/11/462607980/scotuspublicunions.

[158] Jordan Schrader, *Freedom Foundation has Unions in its Sights*, NEWS TRIBUNE (Oct. 4, 2015), http://www.thenewstribune.com/news/local/politics-government/article37688484.html, *archived at* https://perma.cc/9GUQ-EK87.

their precedential holdings: they could also make it more likely that judges who are more inclined towards the deregulatory First Amendment will be appointed to the federal bench.

2. *Workplace Compelled Speech Theories Outside the Agency Fee Context*

Novel compelled speech arguments are not limited to the agency fee context. For example, in *National Association of Manufacturers v. NLRB* ("*NAM*"),[159] the D.C. Circuit struck down on compelled speech grounds a National Labor Relations Board rule requiring employers to post a notice informing employees of their rights under the NLRA, and imposing penalties for failing to post the notice.[160] Even though that case was later overturned in part by the D.C. Circuit sitting *en banc*, the panel's decision has had continuing effects in terms of the notice posting requirement itself, as well as uncertainty regarding the NLRB's ability to compel employers to notify employees of their rights.

The panel decision in *NAM* rested on NLRA § 8(c), which protects employers' rights to express "any views, argument, or opinion,"[161] but the Court also drew heavily on First Amendment caselaw.[162] That discussion began with a citation to *Sorrell* for the proposition that "the 'dissemination' of messages others have created is entitled to the same level of protection as the 'creation' of messages."[163] Then, the Court discussed cases concerning the right against compelled speech and subsidization of speech, before rejecting the Board's arguments that the notice posting requirement was valid because the message was non-ideological, because the poster was drafted by the Board and identifiable as the Board's (and not the employer's) speech, and because the Court had upheld a similar notice-posting requirement in 2003.[164]

This decision was surprising on several grounds, chief among them that mandatory "know your rights" posters are ubiquitous in American workplaces, with little suggestion that they violate the First Amendment. Moreover, the D.C. Circuit's opinion seemed to push at the boundaries of even *United Foods*, as the notice-posting requirement was a part of the broader regulatory scheme imposed by the NLRA. Alternatively, as Charles Morris

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[159] 717 F.3d 947 (D.C. Cir. 2013).

[160] *Id.* at 960.

[161] 29 U.S.C. § 158(c).

[162] 717 F.3d at 956 ("We approach the question by considering some firmly established principles of First Amendment free-speech law.").

[163] *Id.*

[164] *Id.* at 957–58; *see also* UAW-Labor & Emp. Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003). The plaintiffs in this case did not argue that the notice posting requirement violated the First Amendment. *Id.* at 364 (noting "plaintiff raises no free-standing First Amendment claim"); *see also* Kendrick, *supra* note 20, at 1203 (discussing tension between this case and *NAM*).

has argued,[165] one could also view the decision as standing in tension with cases involving content-neutral government regulations, including *Turner Broadcasting System, Inc. v. FCC*,[166] in which the Court rejected a First Amendment challenge to the federal requirement that cable television systems carry local programming. Significantly, *Turner* did not analyze the "must-carry" provision as a case of compelled speech at all—instead, it applied the *O'Brien* test associated with content neutral laws that have the effect of hampering expressive conduct.

Importantly, *NAM* also read narrowly *Zauderer v. Office of Disciplinary Counsel*,[167] in which the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers," at least where the disclosure involves truthful and non-controversial information.[168] The *NAM* Court concluded that *Zauderer* applied only to mandatory disclosures necessary to fight deception.[169] However, the *en banc* D.C. Circuit, rejected this reading in partially overruling *NAM* in *American Meat Institute v. US Department of Agriculture* (*AMI*).[170]

Still, the *NAM* decision has had lasting effects. First, *AMI* came too late for the NLRB notice posting requirement, which the Board withdrew in light of *NAM* and a Fourth Circuit case rejecting the rule on different grounds; perhaps the Board will attempt to revive the notice posting rule in the future, but there is currently no sign of such an effort.[171] Second, *AMI* held that *NAM* construed *Zauderer* too narrowly, but did not actually address its application to the NLRB notice. As a result, employers can (and do) rely on *NAM* in other cases. For example, when the NLRB exercised its separate authority to conduct elections to require employers to post notices of employee rights—without the possibility of unfair labor practice liability—employer groups relied on *NAM* to argue that the requirement violated NLRA § 8(c).[172] (The ensuing litigation, and the rulemaking it sought to invalidate,

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[165] Charles J. Morris, *Notice-Posting of Employee Rights: NLRB Rulemaking and the Upcoming Backfire*, RUTGERS L. REV. 1397–99 (2015) (arguing that *Turner* "is directly on point").

[166] 520 U.S. 180 (1997).

[167] 471 U.S. 626 (1985); *see also* Shanor, *supra* note 13, at 147 (discussing tension between *Zauderer* and D.C. Circuit cases striking down compelled disclosures).

[168] 471 U.S. at 651.

[169] 717 F.3d at 959 n.18.

[170] Am. Meat Inst. v. USDA, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (en banc) (stating that "[t]o the extent that other cases in this circuit may be read as . . . . limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them," and citing *NAM*).

[171] *See* Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013).

[172] Chamber of Commerce v. NLRB, 118 F. Supp. 3d 171, 190 (D.D.C. 2015) (rejecting argument that *NAM* controlled Board's authority to require employers to post notice of employee rights once a petition for a union election has been filed "because the D.C. Circuit specifically distinguished the general employee rights notice involved in that case, which carried with it the unfair labor practice penalty, from the then-existing NLRB election notice posting requirement").

are discussed in greater detail in Part II.C, below.) In other words, *AMI* did not foreclose arguments that *NAM*'s conclusion should be affirmed on other grounds. These could include arguments that NLRA § 8(c) is broader than *Zauderer*, or that *Zauderer* was inapplicable because an employer found the Board's notice to be controversial.[173] Third, the Court's compelled speech analysis is a blueprint for making compelled speech arguments in other cases involving regulation of businesses, such as the one discussed in the next paragraph.

Shortly after *NAM*, compelled speech and subsidization arguments made another appearance in former-NLRB Member Johnson's dissent in *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*,[174] in which the NLRB held that NLRA § 7[175] protects employees' rights to use their work e-mail addresses for union activity.[176] His argument was twofold. First, he argued that employers would effectively be required to pay for employees "hostile speech," either because it would be contained in e-mails composed on work time, or because of costs associated with network maintenance and storage.[177] Second, he argued that the use of a work e-mail address lent "indicia of authority and thus the real potential of confusion."[178]

Former Member Johnson's second argument reflects an empirical judgment about how recipients are likely to interpret e-mail that comes from an address linked to an employer; the NLRB majority had a different assessment, and therefore rejected the argument.[179] But Member Johnson's first argument relies heavily on a string of First Amendment caselaw beginning with *Harris* and *Knox*, as well *NAM*.[180] Thus, following the *Knox* Court in equating compelled speech with compelled subsidization of speech, he concluded that "we are really telling employers they must subsidize the speech of their employees, and, thus 'have employers say whatever the employees want them to.'"[181] While this argument came in a dissent, it is a near certainty that employers appealing unfair labor practice charges based on the *Purple Communications* rule will continue to advance it.

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[173] In this regard, *United Foods*' broad and speaker-defined approach to identifying controversial speech lends support to the argument that, for example, a speaker could find it controversial to inform employees of statutory rights to participate in collective action.

[174] 361 NLRB 126 (2014).

[175] 29 U.S.C. § 157 (2012).

[176] *See Purple Communication*, 361 NLRB No. 126 at *1, slip op. at 1.

[177] *Id.* slip op. at 56 (Member Johnson, dissenting).

[178] *Id.* slip op. at 58 (Member Johnson, dissenting).

[179] *Id.* slip op. at 16 ("We are simply unpersuaded that an email message, sent using the employer's email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer.").

[180] *Id.* slip op. at 57.

[181] *Id.*

In short, the boundaries of compelled commercial speech, spending, and association are acutely contested.[182] Like many of the arguments discussed in this Part, the outcome of these cases will matter significantly for workers' free speech and association; in a real sense, expanding employers' or union objectors' rights to avoid compelled First Amendment activity would come at the expense of the rights of groups of workers to engage in their own collective speech and association.

B. The First Amendment Should Cover, and Should Protect Robustly, More Business Activities That Involve Speech.

Another group of recent deregulatory First Amendment theories seek to expand the field that the First Amendment covers—that is, to bring activity formerly thought to be beyond the reach of First Amendment scrutiny within its ambit.[183] Others have made this observation as well, noting that the Court's recent decisions in cases including *United States v. Stevens*[184] and *Brown v. Entertainment Merchants Association*[185] "might be understood to create a strong presumption" that activities involving speech or expression are covered by the First Amendment.[186] These cases sometimes arise in the workplace setting when enterprises that do their work through the "sweat of their jaws" seek to overturn limits on what they may say. But, as discussed below, some cases go further, challenging on First Amendment grounds even restrictions on their spending on activities other than speech.

One set of cases argues for heightened scrutiny of occupational speech, an issue on which the circuit courts have splintered. Until recently, courts have generally held that "when [occupational] speech consists of advice or recommendations made in the course of business and is in any way tailored to the circumstances or needs of the listener, licensing that speech raises no cognizable First Amendment claim."[187] But several more recent cases have sought to undo that principle. Many of these new cases arise in politically

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[182] For an argument that *Zauderer* should be read narrowly, see Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 434–37 (2016).

[183] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminiary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–69 (2004) (describing concept of First Amendment coverage, and stating that "even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule").

[184] 599 U.S. 460 (2010).

[185] 564 U.S. 786 (2011).

[186] Schauer, *Politics and Incentives*, *supra* note 43, at 1624; Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 433–34 (2012–13) (discussing "absolutist" thread in *Stevens* and *Brown*); *see also* Lakier, *supra* note 25, at 2170 (critiquing *Stevens* as an "unjustified and undesirable" departure from "longstanding historical practice").

[187] Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 187–88 (2015).

charged contexts; these include challenges to a ban on physicians asking their patients about guns in the home,[188] therapists engaging in so-called "gay conversion" therapy,[189] and a proscription against recommending medical marijuana.[190] As was true of *Bigelow*, one can see these cases through the lens of viewpoint discrimination relatively easily. But just as *Bigelow*'s argument against a politically charged ban on advertising abortion services soon translated to the more general *Virginia State Board of Pharmacy*, the argument that the First Amendment should robustly protect occupational speech will extend to decidedly more pedestrian contexts—for example, *Hines v. Alldredge*, in which a retired veterinarian challenged a statute forbidding the dispensation of veterinary advice without an in-person physical exam.[191]

The argument that the First Amendment prohibits occupational speech restrictions may be appealing in some of these contexts and repulsive in others, depending on one's take on the culture war issues implicated by various challenged statutes. For example, many readers will have a strong reaction to *Wollschlaeger*, in which court began by describing Florida's restrictions on physicians asking patients about guns in the home as codifying "the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient's care."[192] But stripping away the subject matter of the cases reveals uncertainty and disagreement among and within the courts of appeals regarding what level of First Amendment scrutiny applies to occupational speech restrictions. For example, the Ninth Circuit has stated both that "professional speech may be entitled to 'the strongest protection our Constitution has to offer'"[193] in the context of doctor recommendations, but also that once those recommendations become "the actual provision of treatment," they lose First Amendment protection altogether.[194] The Third Circuit took a middle ground, analogizing to commercial speech, and applying intermediate scru-

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[188] *See* Wollschlaeger v. Florida, 814 F.3d 1159 (11th Cir. 2015) *reh'g en banc granted, vacated*, 2016 WL 2959373 (11th Cir. Feb. 3, 2016) (rejecting facial First Amendment challenge to statute that restricted physicians from asking patients about firearm ownership, or recording such information, in most circumstances, because statute could survive any level of scrutiny).

[189] *See* King v. New Jersey, 767 F.3d 216, 220, 233 (3d Cir. 2014) (upholding statutory prohibition against practicing "gay conversion" therapy, and holding that "prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest"); Pickup v. Brown, 740 F.3d 1208, 1231–32 (9th Cir. 2014) (upholding state ban on "gay conversion" therapy and concluding that treatment was conduct rather than speech, and therefore subject to rational basis review).

[190] *See* Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002) (striking down federal prohibition against doctors recommending medical marijuana after concluding that the ban was viewpoint discriminatory).

[191] *See* Hines v. Alldredge, 783 F.3d 197, 198–99 (5th Cir. 2015).

[192] *Wollschlaeger*, 814 F. 3d at 1168.

[193] *Conant*, 309 F.3d at 637.

[194] *Pickup*, 740 F.3d at 1229.

tiny.[195] And the Eleventh Circuit concluded that credible arguments supported the application of either intermediate or strict scrutiny, depending on whether the operative inquiry was whether the statute regulated professional speech, or whether it was a content-based speech restriction.[196]

The outcome of this debate could have significant ramifications for the mine run of ordinary occupational regulations. To see why, consider *Hines*. The challenged statute was probably adopted with the goal of promoting best veterinary practices, which a legislature could reasonably decide should involve seeing the patient. But Ronald Hines, the retired veterinarian who challenged the statute, acted responsibly by all accounts—mostly, he provided advice, often free of charge, to those who could not afford other veterinary care or who received conflicting advice from other vets. The Fifth Circuit concluded the First Amendment did not apply to regulation of the "practice of veterinary medicine" even when the regulation had an incidental burden on speech.[197] But, had the Fifth Circuit gone the other way on that initial question (as some other circuits have in more charged cases), the application of First Amendment heightened scrutiny in the context of an as-applied challenge would at minimum present a significant question. And, although the answer to that question may not matter greatly in the context of a single well-intentioned veterinarian, the cumulative effect of legal challenges to the application of occupational regulation affecting speech could quickly become crippling, leading states to abandon their attempts to meaningfully enforce these regulations. Dissenting from denial of rehearing en banc in *Pickup*, Judge O'Scannlain acknowledged as much, while arguing against the panel's conclusion that the First Amendment did not apply to treatment:

> Perhaps what really shapes the panel's reasoning in these cases is not the principles supposedly distilled from the case law, but rather problematic and potentially unavoidable implications of an alternative conclusion. By subjecting SB 1172 to any First Amendment scrutiny at all, the panel may fear it will open Pandora's box: heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice will now attract meritless challenges merely on the basis that such provisions prohibit speech.[198]

It is probably unsurprising that advocates of the deregulatory First Amendment have begun to challenge restrictions on professional communications—after all, those restrictions do directly limit activity that recognizably qualifies as speech, even if there might be good reasons to treat it as

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[195] King v. New Jersey, 767 F.3d 216, 233 (3d Cir. 2014).
[196] *Wollschlaeger*, 814 F.3d at 1185–86.
[197] *Hines*, 783 F.3d at 201.
[198] 740 F.3d at 1220.

something else. But in another case, high-profile litigator Paul Clement has recently argued that depleting the money available for speech can implicate the First Amendment.[199] This First Amendment theory is probably the greatest "reach" of those discussed in this Article; conversely, it has the greatest potential for damage to the regulatory state. If accepted, it would have the potential to do what many conservatives and libertarians had previously (but futilely) hoped the doctrine of regulatory takings would accomplish,[200] and what Lochnerism did before that.

Though unsuccessful before a district court and the Ninth Circuit at the preliminary injunction phase,[201] this argument was advanced in a lawsuit by the International Franchise Association ("IFA") challenging the treatment of franchises under Seattle's $15 hourly minimum wage law.[202] The law groups franchises as large businesses, which are required to phase in the minimum wage more quickly than small businesses, provided the entire franchise network, taken together, meets the threshold number of employees.[203] As the IFA asserted in its complaint:

> Commercial speech "is a form of expression protected by the Free Speech Clause of the First Amendment," and the Ordinance will curtail franchisee commercial speech in at least three important respects. First, by increasing the labor costs of franchisees, the Ordinance will reduce the ability of franchisees to dedicate funding to the promotion of their businesses and brands. Second, the increased labor costs the Ordinance mandates may cause some franchisees to shut their doors, reducing the amount of relevant commercial speech they engage in to zero. Third, and relatedly, the Ordinance will likely cause potential franchisees to forgo purchasing a franchise because of the associated higher operation costs, again eliminating all associated speech.[204]

This argument, if taken seriously, could be cause for alarm, depending on one's risk tolerance or willingness to embrace *Lochner*-style arguments. Because *any* money could eventually be spent on speech, nearly any regulation that requires an individual or entity to spend risks interfering with speech, and, under this reasoning, must be justified under heightened scrutiny. Read more charitably, the IFA's argument seems to be that Seattle's decision to classify franchises as large businesses will *differentially* decrease franchises' ability to engage in speech. But business regulations almost always draw

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[199] *Infra* Part II.C.

[200] Colby & Smith, *supra* note 5, at 570–01.

[201] Int'l Franchise Ass'n v. Seattle, 803 F.3d 389, 408-09 (9th Cir. 2015).

[202] *Id.* at 397.

[203] Seattle Ordinance No. 124490 §§ 2(T) & 4 (2014); Seattle Mun. Code §§ 14.19.010(T) & 14.19.030

[204] Complaint at 32, Int'l Franchise Ass'n v. City of Seattle, No. 2:14-cv-00848 (W.D. Wash. June 11, 2014) (internal citation omitted).

coverage distinctions. By focusing on speech, the IFA is attempting to get what it elsewhere acknowledged was unobtainable under the Equal Protection Clause—heightened scrutiny.[205]

Additionally, in its briefing in support of a preliminary injunction, the IFA made an alternative First Amendment argument based on free association rather than on free speech. The argument asserts that the Seattle ordinance violates the rights of free speech and association by defining franchise employers as "a business that operates 'under a marketing plan prescribed or suggested in substantial part by a grantor or affiliate' and is 'substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol.'"[206] As the IFA's argument goes, "[m]arketing, trademarks, and advertising all involve protected speech, and a franchisee's decision to associate itself with a franchisor's trademark or engage in coordinated marketing and advertising is protected by the First Amendment."[207] Similar to the IFA's primary argument, this argument was fundamentally similar to an Equal Protection claim, and if brought under the Equal Protection Clause would have been subject to rational basis review. Yet the IFA called for heightened scrutiny because a franchise has a contractual relationship with a franchisor.

The argument stretches the right of association a long way from its origins in *NAACP v. Alabama ex rel. Patterson*,[208] or even its more recent incarnation in *Roberts v. U.S. Jaycees*[209] and related cases. Moreover, Justice Sandra Day O'Connor disavowed all but minimal protections for the commercial right of association in her concurrence in *Roberts*.[210] There is neither a privacy component to the IFA's argument, nor a claim that Seattle is attempting to dictate who should be employed by franchises (though Seattle could certainly do that under the framework established by *Roberts* and *Boy*

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[205] Though not arising in the work law context, Verizon made a similar argument against the FCC's net neutrality rule, though the D.C. Circuit ultimately did not reach the argument. *See* Verizon v. FCC, 740 F.3d 623, 634 (2014); *see also* Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 FL. L. REV. 111, 143–44 (2013) (discussing a First Amendment theory of equal protection, but limiting her theory to instances where the differential treatment is imposed to engage in viewpoint discrimination).

[206] Seattle Mun. Code § 14.19.010(T).

[207] Plaintiffs' Motion for a Limited Preliminary Injunction at 21, Int'l Franchise Ass'n v. City of Seattle, No. 2:14-cv-848 (W.D. Wash. Aug. 5, 2014).

[208] 357 U.S. 449 (1958).

[209] 468 U.S. 609 (1984).

[210] *See id.* at 634 ("[T]here is only minimal constitutional protection of the freedom of commercial association. . . . The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."); *see also* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 464 (2015) ("Although the Supreme Court has never explicitly endorsed the distinction between expressive associations and commercial associations, that basic dichotomy is commonly accepted in the law.").

Scouts of America v. Dale[211]). Rather, the argument is an attempt to adapt the approach of cases such as *Citizens United* and *United Foods* in two ways: first, the argument assumes that if there is a First Amendment right enjoyed by individuals and certain associations, surely it must be enjoyed equally by corporations; second, it posits that courts should generally not be in the business of distinguishing between First Amendment activity for economic purposes, versus for other purposes. So given that First Amendment protection for individuals to associate for expressive purposes is established, it is unsurprising that the argument that corporations should be able to associate freely for economic purposes was not far behind.

C. Changing statutory baselines can disrupt First Amendment entitlements.

A key element of Sunstein's theory of post-1970's First Amendment Lochnerism was the treatment of "the existing distribution of wealth and entitlements, and the baseline set by the common law," as a constitutional imperative.[212] But some new First Amendment arguments go a step further, arguing that statutory baselines can also create First Amendment entitlements. The argument is that moving a statutory baseline in a way that makes private speech more difficult or less desirable should be scrutinized under the First Amendment, particularly if the baseline was moved with an intent to make speaking less appealing. Or, as the Chamber of Commerce put it in a challenge to the Department of Labor's rule expanding the universe of professionals obligated to disclose their union avoidance "persuader" activity, "a new intervention by the federal government into the marketplace of ideas" raises "serious First Amendment doubts."[213]

An early, and high profile, example of this argument came in response to the Employee Free Choice Act ("EFCA"),[214] which was introduced in 2007 and again in 2009,[215] but never became law. One important aspect of EFCA would have changed the way workers elect a union representative. Specifically, instead of permitting an employer to insist on a union election conducted by the NLRB, it would have required the Board to certify a labor union as the exclusive representative of a group of employees once a majority of those employees signed cards authorizing the union to represent them.

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[211] 530 U.S. 640, 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

[212] Sunstein, *supra* note 19, at 874.

[213] Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Plaintiffs' Motion for Preliminary Injunction, Associated Builders & Contractors of Arkansas v. Perez, Dkt. No. 4:16-cv-169 (KGB) at *18 (E.D. Ark., Apr. 14, 2016).

[214] S. 1041, 110th Cong. (2007); H.R. 800, 110th Cong. (2007). In 2007, EFCA passed the House, but failed cloture in the Senate.

[215] S. 560, 111th Cong. (2009); H.R. 1409, 111th Cong. (2009).

This election process—which is currently permissible but not required under the NLRA—is known as "card check."

In 2008, Richard Epstein argued that the card-check provisions of the proposed EFCA violated the First Amendment. His argument was that if EFCA made it possible for an organizing campaign to take place in secret, employers would lose their most meaningful opportunity to oppose a union drive. But, EFCA did not ban employer speech; rather, Epstein's argument was that depriving employers of knowledge of a union drive would violate the First Amendment because (1) the knowledge would give employers an incentive to speak; and (2) employers would have received the information under the pre-EFCA NLRA.[216] Epstein further elaborated on his First Amendment argument in his monograph, *The Case Against the Employee Free Choice Act*. There, he argued that card check would "infringe the ordinary rights of political association that are guaranteed to workers, and perhaps their employers, under the First Amendment."[217] The details of the argument are somewhat opaque, but in general, Epstein argues that card check is more likely to violate the Constitution in the private sector than in the public sector because government is binding private firms rather than itself; that a desire to increase union density cannot overcome intermediate scrutiny because the motivation behind EFCA was "partisan, not social"; and that in sum, card check "has no clear legitimate end, and . . . [would] terminate any and all rights of workers to participation in union affairs, while forcing employers to deal with unions when they are denied all opportunity to make their case against the union."[218]

Given that EFCA never became law, there was no opportunity to test Epstein's theories in courts. However, lawyers have recently relied on a similar theory in challenging the NLRB's new election procedures rule.[219] This new rule implements a suite of procedural changes that, taken together, shorten the time between the filing of an election petition and the date an NLRB election is held.[220]

The argument against this aspect of the rule is nearly identical to Epstein's argument against EFCA—by shortening the time between when a union files for an election and when the election is held, employers are de-

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[216] *See* Richard A. Epstein, *The Employee Free Choice Act is Unconstitutional*, WALL STREET J. (Dec. 19, 2008), http://www.wsj.com/articles/SB122964977342320545; Richard A. Epstein, *The Employee Free Choice Act: Free Choice or No Choice for Workers*, MANHATTAN INST. FOR POLICY RES. (Mar. 29, 2009), *archived at* https://perma.cc/DJF5-YHEU ("The entire process can take place without a single word of public debate. It is not only the employer who does not speak. It is also workers who are denied a chance to participate in collective deliberation of the sort that is consistent with . . . union democracy . . . .").

[217] RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 95–96 (2009).

[218] *Id.* at 97–98.

[219] Representation - Case Procedures, 79 Fed. Reg. 74,308, 74,311-15 (Dec. 15, 2014).

[220] *Id.*; *see also* Jeffrey M. Hirsch, *NLRB Elections: Ambush of Anticlimax?*, 64 EMORY L.J. 1647, 1557–63 (explaining aspects of the election procedures rule that decrease time between filing and the election, such as streamlining pre-election challenges).

prived of the opportunity to oppose the union. The three Board Members who voted for the final rule rejected these arguments, offering a two-pronged response. First, they argued that "neither the proposed rule nor the final rule imposes any restrictions on the speech of any party."[221] That is, it leaves employers free to engage in the same anti-union speech as before the rule—for example, the rule would do nothing to prevent an employer from beginning every workday with an anti-union message to its employees. Second, the majority "emphatically disclaim[ed] any . . . motivation"[222] to limit employer influence in elections by shortening the time to campaign against a union. "As previously discussed, the problems caused by delay have nothing to do with employer speech."[223]

On the other hand, Board Member Philip Miscimarra and then-Board Member Harry Johnson were persuaded by the argument against this rule, writing that:

> In short, in respect to free speech concerns, the Final Rule has two infirmities. First, the Rule single-mindedly accelerates the time from the filing of the petition to the date when employees must vote in representation elections (indeed, the Rule overtly requires election voting as soon as "practicable" after a petition is filed). Second, the Rule irrationally ignores the self-evident proposition that, when one eliminates a reasonable opportunity for speech to occur, parties cannot engage in protected speech. In combination, these problems inescapably reflect the same uniform purpose and effect: To limit pre-election campaigning and curtail protected speech, contrary to the First Amendment, the Act and decades of case law establishing that all parties—and the Board—regard pre-election campaigns as vitally important.

The Chamber of Commerce echoed this argument in suing to invalidate the NLRB rule. The Chamber of Commerce argued in part that the rule violated the First Amendment, reasoning that "the Board's rationale for limiting the opportunity for free speech is 'the hallmark characteristic associated with *every* infringement on free speech: the government simply determines the speech is not necessary.' "[224]

A district court rejected the Chamber's First Amendment argument.[225] As the court put it, "the Final Rule does not specifically burden *employer* speech, because all parties to the election proceeding are constrained by the

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[221] Representation - Case Procedures, 79 Fed. Reg. at 74318.

[222] *Id.* at 74323 n.68.

[223] *Id.*

[224] Plaintiff's Motion for Summary Judgment and Memorandum in Support at 43–44, 2015 WL 5656568, Chamber of Commerce v. NLRB, No. 1:15-cv-9-ABJ, 2015 WL 4572948 (D.D.C. Jul. 9, 2015).

[225] *See Chamber of Commerce,* 2015 WL 4572948, at *13–15.

same timeframe in disseminating their views to employees."[226] Moreover, the court noted that the NLRB Regional Director, a government official charged with setting union elections, "retains discretion" to set the election date so as to ensure an adequate opportunity for employer speech.[227]

In addition, the court might have pointed to existing First Amendment case law regarding the rights of unions and union-represented employees, including *Davenport v. Washington Education Association*[228] and *Ysursa v. Pocatello Education Association*.[229] Both of those cases involved changes to state law that made it more difficult for unions to collect fees from represented non-members. In *Davenport*, Washington changed its law to prohibit unions from using non-members' fees for political expenditures without written authorization, and in *Ysursa*, Idaho changed its law to prohibit automatic payroll deduction of union PAC contributions. In both cases, the Court had little difficulty determining that the First Amendment was not implicated by a state changing its statutory baseline in a way that declined to facilitate union speech.[230]

Moreover, a statutory baseline, to which both Epstein and the NLRB rule challengers claim a First Amendment entitlement, is at most a legislative choice that facilitates speech—but it does not actually regulate either speech or communicative conduct—it merely sets out timeline for the NLRB to complete its own election process.[231] *Davenport* suggests that the First Amendment does not even apply to such legislative choices; to the extent there is a contrary argument, it would support at most very deferential review. And, that principle suggests it should not be fatal for the rule even if the NLRB *had* an intention to limit employer speech in order to improve the employee voice and association at work, though conceivably a problem could have arisen if, say, the rule had (counterfactually) represented a naked attempt to promote union membership in order to enhance electioneering in support of Democratic candidates for office.[232]

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[226] *Id.* at *25.

[227] *Id.*

[228] 551 U.S. 177 (2007).

[229] 555 U.S. 353 (2009).

[230] *Davenport*, 551 U.S. at 185 ("The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny."); *Ysursa*, 555 U.S. at 355 ("The First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression."). *Hudson* procedures are explained above, *supra* Part II.A.I.

[231] *See Davenport*, 551 U.S. at 191 ("Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."); *see also id.* (noting that "First Amendment does not require the government to enhance a person's ability to speak").

[232] *Id.* (statute intended to "protect the integrity of the election process, . . . which the voters evidently thought was being impaired by the infusion of money extracted from non-members of unions without their consent" was constitutional even if content-based, because it was not viewpoint discriminatory). Significantly, Justice Scalia did not state that viewpoint neutrality was required in order for the statute to be considered constitutional; he instead said

CONCLUSION

It is not just the Supreme Court, but also the economy, that has changed. "Today's workers manipulate information, not wood or metal. Yet the modern, information-based workplace, no less than its more materially based predecessors, requires the application of community standards."[233] But the First Amendment theories discussed above—which would cover more routine business activity, while also preventing government from either implementing collective regulatory schemes that require participant contributions, or making adjustments to existing law that affects incentives to speak—could threaten this regulatory project. This is especially true as the shift to an information economy means that more employers are dealing in data — even when workers are not.[234] As Ernest Young put it, "[i]t is . . . no longer possible to classify 'free speech' as a personal right separate from the concerns of 'economic regulation.'"[235] Young continued, "[i]f much economic regulation is also speech regulation, then the Court must either fundamentally narrow First Amendment doctrine to allow application of traditional rational basis review to economic regulation of speech or reintroduce meaningful judicial scrutiny into a large swath of regulatory activity."[236]

Consider the following: First, Verizon and other internet service providers ("ISPs") have advanced the argument that the federal government could not mandate "net neutrality" because that step would "violate[ ] the First Amendment by stripping [ISPs] of control over the transmission of speech on their networks."[237] That argument implies that the decision to slow download speeds for certain websites should be treated the same as an editorial decision to include or exclude an article in a newspaper.[238] And, while the D.C. Circuit has not yet reached the issue,[239] it is likely to recur.[240] Sec-

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that "Even if it be thought necessary that the content limitation be reasonable and viewpoint neutral," the statute satisfied those requirements. *Id.* *Cf.* Minneapolis Star & Tribune Co. v. MN Comm'r of Rev., 460 U.S. 575, 591 (1983) (tax on paper and ink was unconstitutional where it was targeted only a small group of newspapers).

[233] Stephen Breyer, *Our Democratic Constitution*, 77 NYU L. REV. 245, 255 (2002).

[234] Kendrick, *supra* note 20 at 1209 (discussing incentive to file deregulatory First Amendment cases in "an information economy, where many activities and products involve communication").

[235] Ernest A. Young, Sorrell v. IMS Health *and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903, 904 (2012).

[236] *Id.* at 925.

[237] Joint Brief for Verizon and MetroPCS at 3, 2012 WL 9937411, at *3, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); *see also* AT&T Inc. v. FCC, Statement of Issues to be Raised, D.C. Cir. No. 15-1092 (May 15, 2015).

[238] *See* Joint Brief for Verizon and MetroPCS, *supra* note 237, at 43 (arguing that "broadband providers possess 'editorial discretion'").

[239] *See Verizon*, 740 F.3d 623, 634 (D.C. Cir. 2014) (rejecting net neutrality order on other grounds).

[240] In addition, the argument has spawned a large amount of scholarship, both pro and con. *See, e.g.*, James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 893 (2014) (arguing that search engines are more like "advisors" than "editors"); Jane Bambauer, *Is Data Speech?*,

ond, Uber, the ridesharing app, and other companies in the "1099 economy"[241] have sought to avoid "employer" status by emphasizing that they are technology platforms that simply enable workers to "be their own bosses"—albeit "bosses" subject to significant constraints imposed by Uber itself.[242] While Uber has not, to my knowledge, argued that the First Amendment protects its business model from interference by regulators, it is easy to see how the argument might go based on the arguments discussed above. For example, Uber might argue that its business model is about communicating information about the location of people who need rides to drivers who are willing to provide them for a certain price. If courts accept that premise, then it is a short jump to the argument that, by regulating (or even refusing to license) Uber, a city is suppressing a disfavored speaker.

That may sound farfetched (just as many of the arguments described in Part II may sound farfetched), but it is not purely theoretical. When the Federal Aviation Administration restricted the operation of the website Flytenow.com—essentially, a cross between Uber and Airbnb, the short-term accommodation sharing platform, for private planes—the Goldwater Institute argued that the regulation was invalid because "[p]rivate pilots have a First Amendment right to communicate their travel plans with others."[243] The D.C. Circuit rejected this argument, focusing first on the FAA's ban on operating as a "common carrier" without a commercial pilot's license, and then reasoning that "the advertising of illegal activity has never

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66 STAN. L. REV. 57, 57 (2014) (arguing "data must receive First Amendment protection"); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1151 (2008) (arguing that the First Amendment "does not prohibit" "some regulation of the ability of search engines to manipulate and structure their results").

[241] The phrase "1099 economy" is used interchangeably with "gig economy," "on-demand economy," and "sharing economy." These phrases refer to "new labor relationships being enabled by digital technology," in which workers accept assignments on a piecework basis. Justin Fox, *The Rise of the 1099 Economy*, BLOOMBERG VIEW (Dec. 11, 2015), http://www.bloombergview.com/articles/2015-12-11/the-gig-economy-is-showing-up-in-irs-s-1099-forms, *archived at* https://perma.cc/6JSN-BML6.

[242] *See* Tom Simonite, *When Your Boss Is an Uber Algorithm*, MIT TECH. REV. (Dec. 1, 2015), http://www.technologyreview.com/news/543946/when-your-boss-is-an-uber-algorithm/, *archived at* https://perma.cc/9L92-7XN6; Alex Rosenblat & Luke Stark, *Uber's Drivers: Information Asymmetries & Control in Dynamic Work*, DATA & SOCIETY 2 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227 (noting that "Uber makes claims that its platform fosters entrepreneurship in drivers, while simultaneously exerting significant control over how drivers do their jobs through constant monitoring, predictive and real-time scheduling management, routine performance evaluations, and implicit and explicit rules about driver performance").

[243] GOLDWATER INST., *FAA Meets Internet: Ruling On General Aviation Limits The Sharing Economy* (Jan. 23, 2015), http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/faa-meets-internet-ruling-on-general-aviation-limi/, *archived at* https://perma.cc/33UJ-TWPQ; *see also* Petitioner's Opening Brief, Flytenow, Inc. v. FAA, D.C. Cir. No. 14-1168, Jan. 5, 2015 at *39 ("By concluding that all expense-sharing flight operations resulting from Internet-based communications are *per se* "common carriage," . . . the FAA not only chills, but freezes out Internet-based speech").

been protected speech."[244] However, that means that the D.C. Circuit's rejection of the First Amendment challenge hinged on the fact that the government already regulated underlying non-speech conduct—it is less clear what that Court might have done in a scenario in which the non-speech conduct was not so easily identified.

Similarly, consider the app MonkeyParking, which "lets users auction off their public parking spaces" by posting to the app when they are about to vacate a public parking space and allowing other users to bid for information about the space's location.[245] When San Francisco took the position that the app was facilitating the sale or rental of public parking spaces in violation of city law, MonkeyParking claimed in the media (though not in litigation to date) that "it auctions off information *about* the parking spaces," invoking the "First Amendment right to express and sell such information."[246]

Finally, even First Amendment arguments that are unlikely to be accepted can matter; for example, Chicago reportedly considered a minimum wage ordinance modeled on Seattle's, but abandoning it in light of the IFA's challenge. As Jedediah Purdy recently put it: "The availability of these arguments imposes (1) costs in litigation, (2) caution in drafting, and (3) general uncertainty on those who support, design, and implement the policies that the novel arguments call into question."[247] Thus, one problem with the emerging deregulatory First Amendment is that it can accomplish some of its aims without the courts ever adopting it; the increasingly real threat of expensive litigation by high-profile litigators can stay regulators' hands. Thus, in one sense, those advancing the deregulatory First Amendment are right—the translation of First Amendment doctrines developed in a pre-digital age are in need of an update. But key questions remain about how big the First Amendment will grow under any new approach, and the extent to which it will eclipse government regulation of the workplace.

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[244] Flytenow, Inc. v. FAA, 808 F.3d 882, 894 (D.C. Cir. 2015).

[245] Gene Maddaus, *Kicked Out of San Francisco, MonkeyParking App Plans a Fresh Start in Santa Monica*, LA WEEKLY (Sept. 18, 2014), http://www.laweekly.com/news/kicked-out-of-san-francisco-monkeyparking-app-plans-a-fresh-start-in-santa-monica-5080436.

[246] Cyrus Farivar, *Parking Spot Auction Startup Defies San Francisco's Orders to Shut Down*, ARSTECHNICA (Jan. 26, 2014), http://arstechnica.com/tech-policy/2014/06/parking-spot-auction-startup-defies-san-franciscos-orders-to-shut-down/.

[247] Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 209 (2014).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

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

No. 16–1466. Argued February 26, 2018—Decided June 27, 2018

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i.e.*, a percentage of the full union dues. Under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here it was 78.06% of full union dues.

Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court

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granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held:

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended complaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157, distinguished. Pp. 6–7.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 7–47.

(a) *Abood*'s holding is inconsistent with standard First Amendment principles. Pp. 7–18.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E.g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633. That includes compelling a person to subsidize the speech of other private speakers. *E.g.*, *Knox* v. *Service Employees*, 567 U. S. 298, 309. In *Knox* and *Harris* v. *Quinn*, 573 U. S. ___, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 7–11.

(2) Neither of *Abood*'s two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

Second, avoiding "the risk of 'free riders,' " *Abood*, *supra*, at 224, is not a compelling state interest. Free-rider "arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, *supra*, at 311, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. As is evident in non-agency-fee jurisdictions, unions are quite willing

to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 11–18.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 18–26.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick* v. *Myers*, 461 U. S. 138, 143, supports the view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 18–22.

(2) Nor does *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, provide a basis for *Abood*. *Abood* was not based on *Pickering*, and for good reasons. First, *Pickering*'s framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States* v. *Treasury Employees*, 513 U. S. 454, 467, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering*'s framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties. Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood*, nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering*, an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 22–26.

(c) Even under some form of *Pickering*, Illinois' agency-fee arrangement would not survive. Pp. 26–33.

(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti* v. *Ceballos*, 547 U. S. 410, 421, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 26–27.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and

minority rights. Pp. 27–31.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment interests. They do not. The state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 31–33.

(d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion. Pp. 33–47.

(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363. *Abood* relied on *Railway Employes* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate the very different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using *Hanson*'s deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 35–38.

(2) *Abood*'s lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e.g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 38–41.

(3) Developments since *Abood*, both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or

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agency shop," *Harris*, 573 U. S., at ___–___, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phenomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e.g.*, *Elrod* v. *Burns*, 427 U. S. 347. Pp. 42–44.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood*, known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 44–47.

3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 48–49.

851 F. 3d 746, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and, GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–1466

MARK JANUS, PETITIONER *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

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

[June 27, 2018]

JUSTICE ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations

that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, §315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours[,] and other conditions of employment." §315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies. §315/4; see §315/6(c); see generally, *e.g.*, *Illinois Dept. of Central Management Servs.* v. *AFSCME, Council 31*, No. S–CB–16–17 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§315/6(c)–(d), 315/10(a)(4); see *Matthews* v. *Chicago Transit Authority*, 2016 IL 117638, 51 N. E. 3d 753, 782; accord, *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678,

683–684 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. §315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U. S., at 235; see *id.*, at 235–236. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours[,] and conditions of employment." §315/6(e); see also §315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." §315/3(g); see §315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," §315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris* v. *Quinn*, 573 U. S. ___, ___–___ (2014) (slip op., at 19–20) (describing this process). Nonmembers need not be asked, and they are not required to consent before

the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers* v. *Hudson*, 475 U. S. 292 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.*, at 310. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris*, *supra*, at ___ (slip op., at 19).

As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.*, at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.*, at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.*, at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.*, at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the

interests of Illinois citizens." *Id.*, at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.*, at 14a—which would amount to about $535 per year.

Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.*, at 60.

Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E.g.*, *id.*, at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.*, at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.*, at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F. 3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U. S. ___ (2017).

II

Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.*, at 13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157 (1914), actually works against them. That case

concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.*, at 162. One creditor filed suit before the 6-month starting date, but another intervened within the 6-to-12-month window. The Court held that the "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated treating "intervention . . . as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e.g.*, filing a separate complaint and properly serving the defendants. *Id.*, at 163–164. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U. S., at 232, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox* v. *Service Employees*, 567 U. S. 298, 311 (2012), and that *Abood*'s "analysis is questionable on several grounds," *Harris*, 573 U. S., at ___ (slip op., at 17); see *id.*, at ___–___ (slip op., at 17–20) (discussing flaws in *Abood*'s reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris*, *supra*, at ___–___ (slip op., at 27–29), while leaving for another day the question whether *Abood* should be overruled, *Harris*, *supra*, at ___, n. 19 (slip op., at 27, n. 19); see *Knox*, *supra*, at 310–311.

We now address that question. We first consider whether *Abood*'s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the

freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); see *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–257 (1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec.*, *supra*, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, see, *e.g.*, *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), and it furthers the search for truth, see, *e.g.*, *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette*, *supra*, at 633; see also *Riley*, *supra*, at 796–797 (rejecting "deferential test" for compelled speech claims).

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*, *supra*, at 309; *United States* v. *United Foods, Inc.*, 533 U. S. 405, 410 (2001); *Abood*, *supra*, at 222, 234–235. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson*, 475 U. S., at 305, n. 15. We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, *supra*, at 310–311 (quoting *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455 (1984)).

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*, *supra*; *Harris*, *supra*; *Friedrichs* v. *California Teachers Assn.*, 578 U. S. ___ (2016) (*per curiam*) (affirming decision below by equally divided Court).

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U. S., at 309–310, 321–322. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e.g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980), prior precedent in that area, specifically *United Foods*, *supra*, had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U. S., at 310, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U. S., at ___ (slip op., at 33). But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.*, at ___ (slip op., at 30).

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on

the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post*, at 4 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

B

In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U. S., at 224. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220. And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]." *Id.*, at 221.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence

that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris*, *supra*, at ___ (slip op., at 31).

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U. S. C. §§7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members.[1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U. S. C. §§1203(a), 1209(c), and about 400,000 are union members.[2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris*, *supra*, at ___ (slip op., at 30) (internal quotation marks omitted).

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[1] See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

[2] See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), unionstats.com.

[3] See National Conference of State Legislatures, Right-to-Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx#chart; see also, *e.g.*, Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

C

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders'" as justification for agency fees, 431 U. S., at 224. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e.g.*, Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Knox*, 567 U. S., at 311. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First

Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.[4]

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. §315/6(d); see, *e.g.*, Brief for State Respondents 40–41, 45; *post*, at 7 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought.[5] Why is

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[4]The collective-action problem cited by the dissent, *post*, at 6, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

[5]In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, §315/9(a) (2016); see, *e.g.*, *County of Du Page* v. *Illinois Labor Relations Bd.*, 231 Ill. 2d 593, 597–600, 900 N. E. 2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e.g.*, Brief for Employees of

this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See §315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. §315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see §315/6(c), and having dues and fees deducted directly from employee wages, §§315/6(e)–(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." Brief for State Respondents 41; see *Cintron* v. *AFSCME, Council 31*, No. S–CB–16–032, p. 1, 34 PERI ¶105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 271 (2009); *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967).

What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against non-

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the State of Minnesota Court System as *Amici Curiae* 9–17.

members, see *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202–203 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.*, at 198–199, 202 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. §315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively

subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 58, n. 19 (1974); see *Stahulak* v. *Chicago*, 184 Ill. 2d 176, 180–181, 703 N. E. 2d 44, 46–47 (1998); *Mahoney* v. *Chicago*, 293 Ill. App. 3d 69, 73–74, 687 N. E. 2d 132, 135–137 (1997) (union has "'discretion to refuse to process'" a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U. S., at ___ (slip op., at 30) (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 2–3. Protec-

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[6]There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.*, Cal. Govt. Code Ann. §3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, §315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

tion of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele*, *supra*, at 198.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*, 567 U. S., at 311, 321. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.*, at 1. Cf., *e.g.*, Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti* v. *Ceballos*, O. T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See

Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), and its progeny would fall. Yet *Pickering*, as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. 431 U. S., at 234–235 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e.g.*, *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990); *Branti* v. *Finkel*, 445 U. S. 507 (1980); *Elrod* v. *Burns*, 427 U. S. 347 (1976). Also imperiled would be older precedents like *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) (loyalty oaths), *Shelton* v. *Tucker*, 364 U. S. 479 (1960) (disclosure of memberships and contributions), and *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte*

Curtis, 106 U. S. 371, 372–373 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "'contemptuous or disrespectful words against the President'" and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e.g.*, *Brown* v. *Glines*, 444 U. S. 348, 353 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 556–557 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that, "[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick* v. *Myers*, 461 U. S. 138, 143; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U. S., at 144, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "necessary to protect"

fundamental government interests. *Curtis*, *supra*, at 374.

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid-20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as "'sinful and tyrannical,'" *supra*, at 9, and others expressed similar views.[8]

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[7] Indeed, under common law, "collective bargaining was unlawful," *Teamsters* v. *Terry*, 494 U. S. 558, 565–566 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair* v. *United States*, 208 U. S. 161, 174–175 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

[8] See, *e.g.*, Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclu-

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 391 U. S. 563, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti* v. *Ceballos*, 547 U. S. 410, 421–422 (2006), or if it involved a matter of only private concern, see *Connick*, *supra*, at 146–149. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'" *Harris*, 573 U. S., at ___ (slip op., at 35) (quoting *Pickering*, *supra*, at 568). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U. S., at ___–___ (slip op., at 17–21) (KAGAN, J., dissenting), and we found the argument unpersuasive, see *id.*, at ___–___ (slip op., at 34–37). The intervening years have not improved its appeal.

1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U. S., at ___, and n. 26 (slip op., at 34, and n. 26). The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a

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sions from Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U. S., at 230, n. 27. That aside has no bearing on the agency-fee issue here.[9]

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris*, *supra*, at ___ (slip op., at 34). And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 348–349, 363 (2010) (rejecting efforts to recast *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990)); see also *Citizens United*, *supra*, at 382–385 (ROBERTS, C. J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

2

Even if that were attempted, the shoe would be a painful fit for at least three reasons.

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States* v. *Treasury Employees*, 513 U. S. 454, 467 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that

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[9]Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 259 (1977) (concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

the standard *Pickering* analysis requires modification in that situation. See 513 U. S., at 466–468, and n. 11. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.*, at 468. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.*, at 466, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.*, at 475–476, n. 21; accord, *id.*, at 482–483 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post*, at 13–14, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government

office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti*, 547 U. S., at 421–422, 425–426. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U. S., at 148. As a result, we held, the district attorney could fire her for making those comments. *Id.*, at 154. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly pro-

hibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering*, Illinois' agency-fee arrangement would not survive.

A

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, *i.e.*, as speech "pursuant to [an employee's] official duties," 547 U. S., at 421. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect public employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.*, at 425–426, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the

speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

Since the union speech paid for by agency fees is not controlled by *Garcetti*, we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U. S., at ___–___ (slip op., at 19–20) (KAGAN, J., dissenting). We squarely rejected that argument, see *id.*, at ___–___ (slip op., at 35–36), and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern," *id.*, at ___ (slip op., at 36).

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget

problems.[10] As of 2013, Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities.[11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills.[12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities.[13] These problems and others led Moody's and S&P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U. S. state."[14]

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is "'squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.'" Securities Act of 1933 Release No. 9389, 105 S. E. C. Docket 3381 (2013). It therefore "told the Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's

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[10] See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

[11] PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind4.

[12] See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed-Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

[13] Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

[14] E. Campbell, S&P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U. S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.*, at 13; *Illinois Dept. of Central Management Servs.* v. *AFSCME, Council 31*, No. S–CB–16–17 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.*, at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post*, at 16 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e.g.*, Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and

education is typically the largest component of state and local government expenditures.[15]

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?[16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots?[17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21] and minority religions.[22] These are sensitive politi-

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[15] See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, pp. 306, Table 476, 321, Table 489.

[16] See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

[17] See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low-Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

[18] See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

[19] See Reagan, Anti-Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

[20] See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L. A. Times, Oct. 16, 2011, p. A1.

[21] See Goodstein, A Web of Faith, Law and Science in Evolution Suit,

cal topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.*, at 452.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post*, at 17. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post*, at 16. For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State* v. *AFSCME Council 31*, 2016 IL 118422, 51 N. E. 3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

C

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra*, at 11–18—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an ade-

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N. Y. Times, Sept. 26, 2005, p. A1.

[22] See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

quately funded exclusive bargaining agent." 573 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 7); see also *post*, at 6–7 (KAGAN, J., dissenting). This was not "the interest *Abood* recognized and protected," *Harris*, *supra*, at ___ (slip op., at 7) (KAGAN, J., dissenting), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post*, at 8–9, 11, ample experience, as we have noted, *supra*, at 12, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, see *supra*, at 23–25, the balance tips decisively in favor of the employees' free speech rights.[23]

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[23] Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post*, at 17–18. Both hypotheticals are short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.

In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post*, at 17. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.

In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post*, at 17. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering*

We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U. S., at 568. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See *supra*, at 10. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering*, *supra*, at 564–566 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin* v. *McPherson*, 483 U. S. 378, 392 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees*, 513 U. S., at 477 (holding federal-employee honoraria ban unconstitutional).

VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

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balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post*, at 17. And the time and place of the agitation would also be important.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). We will not overturn a past decision unless there are strong grounds for doing so. *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855–856 (1996); *Citizens United*, 558 U. S., at 377 (ROBERTS, C. J., concurring). But as we have often recognized, *stare decisis* is "'not an inexorable command.'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009); see also *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003); *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 63 (1996); *Payne*, *supra*, at 828.

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, *supra*, at 235. And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Citizens United*, *supra*, at 362–365 (overruling *Austin*, 494 U. S. 652); *Barnette*, 319 U. S., at 642 (overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940)).

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, devel-

opments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citizens United*, 558 U. S., at 363–364; *id.*, at 382–385 (ROBERTS, C. J., concurring); *Lawrence*, 539 U. S., at 577–578, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U. S., at ___–___ (slip op., at 17–20). We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employes* v. *Hanson*, 351 U. S. 225 (1956), and *Machinists* v. *Street*, 367 U. S. 740 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U. S., at 226. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization*" of *private-sector* union shops under the Railway Labor Act. *Street*, *supra*, at 749 (emphasis added).[24] *Abood* failed to appreciate that a very different First Amendment question

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[24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 53 (1999); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). Compare, *e.g.*, *White* v. *Communications Workers of Am., AFL–CIO, Local 13000*, 370 F. 3d 346, 350 (CA3 2004) (no state action), and *Kolinske* v. *Lubbers*, 712 F. 2d 471, 477–478 (CADC 1983) (same), with *Beck* v. *Communications Workers of Am.*, 776 F. 2d 1187, 1207 (CA4 1985) (state action), and *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 16, and n. 2 (CA1 1971) (same). We reserved decision on this question in *Communications Workers* v. *Beck*, 487 U. S. 735, 761 (1988), and do not resolve it here.

arises when a State *requires* its employees to pay agency fees. See *Harris*, *supra*, at ___ (slip op., at 17).

Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U. S., at 233–235. After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.*, at 238; see *Harris*, *supra*, at ___ (slip op., at 17). For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U. S., at 749–750, 768–769. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris*, 573 U. S., at ___ (slip op., at 17). As we said in *Harris*, "[s]urely a First Amendment issue of this importance deserved better treatment." *Ibid.*

Abood's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra*, at 10–11, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street*, which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor rela-

tions established by Congress." 431 U. S., at 222 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. See *supra*, at 11–12; *Harris*, *supra*, at ___ (slip op., at 31).

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political'" speech. 431 U. S., at 226. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.*, at 228; see *id.*, at 228–231. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. *Id.*, at 229. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions,

and benefits are important political issues, but that is generally not so in the private sector." *Harris*, 573 U. S., at ___ (slip op., at 17).

Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Id.*, at ___ (slip op., at 18). Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." *Ibid.* Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." *Id.*, at ___ (slip op., at 19).

In sum, as detailed in *Harris*, *Abood* was not well reasoned.[25]

B

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009), and that factor also weighs against *Abood*.

1

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be "'ger-

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[25] Contrary to the dissent's claim, see *post*, at 19, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e.g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defend [its actual] reasoning." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363 (2010); *id.*, at 382–385 (ROBERTS, C. J., concurring).

mane'" to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U. S., at 519, but the Court splintered over the application of this test, see *id.*, at 519–522 (plurality opinion); *id.*, at 533–534 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.*, at 551 (opinion of Scalia, J.), rendering the test "altogether malleable" and "no[t] principled," *id.*, at 563 (KENNEDY, J., concurring in judgment in part and dissenting in part).

Justice Scalia presciently warned that *Lehnert*'s amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.*, at 551, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education funding was not chargeable. *Id.*, at 519–522. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.*, at 533–542. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox*, for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox* v. *Service Employees*, O. T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U. S., at 320–321, but the dissent refused to do so, *id.*, at 336 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That formulation is broad enough to encompass just about anything that the union might choose to do.

Respondents agree that *Abood*'s chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that "a firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 66; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U. S., at 306, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	Total Expense	Chargeable Expense
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.[26]

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e.g.*, *Knox* v. *Chiang*, 2013 WL 2434606, *15 (ED Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1 million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

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[26] For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post*, at 22 (KAGAN, J., dissenting).

C

Developments since *Abood*, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 573 U. S., at ___ (slip op., at 20); *Abood*, 431 U. S., at 220–222. But, as already noted, experience has shown otherwise. See *supra*, at 11–12.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By

2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, pp. 17, Table 14, 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris*, *supra*, at ___ (slip op., at 8); *Knox*, 567 U. S., at 311. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the "'exacting scrutiny'" applied in other cases involving significant impingements on First Amendment rights. 431 U. S., at 259; see *id.*, at 259–260, and n. 14. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e.g.*, *Roberts*, 468 U. S., at 623; *United Foods*, 533 U. S., at 414. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox*, *supra*, at 314; *Harris*, *supra*, at ___–___ (slip op., at 28–29).

Abood particularly sticks out when viewed against our

cases holding that public employees generally may not be required to support a political party. See *Elrod*, 427 U. S. 347; *Branti*, 445 U. S. 507; *Rutan*, 497 U. S. 62; *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U. S. 712 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan*, *supra*, at 95 (Scalia, J., dissenting); see also *Elrod*, 427 U. S., at 353 (plurality opinion); *id.*, at 377–378 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood*, *supra*, at 260, n. 14 (opinion concurring in judgment) (citing *Elrod*, *supra*, at 376–380, 382–387 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political patronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

In some cases, reliance provides a strong reason for adhering to established law, see, *e.g.*, *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202–203 (1991), and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provi-

sions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post*, at 22–26 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona* v. *Gant*, 556 U. S. 332, 349 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota* v. *Wayfair, Inc.*, *ante*, at 20; see *supra*, at 38–41.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U. S., at 311. Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*'s many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs* v. *California Teachers Assn.*, 576 U. S. ___. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U. S. ___ (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

That is certainly true with respect to the collective-bargaining agreement in the present case. That agree-

ment initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid.* Thus, for the past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71, 76–79 (1953); see also 8 R. Lord, Williston on Contracts §19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post*, at 23, n. 5 (KAGAN, J., dissenting).

In short, the uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a

factor supporting *Abood*.[27]

* * *

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "'special justification[s]'" for overruling *Abood*. *Post*, at 19 (KAGAN, J., dissenting) (quoting *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 8)).[28]

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[27] The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post*, at 23. But as we explained in *Citizens United*, "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.'" 558 U. S., at 365 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Nor does our decision "'require an extensive legislative response.'" *Post*, at 23. States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.

[28] Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post*, at 27–28. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. §315/6(e). No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); see also *Knox*, 567 U. S., at 312–313. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

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side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943).

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–1466

MARK JANUS, PETITIONER *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

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

[June 27, 2018]

JUSTICE SOTOMAYOR, dissenting.

I join JUSTICE KAGAN's dissent in full. Although I joined the majority in *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e.g., National Institute of Family and Life Advocates* v. *Becerra*, *ante,* p. ___. Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with JUSTICE KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in . . . an aggressive way" just as the majority does today. *Post,* at 27.

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[June 27, 2018]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For over 40 years, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of

an exclusive employee representative to bargain with. Far from an "anomaly," *ante,* at 7, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6-year campaign to reverse *Abood*. See *Friedrichs* v. *California Teachers Assn.*, 578 U. S. ___ (2016) (*per curiam*); *Harris* v. *Quinn*, 573 U. S. ___ (2014); *Knox* v. *Service Employees*, 567 U. S. 298 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I

I begin with *Abood*, the 41-year-old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause,

which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood*, 431 U. S., at 212. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations" since the New Deal. *Id.,* at 220. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit[ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.,* at 220–221. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.,* at 219, 229. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.,* at 221. "The tasks of negotiating and administering a collective-bargaining agreement and

representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.,* at 222. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.'" *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.,* at 232, 234. Employees might well object to the use of their money to support such "ideological causes." *Id.,* at 235.

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.,* at 225–226. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.,* at 225. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any conflicting government interest. See *id.,* at 234–235.

II

Unlike the majority, I see nothing "questionable" about *Abood*'s analysis. *Ante,* at 7 (quoting *Harris*, 573 U. S., at ___ (slip op., at 17)). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U. S., at 220–221. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an

effective employee representative and bargaining partner. See *id.*, at 221. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.*, at 222.

The majority does not take issue with the first point. See *ante,* at 33 (It is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. See *ante,* at 31–32; but see *Abood*, 431 U. S., at 221 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante*, at 12 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante,* at 14.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra,* at 4. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allow-

ing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante,* at 13 (quoting *Knox*, 567 U. S., at 311). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante,* at 13. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e.g., Machinists* v. *Street*, 367 U. S. 740, 762 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood*: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U. S., at 556.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood*'s economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive

bargaining representative even "if they are not given agency fees." *Ante,* at 14; see *ante,* at 14–17. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante,* at 15. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991).[1] And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsi-

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[1]The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante,* at 12. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e.g.,* R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 649 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

bilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra,* at 2, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often depends on agency fees. See, *e.g., Harris*, 573 U. S., at ___ (slip op., at 24) (KAGAN, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to

union fees alone, from the usual rules governing public employees' speech.

"Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA* v. *Nelson*, 562 U. S. 134, 148 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 598 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." *Engquist*, 553 U. S., at 600. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA*, 562 U. S., at 149 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U. S., at 418. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.,* at 419. But when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e.g., id.*, at 426; *Connick* v. *Myers*, 461 U. S. 138, 154 (1983).

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti*, 547 U. S., at 418. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante,* at 26. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering*'s analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating *Abood*. See *ante,* at 22.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to

[2] For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante,* at 25. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 12–13.

make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." 431 U. S., at 225–226. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea* v. *Guarnieri*, 564 U. S. 379, 391 (2011); the speech occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U. S., at 220–222, 224–226; *supra,* at 3. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U. S., at 235. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.,* at 234. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

Abood thus dovetailed with the Court's usual attitude in

First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

2

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering*, to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante,* at 23. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante*, at 24–25. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante,* at 27–31. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must con-

cede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante,* at 23. In fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States* v. *Treasury Employees*, 513 U. S. 454 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees*, the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest. See *id.,* at 470, 477.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante,* at 8. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943)). Regulations challenged as compelling expression do not usually look

anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988); see *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of").[3] So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA*, 562 U. S., at 148.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here

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[3] That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 14 (1990); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 233 (2000); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 474 (1997); see also *infra*, at 20.

that, at *Pickering*'s first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect[s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante,* at 27, 29 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U. S., at 466 (quoting *Pickering*, 391 U. S., at 568). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U. S., at 466; see *id.,* at 465, 470 (repeating that analysis twice more). The Court could not have cared less whether the speech at issue was "important." *Ante,* at 29. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*'s first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri*, 564 U. S., at 391; see *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675 (1996) (stating that public employees' "speech on merely private employment matters is unprotected"). For that reason, even the Jus-

tices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment). Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante,* at 29. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante,* at 30. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri*, 564 U. S., at 391. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra,* at 9–11.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering*'s "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante,* at 32, n. 23.) But in fact, this Court has always

understood such cases to end at *Pickering*'s *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti*, 547 U. S., at 418; see *supra,* at 11. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering*'s first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U. S., at 418; *supra,* at 11. That inquiry is itself famously respectful of government interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti*, 547 U. S., at 419; *Rankin* v. *McPherson*, 483 U. S. 378, 388 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent. See 431 U. S., at 220–221, 224–226; *supra,* at 3–4. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See *supra,* at 6–9 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected

and acceded to those interests—just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 7). Any departure from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.,* at ___ (slip op., at 8) (internal quotation marks omitted); see, *e.g., Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). And the majority does not have anything close. To the contrary: all that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood*, beyond even the normal precedent.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court

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[4] And then, after ostensibly turning to *stare decisis*, the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante,* at 38; see *ante,* at 35–38.

should stand by yesterday's decisions"—is "a foundation stone of the rule of law." *Kimble,* 576 U. S., at ___ (slip op., at 7) (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 15)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e.g., Locke* v. *Karass*, 555 U. S. 207, 213–214 (2009); *Lehnert*, 500 U. S., at 519; *Teachers* v. *Hudson*, 475 U. S. 292, 301–302 (1986); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–457 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke*, 555 U. S., at 213. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor sphere—cases today's decision does not question. See, *e.g., Keller* v. *State Bar of Cal.*, 496 U. S. 1, 9–17 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 230–232 (2000) (public university student fees); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 471–473 (1997) (commercial advertising assessments); see also n. 3, *supra.*

Ignoring our repeated validation of *Abood*, the majority

claims it has become "an outlier among our First Amendment cases." *Ante,* at 42. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra,* at 11–13. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante,* at 44. But in fact those decisions strike a balance much like *Abood*'s. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod* v. *Burns*, 427 U. S. 347, 366–367 (1976); *Branti* v. *Finkel*, 445 U. S. 507, 517 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod,* 427 U. S., at 366; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti*, 547 U. S., at 419. So all that the majority has left is *Knox* and *Harris*. See *ante,* at 43. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante,* at 38. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante,* at 38. Well, not quite that—but as exer-

cises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e.g., Johnson* v. *United States,* 576 U. S. ___ (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided—as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante,* at 39—as though those weren't stock terms in dissenting vocabulary. See, *e.g., Murr* v. *Wisconsin*, 582 U. S. ___, ___ (2017) (ROBERTS, C. J., dissenting) (slip op., at 2); *Dietz* v. *Bouldin*, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 1); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. ___, ___ (2015) (slip op., at 13) (SCALIA, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U. S. Reports." 573 U. S., at ___ (slip op., at 15).

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). That is because overruling a

decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e.g.,* Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante,* at 47, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that "[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 785 (1992); *Hilton*, 502 U. S., at 203.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Not today. The majority undoes bargains reached all over the country.[5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the

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[5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante,* at 46 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra,* at 23. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." *Ante,* at 45, 46. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra,* at 23. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining

as well. See Brief for Governor Tom Wolf et al. 11.[6]

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood*." *Ante,* at 45. Here, the majority proudly lays claim to its 6-year crusade to ban agency fees. In *Knox*, the majority relates, it described *Abood* as an "anomaly." *Ante,* at 45 (quoting 567 U. S., at 311). Then, in *Harris*, it "cataloged *Abood*'s many weaknesses." *Ante,* at 45. Finally, in *Friedrichs*, "we granted a petition for certiorari asking us to" reverse *Abood*, but found ourselves equally divided. *Ante,* at 45. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid*. And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 320 (1992) (concurring opinion). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.,*

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[6] In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood*'s] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for collective bargaining from those for political activities. *Ante,* at 45. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra,* at 21–22. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

at 321 (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "private parties anticipate our overrulings." 406 U. S., at 320. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid.* *Abood*'s holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante,* at 47, is to trivialize *stare decisis.*

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey*, 467 U. S., at 212—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood*, the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood*'s legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent

with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 47, n. 27.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e.g., National Institute of Family and Life Advocates* v. *Becerra*, *ante,* p. ___ (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell* v. *IMS Health Inc.,* 564 U. S. 552 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity

(employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

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 APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The City of New York submits this brief *amicus curiae* to describe how, decades ago, it came to embrace agency fees. This historical perspective will illuminate a key backdrop to *Abood v. Detroit Board of Education*, as well as the City's powerful interest, on behalf of all its residents, in the Court's preserving that decision now.

The story centers on a series of paralyzing public-sector strikes in the 1960s and 1970s that wreaked havoc on millions of City residents, including union members and their families but hardly limited to them. Garbage piled in streets, children missed weeks of school, and subways ground to a halt.

When a ban on strikes paired with collective bargaining and automatic dues collection proved an ineffectual response to the crisis, the City and State turned to agency shop agreements as part of a broader labor management strategy designed to promote labor stability. The City's collective bargaining system flourished thereafter, and its success has helped protect public health and safety ever since.

Over the decades, the reliable funding provided by agency fees has enabled the City's public-sector unions to pursue informed bargaining strategies that benefit the workforce broadly, rather than short-term or confrontational approaches designed to serve only the interests of those most willing to pay union dues. Effective collective bargaining

regimes are time- and resource-intensive, and must protect all represented employees, whether active or inactive, member or nonmember. Financial stability helps empower unions to build long-lasting and constructive bargaining relationships with the City, improving the provision of public services to the benefit of all residents. Indeed, disagreements between the City and its unions now rarely result in the sort of public disruption that plagued New Yorkers before agency fees were used.

Agency fees remain critically important. The City retains over 380,000 workers—more than all but five private employers in the country—and nearly all of those workers are currently represented by a union. It ranks first nationwide in the number of unionized workers it manages. And unionized public-sector workers are responsible for a wide range of services essential to the operation of the nation's densest and most populous city.

Overruling *Abood* would strip jurisdictions like New York City of a vital tool that has for years promoted productive relationships with public workforces. History shows that millions of everyday New Yorkers, including the City's public employees, would ultimately shoulder the cost of any resulting discord. That is a risk that should not be revived.

SUMMARY OF THE ARGUMENT

Under traditional collective bargaining schemes, employees have the right to select a union by majority vote to serve as their exclusive representative in negotiations. Agency shop provisions permit the selected union to charge employees who decline to join it a fee to defray the cost of its non-political activities that benefit the entirety of the workforce it represents. Forty years ago, this Court upheld the constitutionality of the public-sector agency shop in *Abood v. Detroit Board of Education*.[1] Relying on *Abood*, jurisdictions across the nation have legalized and negotiated the collection of agency fees to support public-sector collective bargaining.

New York City agrees with respondents that agency fees do not run afoul of the First Amendment, and that *Abood's* decades-old precedent should be preserved. In support of these contentions, the City submits this brief to highlight two points which illustrate why agency fees are central to many public labor management schemes, and the strength of the government interest—as employer and protector of public welfare—in permitting their collection.

First, as the City's history demonstrates, agency fees are a key means of protecting the public from the disruption of government services caused by

[1] 431 U.S. 209 (1977).

labor disputes. The City embraced the agency shop as part of a comprehensive labor management system at a time when existing collective bargaining policy proved insufficient to yield a reliable alternative to strikes. The change helped to stabilize labor relations for the benefit of all City residents, not just the City's workers.

Second, and relatedly, the City's experience rebuts petitioner's crabbed portrayal of the government interest in agency fees. The collaborative benefits of strong bargaining relationships aside, Petitioner ignores the massive public harm that can arise from the disruption of public services, especially in large, densely populated cities like New York City. Given this threat, tools that reduce the risk of public-sector strikes—like agency fees—serve a compelling government interest that far exceeds mere administrative convenience. While different jurisdictions may reasonably find different labor management strategies better suited for their particular circumstances, *Abood* wisely left those choices to the political process.

ARGUMENT

I. The City authorized agency fees in response to a series of devastating strikes that caused massive public harm.

The City has found it essential public policy both to pursue collective bargaining with public-sector unions and to promote its effectiveness. Successful negotiations not only advance the welfare of wage-earners and their families, but more broadly serve the public's strong interest in prompt and successful resolution of labor disputes. In plain terms, the City's residents suffer when vital public services are interrupted by strikes.

The City had this consideration specifically in mind when it pushed for agency fees as part of a comprehensive program—based on successful private-sector models—that would protect the public from the catastrophic harm of public-sector strikes. The fees served to buttress the existing labor relations framework at a time when collective bargaining and union exclusivity alone proved inadequate to yield a sufficiently stable and robust alternative to strikes.

Certainly, no labor relations system is perfect. Nor can the impact of any of its components be measured in isolation. But it is undeniable that collective bargaining paired with agency fees has proven to be a successful formula for promoting labor peace in New York City (and across New York State).

A. The City's early adoption of public-sector collective bargaining proved insufficient to prevent labor disruption.

Congress protected private-sector workers' right to organize and bargain in the 1935 National Labor Relations Act.[2] For decades thereafter, however, no similar system existed for public-sector workers. Instead, many states, including New York, attempted to minimize the damage of public-sector labor disputes by simply banning government workers from striking and imposing harsh fines on violators.[3]

But banning strikes proved ineffective absent a mechanism to address and remedy the root causes of labor unrest.[4] In response, the City pioneered collective bargaining as a means of promoting the fair resolution of public-sector labor disputes such that employees would not feel compelled to walk out on the job.

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[2] *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C § 157 (2012)).

[3] *See* Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 256 (repealed 1967); *see also* Terry O'Neil & E.J. McMahon, Empire Ctr., SR4-07, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws* 3 (2007), available at http://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf.

[4] O'Neil & McMahon, *supra* note 3, at 3 (noting Condon-Wadlin's "mixed effectiveness" and that it ultimately was deemed "flawed and unenforceable").

In 1958, Mayor Robert F. Wagner issued an executive order authorizing collective bargaining through public-sector labor unions for certain groups of City workers.[5] The order recognized that "labor disputes between the City and its employees [would] be minimized, and that effective operation of the City's affairs in the public interest [would] be safeguarded, by permitting employees to participate … through their freely chosen representatives in the determination of the terms and conditions of their employment."[6] It positioned the City as "one of the first jurisdictions in the nation to adopt an essentially private sector model for municipal labor relations."[7] Similar rights would not be granted to any State workers until 1959,[8] to federal public employees until 1962,[9] or to New York State public employees until 1967.[10]

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[5] *See* Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York* 14 (1990) (describing the Executive Order); O'Neil & McMahon, *supra* note 3, at 4.

[6] Exec. Order (Mayor Wagner) No. 49 § 2 (1958).

[7] Michael Marmo, *More Profile than Courage: The New York City Transit Strike of 1966*, at 72 (1990).

[8] Donovan, *supra* note 5, at v; Steven Greenhouse, *The Wisconsin Legacy*, N.Y. Times, Feb. 23, 2014, at BU1.

[9] Exec. Order No. 10,988, 3 C.F.R. 321 (1959–1963).

[10] *See* Public Employees' Fair Employment Act (Taylor Law), ch. 392, §§ 202–03, 1967 N.Y. Sess. Laws 393, 396 (McKinney)

Without agency fees, the right to collectively bargain, even when paired with an outright ban on public-sector strikes, failed to prevent destructive labor disputes. New York City was the epicenter of a series of strikes from the mid-1960s through the early 1970s. State officials considered the City to be the poster child for the failure of then-existing law to "protect vital public interests."[11] The effect on ordinary New Yorkers, including union members, was profound.

The wave of public-sector strikes began in 1965, when eight thousand welfare workers held a twenty-eight-day work stoppage, closing two-thirds of the City's welfare centers.[12] It disrupted vital services for half a million welfare recipients, many of them children or seniors.[13]

(codified as amended at N.Y. Civ. Serv. Law §§ 202–03 (2015)); *see also* O'Neil & McMahon, *supra* note 3, at 6.

[11] Letter from Governor's Comm. on Pub. Emp. Relations to Governor Nelson A. Rockefeller 10 (Jan. 23, 1969) (on file with the New York City Law Department).

[12] *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205 (2000); O'Neil & McMahon, *supra* note 3, at 3.

[13] Emanuel Perlmutter, *Welfare Help in a City Curbed by a Walkout*, N.Y. Times, Jan. 5, 1965, at 1, 21; Emanuel Perlmutter, *Welfare Strike Due in City Today in Spite of Writ*, N.Y. Times, Jan. 4, 1965, at 1, 25.

Then, on the following New Year's Day, transit workers began a twelve-day strike—which persisted despite a court injunction—that cost the City's economy nearly $9 billion in today's dollars.[14] The strike effectively shut down the subway and bus system, overwhelming railroads, producing historic traffic jams, and closing public schools. This led the mayor to devise "the most urgent civil defense plan New York City has ever had to improvise for its own health and safety."[15] The New York Times captured the scene: "Seldom in its history has New York City been through more difficult days, … and not since the draft riots of the Civil War has the normal course of life in [the] city been more profoundly altered for so many days."[16]

In the aftermath of this vast turmoil, the City and State governments each made it a priority to promote the resolution of labor disputes through an

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[14] Donovan, *supra* note 5, at 19; Freeman, *supra* note 12, at 211; Marmo, *supra* note 7, at 151; O'Neil & McMahon, *supra* note 10, at 4; *see also News Summary and Index: The Major Events of the Day: Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33; *$100-Million Loss Each Day Is Seen*, N.Y. Times, Jan. 5, 1966, at 1, 16

[15] Editorial, *The Big Crush*, N.Y. Times, Jan. 3, 1966, at 26; Homer Bigart, *New Talks Today: Quill Scores Mayor—Says Walkout Could Last for a Month*, N.Y. Times, Jan. 2, 1966, at 1, 58; *Strict Rules Set on Travel into the City During Strike*, N.Y. Times, Jan. 1, 1966, at 1, 6.

[16] Editorial, *This Beleaguered City*, N.Y. Times, Jan. 12, 1966, at 20.

effective bargaining system. In 1967, based largely on the City's recent experience, New York State enacted the Taylor Law to "protect[] the public against the disruption of vital public services …, while at the same time protecting the rights of public employees."[17] The law created a new comprehensive scheme for public-sector labor relations to address the root causes of labor unrest. It paired the State's prohibition on public employee strikes with an overarching process for collective bargaining, including an automatic deduction of union dues from paychecks (or "dues check-off"). The law also established a "new administrative agency charged exclusively with the regulation of public sector labor relations."[18]

Relying on a Taylor Law provision permitting local flexibility and experimentation, the City enacted its own Collective Bargaining Law, creating an Office of Collective Bargaining to

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[17] Governor's Comm. on Pub. Emp. Relations, *Final Report* 9 (1966) (internal quotation marks omitted) (on file with the New York City Law Department); *see also* Public Employees' Fair Employment Act (Taylor Law), ch. 392, § 200, 1967 N.Y. Sess. Laws 393, 394 (McKinney) (codified as amended at N.Y. Civ. Serv. Law § 200 (2015)) (describing its purpose as "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government").

[18] Donovan, *supra* note 5, at v; O'Neil & McMahon, *supra* note 3, at 6.

"effectuat[e] sound labor relations and collective bargaining between public employers and institutions in the city and their employees."[19] The legislation took effect on the same day as the Taylor Law.[20]

While a positive step, the new collective-bargaining laws, without agency shop provisions, failed to solve the problem of labor unrest. Instead, disagreements between the City and public-sector workers continued to impose enormous financial costs and public harm:

- In February 1968, a sanitation strike left the streets piled with nearly 100,000 tons of refuse—enough to fill the Titanic twice.[21] This led to a proliferation of trash fires and the City's first general health emergency since a 1931 polio epidemic.[22] The New York Times likened the City to "a vast slum" as "mounds of refuse grew

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[19] Local Law No. 53 (1967) of City of New York.

[20] John V. Lindsay, City of N.Y., *Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 7 (1969) (on file with the New York City Law Department).

[21] *See Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 23; Tad Fitch, J. Kent Layton & Bill Wormstedt, *On a Sea of Glass: The Life and Loss of the RMS Titanic*, at App. A (2013).

[22] *See Fragrant Days in Fun City*, *supra* note 21, at 23.

higher and strong winds whirled the filth through the streets."[23]

- Later in 1968, three teacher walkouts caused more than a million children to miss thirty-six days of school.[24] The City's poorest children were hardest hit: 240,000 kids went without their free daily lunches.[25] Some parents fashioned improvised classrooms in churches and storefronts, while others resorted to smashing doors and windows to open their children's schools.[26]

- In January 1971, the City's police force held an unscheduled walkout (or "wildcat strike"). For six days, less than a sixth of the City's patrolmen reported for work.[27]

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[23] Emanuel Perlmutter, *Shots Are Fired in Refuse Strike; Filth Litters City*, N.Y. Times, Feb. 5, 1968, at 1, 37.

[24] *See* Leonard Buder, *Strike Cripples Schools, No Settlement in Sight*, N.Y. Times, Oct. 15, 1968, at 1, 38; *Strike's Bitter End*, Time, Nov. 29, 1968, at 89.

[25] *See Strike's Bitter End*, *supra* note 24, at 89.

[26] Leonard Buder, *Parents Smash Windows, Doors to Open Schools*, N.Y. Times, Oct. 19, 1968, at 1, 26; *Strike's Bitter End*, *supra* note 24, at 89.

[27] Jeffrey A. Kroessler, *New York Year By Year: A Chronology of the Great Metropolis* 309 (2002); *The Police Strike in New York*, Chi. Trib., Jan. 21, 1971, at 20; Richard Reeves, *Police:*

> The Chicago Tribune described a city "nakedly exposed to the threat of criminality on a massive scale."[28]

The continued turmoil made abundantly clear that more had to be done to forge an effective system of collective bargaining that would serve, consistently and in the long term, as a bulwark against public-sector strikes.

B. The City's use of agency shop provisions ultimately fortified a successful collective bargaining system.

It was at this pivotal time that New York City looked to agency shop provisions to help create effective and stable collective bargaining and stem labor unrest. In 1969, the City's Mayor urged the State Legislature to adopt "the agency shop, a recognized form of union security," as a means of promoting both "labor harmony and responsibility."[29]

'Attention Must Be Paid!' Say the Men on Strike, N.Y. Times, Jan. 17, 1971, at E1.

[28] *The Police Strike in New York*, *supra* note 27, at 20.

[29] John V. Lindsay, City of N.Y., *Report and Plan Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 9-10 (1969) (on file with the New York City Law Department). The City pursued agency shop arrangements that same year.

Three years later, in 1972, the City explicitly amended its own Collective Bargaining Law to permit the negotiation of agency shop arrangements to the full extent permitted by state law.[30] Only a few years after that, and against the backdrop of repeated disruption of public services in New York and other cities, this Court decided *Abood*. The stakes would have been clear to any newspaper reader of the time—and could not have been lost on the Court.

After *Abood* resolved the constitutionality of agency fees in the public sector, New York State moved quickly to amend the Taylor Law to require state employees to pay agency fees and to designate them a mandatory subject of negotiation at the local level.[31] The Legislature explicitly relied on

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[30] *See* Local Law No. 1 (1972) of City of New York § 10; *see also* Presentation by the Majority Leader, Thomas J. Cuite 4, *reprinted in* New York Legislative Service, NYLS' New York City Legislative History: 1972 Local Law #1 (2010) at unnumbered 221. In *Bauch v. New York*, the Court of Appeals acknowledged that "[t]he maintenance of stability in the relations between the city and employee organizations, as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration." 21 N.Y.2d 599, 607 (1968). The City interpreted agency shop arrangements as "further[ing] these objectives." *Id.*

[31] *See* Act of Aug. 3, 1977, ch. 677, § 3, 1977 N.Y. Sess. Law 1081, 1082 (McKinney); *see also* O'Neil & McMahon, *supra* note 3, at 24 n.17. In 1992, the State amended the Taylor Law to require agency shop arrangements for all public employees.

Abood; a full copy of the decision was included in the bill's official legislative history.[32]

The City strongly supported the amendment, urging the State Legislature that agency fees "generate a more stable and responsible labor relation atmosphere at the bargaining table" by providing unions with the organizational security necessary to resist "divisive elements"—those within and without their ranks who undermine meaningful negotiation—and thereby deterring strikes.[33] When the amendment passed, the Mayor directed city agencies to implement agreements with agency fees "expeditiously."[34]

Within only a few years of state-wide implementation of agency shop provisions, the rate of strikes plummeted by well over 90% across all of

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See Act of July 24, 1992, ch. 606, § 2, 1992 N.Y. Sess. Laws 1650, 1650 (McKinney); *see also* O'Neil & McMahon, *supra* note 3, at 24 n.17.

[32] *See* Bill Jacket for Act of Aug. 3, 1977, ch. 677.

[33] Richard L. Rubin, Memorandum in Support (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677; *see also* Memorandum from Donald H. Wollett, N.Y. State Office of Emp. Relations, to Judah Gribetz, Counsel to the Governor (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677 (noting that agency shop arrangements "provide[] to employee organizations the organizational security necessary for responsible collective bargaining").

[34] Admin. Order (Mayor Beame) No. 38 (1977) (on file with the New York City Law Department).

New York State—a dramatic improvement in cooperation between labor and government.[35] As a result, "the last quarter-century has been an era of labor tranquility in … state and local government throughout New York."[36] Both workers and the general public have benefitted.

While the precise explanation for the reduction in strikes may be complex, government employers like New York City have good reason to conclude that agency shop provisions remain a cornerstone of successful strategies for promoting labor peace. Armed with a stable source of funding, public-sector unions have used collaborative approaches and adopted long-term perspectives in resolving labor disputes, rather than seeing strikes or other confrontational tactics as their only or best option. Agency fees also temper the influence of extreme elements and curb incentives for labor leaders to play up disputes or management intransigence as a means of attracting members.[37] A return to the

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[35] In the 15 years after the first Taylor Law came into effect (1967–1982), there were, on average, about 20 public-sector strikes per year in New York State. *See* O'Neil & McMahon, *supra* note 3, at 10. By contrast, between 1983 and 2006, there were, on average, less than two per year. *Id*.

[36] *Id*.

[37] This mechanism is further explained in the brief of Amici Curiae Los Angeles County's Department of Health Services, NYC Health + Hospitals, and Service Employees International Union.

failed labor regime of the past risks a serious regression which, as the City's history illustrates, would come at great cost to the public at large.

II. Petitioner and amici ignore the compelling public interest of New York City and other jurisdictions in avoiding disruption of essential public services.

The history of New York City's collective bargaining system demonstrates that petitioner and his amici frame the government interest in agency fees far too narrowly. In posing the relevant First Amendment question, petitioner mischaracterizes the pursuit of "labor peace" under *Abood* as an interest in the mere administrative convenience of "bargaining with exclusive representatives."[38] Indeed, petitioner's brief does not even mention strikes or other work stoppages, when agency fees, as a matter of historical fact, were meant to help prevent them.[39]

This amnesia about the origin and purpose of agency fees leads petitioner and his amici to overlook the substantial risk of injury to the public

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[38] *See* Brief for the Petitioner at 61, *see also id.* at 53–60.

[39] *See generally Brief Amici Curiae of Los Angeles County's Department of Health Services, NYC Health + Hospitals, And Service Employees International Union Supporting Respondents.*

as a whole that can be posed by unsuccessful public-sector labor negotiations.[40] But these devastating strikes prompted the City and State to first embrace agency fees. When petitioner and his amici reduce this interest to mere "rational basis justification[s]" like limiting bargaining partners and avoiding confusion,[41] they erase decades of history and ignore hardships endured by millions of City residents.

New York City's experience also refutes petitioner's assumption that the governmental interest in labor peace is uniform nationwide. We are a nation of many different governments—federal, state, and local—all with widely varying circumstances, histories, and needs that in turn may warrant different labor relations strategies.[42]

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[40] Similarly, when petitioner limits the advantages of "collectivization" to securing greater benefits for public-sector employees, he turns a blind eye to the broader public benefit that is confirmed by history, at least for some jurisdictions. *Id.* at 58–59.

[41] *Id.* at 56; *see also id.* at 57–59.

[42] This point shows the fallacy of the blunt comparison offered by Amicus Curiae Freedom Foundation and Economists between states with so-called "right-to-work" laws and those without them. That analysis fails to control for numerous relevant variables, and it cannot measure the impact of agency fees in any particular jurisdiction or predict the consequences of stripping them now. *See* Brief of the Freedom Foundation and Economists as Amicus Curiae in Support of the Petitioners at 6. As New York City's experience

A constitutional rule that mandates a single answer to the agency shop question—the practical result of overruling *Abood*—is simply not workable.

A. The City's circumstances render labor peace a particularly compelling interest here.

In New York City, the disruption of public services presents an untenable risk due to the City's size, density, and diversity. It packs more than eight-and-a-half million residents into its tiny geography[43]—outranking forty states[44] and standing as the nation's most densely populated major city.[45] It also hosts 600,000 commuters each

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illustrates, the unique challenges faced by some government employers, and the nature of the workforces they manage, render agency fees an essential tool, even if they are not uniformly necessary, or even sensible, nationwide.

[43] *See Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2016 Population*: *April 1, 2010 to July 1, 2016*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANNRSIP.US12A.

[44] *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Dec. 6, 2017).

[45] Mike Maciag, *Mapping the Nation's Most Densely Populated Cities*, Governing (Oct. 2, 2013), http://www.governing.com/blogs/by-the-numbers/most-densely-populated-cities-data-map.html.

weekday,[46] joined by over 60 million tourists each year.[47]

Core governmental services loom large for the City's residents and visitors alike, leaving them especially vulnerable to labor disruption. For example:

- Public transportation is essential (less than 45 percent of City households own a car).[48] Mass transit provides nearly nine million rides every weekday, bringing employees and customers to thousands of businesses.[49]

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[46] Sam Roberts, *Commuters Nearly Double Manhattan's Daytime Population, Census Says*, N.Y. Times: City Room (June 3, 2013, 11:56 AM), http://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says/.

[47] Press Release, City of N.Y., *Mayor de Blasio Announces Total NYC Visitors Surpasses 60 Million for First Time* (Dec. 19, 2016), http://www1.nyc.gov/office-of-the-mayor/news/963-16/mayor-de-blasio-total-nyc-visitors-surpasses-60-million-first-time.

[48] *See Physical Housing Characteristics for Occupied Housing Units: 2011-2015 American Community Survey 5-Year Estimates*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S2504/1600000US3651000.

[49] *The MTA Network*, Metro. Transp. Auth., http://web.mta.info/mta/network.htm (last visited Dec. 6, 2017).

- Garbage collection is critical for public health in the City's incredibly dense environment. The volume of residents, visitors, and businesses in the City produces over 21,000 tons of waste every day—which the City employs a small army of sanitation workers to collect.[50] Without them, trash would quickly pile in the streets—as it did in 1968.

- The City runs the largest fire and police departments in the country.[51] It also operates the biggest single-district public school system,[52] employing over 90,000 educators who teach a million public school students each day.[53] The

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[50] *About DSNY*, N.Y.C. Dep't of Sanitation, http://www1.nyc.gov/assets/dsny/about/inside-dsny.shtml (last visited Dec. 6, 2017).

[51] Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Local Police Departments, 2013: Personnel, Policies, and Practices* 3 (2015), *available at* http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf; *Overview*, N.Y.C. Fire Dep't, https://www1.nyc.gov/site/fdny/about/overview/overview.page (last visited Dec. 11, 2017).

[52] *Enrollment, Poverty, and Federal Funds for the 100 Largest School Districts, by Enrollment Size in 2012*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics (2015), https://nces.ed.gov/programs/digest/d14/tables/dt14_215.30.asp.

[53] Dep't of Citywide Admin. Servs., *New York City Gov't Workforce Profile Report, Fiscal Year 2016* at 67 (2016),

> disruption of any of these services would have devastating consequences for City residents.

Because of the scale and critical importance of basic public services in the City, even relatively small disruptions can wreak havoc.[54] Less than a week without mass transit, for example, would cost the City economy over a billion dollars.[55] A week without garbage collection would flood the streets with refuse, threatening a public health crisis.[56] One day without teachers would squander a million days' worth of learning.[57] Simply put, the damage inflicted by public-sector strikes in New York City is too great to risk. The City therefore has an overriding—and compelling—interest in ensuring its collective bargaining system works.

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http://www.nyc.gov/html/dcas/downloads/pdf/misc/workforce_profile_report_fy_2016.pdf; *Statistical Summaries*, N.Y.C. Dep't of Educ., http://schools.nyc.gov/AboutUs/schools/data/stats/"default.htm (last visited Dec. 6, 2017).

[54] *See supra* Part I.

[55] *See* Mike Pesca, *The True Cost of the NYC Transit Strike*, NPR (Dec. 21, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=5064612.

[56] *See supra* Part I.B.

[57] *Cf. Statistical Summaries*, *supra* note 61.

The City's experience also makes plain that the incremental benefit of agency fees does not have to be overwhelming for them to be constitutionally permissible. The harms of public-sector work stoppages are often so large that even a marginal reduction in the risk of strikes is compelling grounds for authorizing agency fees. This is not a theoretical justification. The City *tried* collective bargaining without agency fees, and despite employing techniques like the "government assistance with … dues collection" suggested by petitioner,[58] the public continued to suffer.

B. Governments' practical need to adapt to local circumstances points against constitutionalizing a single approach to public-sector labor relations.

To be sure, not all jurisdictions permit agency fees. Petitioner and his amici paint the variety in labor laws across the nation as evidence that such fees are unnecessary.[59] Yet they draw precisely the wrong conclusion. The diversity of labor laws nationwide is reason for this Court to adhere to *Abood*'s flexible framework, not to abandon it. Divergence in public-sector labor laws is the natural result of the dramatically different circumstances confronted by state and local governments across the nation.

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[58] Brief for the Petitioner at 42.

[59] *See, e.g., id.* at 37; Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioner at 27-36.

For example, while several states have laws that prohibit agency fees (known as "right-to-work" laws),[60] the people in those States did not experience the same series of strikes that New Yorkers endured in the 1960s and 1970s. Nor do those jurisdictions have the same "long, deep tradition" of labor activism as New York City does, where unions are embedded in its institutions and its culture. Even its housing stock bears the imprint of its vibrant labor movement, with more than a dozen union-sponsored housing cooperatives anchoring neighborhoods across the City.[61]

Governments in "right-to-work" states, by contrast, manage different workforces, have endured different histories, and must satisfy different demands. Their legislative choices thus should not control outside their borders any more than New York City's approach should dictate labor policy in Madison, Wisconsin or Fort Worth, Texas. In short, mandating one nationwide rule on agency fees would be deeply inconsistent with this Court's

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[60] *Right-To-Work Resources*, Nat'l Conf. of State Legislators, (2017), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx.

[61] Freeman, *supra* note 12, at 100; David W. Chen, *Electchester Getting Less Electrical; Queens Co-op for Trade Workers Slowly Departs From Its Roots*, N.Y. Times, Mar. 15, 2004, at B1 (describing union-sponsored housing cooperatives providing nearly 50,000 apartments).

recognition that needs vary across the nation,[62] and that local communities should have leeway to promote their own health, safety, and welfare through core labor policies.[63]

Varied circumstances have even led to policy divergence among right-to-work states themselves. Some ban public-sector unions altogether,[64] rejecting collective bargaining as a labor management strategy entirely. Others, however, stop short of abandoning agency fees in all contexts. For example, while Michigan and Wisconsin currently prohibit agency fees for some public-sector unions, both States exempt local police and firefighter unions.[65] The exemptions are necessary because, as Wisconsin's governor put it,

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[62] *See Kelo v. City of New London*, 545 U.S. 469, 482 (2005) ("Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.").

[63] *See Bond v. United States*, 564 U.S. 211, 220–22 (2011) (discussing the role, and virtues, of federalism).

[64] For example, Texas does not permit the recognition of public-sector labor unions as bargaining agents, nor does it allow state officials to enter into collective bargaining contracts with public employees. Texas Gov't Code § 617.002 (2017).

[65] *See* Mich. Comp. Laws § 423.210(4) (2017); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (2017).

"there's no way we're going to put the public safety at risk."[66]

Petitioner and his amici thus mistake public controversy for constitutional error. As this Court has made clear, "[t]he genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."[67] Consistent with this principle, *Abood* left the "wisdom" of adopting agency fees to voters in each State, ensuring that no labor relations policy is frozen in place.[68]

Judgments about risk tolerance and the necessity of public services necessarily differ, and they can even change over time within individual

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[66] Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011, 12:00 AM), http://www.bloomberg.com/news/articles/2011-02-25/walker-says-public-safety-means-wisconsin-cops-keep-collective-bargaining.

[67] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

[68] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977).

jurisdictions.[69] While *Abood* itself concerned a Michigan law authorizing agency fees,[70] the state has since chosen to limit the use of such fees.[71] That change was accomplished through state legislation, not a constitutional rule that imposed Michigan's choice on other communities.

New York City has a powerful interest in labor peace because of its importance to avoiding disruption of essential public services, precisely the rationale that petitioner ignores. Given its unique circumstances and history, the City reasonably views its public services as integral to public safety and welfare, and it accordingly extends to all public unions the same agency shop protection that other jurisdictions offer only to a subset of their public workforces.

More broadly, New York City has for decades chosen to rely on strong, stable unions as a key part

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[69] The range of permissible policy judgments about labor practices is remarkably broad. While most jurisdictions prohibit public workers from striking, some States authorize strikes by some or all government workers. *See, e.g.,* Ohio Rev. Code Ann. § 4117.14(D)(2) (2017). But the existence of those laws does not refute the need to limit or prohibit public-sector strikes in New York and elsewhere.

[70] *Abood*, 431 U.S. at 211.

[71] *See, e.g.,* Jack Spencer, *Right-to-Work Bills Pass Michigan House, Senate*, Mich. Capitol Confidential (Dec. 7, 2012), http://www.michigancapitolconfidential.com/18028; *see also* Mich. Comp. Laws § 423.210(3)(c) (2017).

of its governance strategy, one that embraces the provision of services to strengthen the fabric of the City and better the lives of its residents, while also ensuring fair treatment and protection for workers who serve the public. While other jurisdictions may choose a different course, this Court should not embed that choice in a constitutional rule that overrides New York City's successful long-term labor management scheme or the similar strategies of other cities and states.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR THE STATES OF NEW YORK, ALASKA, CONNECTICUT, DELAWARE, HAWAII, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed that the Constitution permits States to adopt the model of collective bargaining that is widely used in the private sector pursuant to federal labor law. Under this model, a union that employees select to serve as their exclusive representative in collective-bargaining negotiations may charge all represented employees—including those who decline to join the union—an "agency fee" to defray the costs of the workplace services provided by the union. In reliance on *Abood*, twenty-three States and the District of Columbia have long authorized public-sector collective-bargaining arrangements that include agency-fee provisions.

Amici States address the following question raised by petitioners:

> Whether *Abood* should be overruled, thereby forcing many States to abandon the labor-management arrangements that they have long used to ensure the efficient and uninterrupted provision of government services to the public?

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INTEREST OF THE AMICI STATES

Every day, millions of state and local government employees across the country perform varied functions in the service of varied communities. There is no one-size-fits-all approach for the government employers tasked with managing them. What works to attract and retain police officers in a small rural community is vastly different from what is required to attract and retain sanitation workers in a large urban area, or public school teachers in the suburbs.

Accordingly, this Court has long recognized that States' judgments about how best to manage their workforces warrant deference. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* held in relevant part that States may permit collective-bargaining arrangements under which state and local government employees who are represented by a union—including those employees who decline to become union members—may be charged an "agency fee" to cover the costs of the workplace services provided by the union. *Id.* at 221-22. In that context, the government is acting as an employer, and the Court has long recognized that the First Amendment permits government employers to adopt reasonable workforce-management policies to promote efficient and effective operation of the public sector workplace, *see, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006).

This amicus brief is filed on behalf of the States of New York, Alaska, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of

Columbia.[1] Amici States employ a wide range of different approaches for managing their workforces, but all have a significant interest in preserving the flexibility to structure public-sector labor relations that *Abood* allows.

As *Abood* recognized, the task of balancing the potentially divergent interests of public employers, public employees, and the public is delicate and difficult. And the stakes are high. In the decades before *Abood*, many States faced paralyzing public-sector strikes and labor unrest that jeopardized public order and safety. The relative success of state labor-relations systems in preserving public-sector labor peace should not be mistaken for evidence that the leeway afforded by *Abood* is no longer needed. To the contrary, that success is evidence that *Abood* works because it confirms that states and local governments have used the flexibility allowed by *Abood* to adopt policies best tailored to meet their needs in achieving labor peace. That flexibility is no less critical today than when *Abood* was decided. Now, as before, labor peace secures the uninterrupted function of *government itself* and is a necessary precondition for the secure and effective provision of government services.

Amici States also have a substantial interest in avoiding the vast disruption in state and local labor relations that would occur if the Court were now to overrule *Abood*'s approval of public-sector collective-bargaining arrangements utilizing agency-fee rules. That ruling is the foundation for thousands of contracts

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[1] The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "Amici States."

involving millions of public employees in twenty-three States and the District of Columbia.

Abood is permissive, not mandatory. Voters and elected officials in each State—including the States that support petitioner here—remain free to decide what policies should apply in public-sector labor relations for their communities. Petitioner and his amici should not be permitted to constrain those options by constitutionalizing a single approach to public-sector labor relations for all state and local governments nationwide. As this Court has recognized, the Constitution permits States "broad autonomy in structuring their governments" out of respect for the "'integrity, dignity, and residual sovereignty of the States'" and to "'secure[] to citizens the liberties that derive from diffusion of sovereign power.'" *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

STATEMENT OF THE CASE

A. This Court's Longstanding Recognition That Private Employers May Require Employees to Fund the Workplace-Related Activities of a Union Designated to Act as Their Exclusive Representative

Labor-relations law in the United States has long been based on a model of exclusive representation accompanied by agency-fee authorization. The first federal law guaranteeing workers the right to organize was the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq. Enacted in 1926 after decades of labor unrest in the railroad industry, the RLA enabled railroad workers to select a union that would serve as

their exclusive representative in dealing with management, and imposed a corresponding duty of fair-representation on the union to represent all employees in good faith and without discrimination. *See Burlington N. R.R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 444 (1987); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961). The RLA was later expanded to specifically authorize "union-shop" arrangements that required employees to join the union designated as their exclusive-bargaining representative and to pay an "agency fee," as a condition of continued employment. *See* Ch. 1220, 64 Stat. 1238 (1951) (amending 45 U.S.C. § 152).

Congress adopted a similar model in enacting the much broader National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, the federal statute that comprehensively regulates labor relations for most employees in the private sector. As with the RLA, Congress sought to end labor strife and to reduce the need for labor strikes by encouraging collective bargaining. And Congress once again identified exclusive-representation collective bargaining as the best model for achieving labor peace. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). The NLRA also authorized "agency shop" agreements that permitted employees to choose not to join the union that represented them, but required all represented employees to pay fees to the union for the collective-bargaining assistance and other workplace-related services that those employees received. *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 738 & 744-45 (1988).

In a series of decisions beginning with *Railway Employees' Department v. Hanson*, this Court construed

the "union shop" and "agency shop" provisions of the RLA and NLRA as requiring only financial support for an employee-selected union, not compelled union membership by objecting employees. 351 U.S. 225, 238 (1956). This Court also determined that compulsory fees must be limited to compensating the union for actual collective bargaining and related activities, and could not be used to fund unrelated political lobbying. With those limits in place, the Court rejected claims that the First Amendment prohibited government legislation authorizing unions to impose a mandatory financial obligation on represented employees who chose not to join the union, to defray the union's costs for collective bargaining and other workplace-related activities germane to labor-management relations. *See Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Street*, 367 U.S. at 749.

B. This Court's Determination in *Abood* That States May Adopt Labor-Management Policies Similar to Those That Have Proved Effective in the Private Sector

In *Abood*, this Court recognized the important state interest in avoiding labor strife that could disrupt government operations and programs. The Court confirmed that States, acting as employers, should not be deprived of the ability to pursue labor peace and stability in the public workforce by adopting labor-management policies—such as exclusive-representation collective-bargaining funded through agency-fees—that federal law has long allowed private employers to utilize. *See* 431 U.S. at 229-33.

Abood involved a First Amendment challenge to a Michigan statute that authorized collective bargaining for local public school teachers under the same

exclusive-representation, agency-fee model authorized by federal law for the private sector. *Id.* at 212-14, 223-24. This Court, in rejecting that challenge, noted that government entities have a strong interest in providing for exclusive representation in light of "[t]he confusion and conflict that could arise" if government employers had to reach multiple, potentially varying agreements with different unions. *Id*. at 224; *see id.* at 220. And the Court further observed that the union's "tasks of negotiating and administering a collective-bargaining agreement . . . often entail expenditure of much time and money." *Id.* at 221. The Court recognized that agency fees address the inherent "free rider" problem created by exclusive representation: that is, employees who are guaranteed union representation may decline to share in the costs incurred by the union, creating the risk that unions will be underfunded and unable to fulfill their intended duties. *Id.* at 221-22.

Abood acknowledged that public-sector unionization was controversial as a policy matter and that there was widespread debate and disagreement about the utility of adopting private-sector models to manage public-sector workplaces. *Id.* at 224-25, 229. Partly for that reason, *Abood* deferred to state judgments about appropriate workforce policies to achieve stable public-sector labor relations. The Court noted that the "'ingredients'" of labor peace and stability were too numerous, complex, and context-dependent for judges to second-guess the wisdom of particular state choices. *Id*. at 225 n.20 (quoting *Hanson*, 351 U.S. at 233-34).

Abood and multiple later cases establish that the First Amendment permits agency fees to be imposed on public employees who do not wish to join the union

designated as their exclusive representative, so long as objecting employees are not charged for political or ideological activities unrelated to the union's workplace services. *See, e.g., Locke v. Karass*, 555 U.S. 207, 213 (2009); *see also Knox v. Service Emps. Int'l Union*, 567 U.S. 298, 302 (2012). To be sure, the Court has concluded that a State's desire to secure labor peace and prevent free-riding may not justify the imposition of an agency-fee requirement on persons who are not "full-fledged public employees." *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014). But the Court has recognized that different considerations are implicated when a State—acting in its capacity as an employer—devises rules for managing its own workers. *Id.* at 2634.

C. Abood's Centrality to Public-Sector Workforce Management

Abood's framework is now central to state labor law. See Appendix, Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative. Forty-one States, the District of Columbia, and Puerto Rico authorize collective bargaining for at least some public employees, and all adopt the federal model of exclusive representation.[2] Twenty-three States and the District of Columbia also authorize agency fees (also known as

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[2] These States are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. See Appendix.

"fair share" fees) to provide a mechanism for ensuring that represented employees contribute to the costs of workplace-related services that their exclusive representative provides. The majority of these statutes make agency-fee requirements a permissible subject of bargaining and authorize (but do not require) agency-fee provisions as part of public-sector collective-bargaining agreements.[3] Many state agency-fee statutes were enacted in specific reliance on *Abood*.[4]

D. Petitioner's Challenge

Illinois law permits public employees to select a union to act as their exclusive representative and authorizes the union to negotiate the inclusion of an agency-fee provision—called a "fair share" clause—in its collective-bargaining agreement to cover "the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 Ill. Comp. Stat. 315/6(e); *see also id.* § 315/6(c). Petitioner Mark Janus is employed by the State of Illinois in a bargaining unit that is exclusively represented by Respondent AFSCME

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[3] These States are Alaska, California (for local and state employees), Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia. See Appendix.

[4] *See, e.g.*, N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*); *see also* Sally Whiteside, Robert Vogt, & Sherryl Scott, *Illinois Public Labor Relations Laws: A Commentary and Analysis,* 60 Chi.-Kent L. Rev. 883, 924 & n.264 (1984) (Illinois Public Labor Relations Act was drafted by the Illinois Legislature to comport with *Abood*).

Council 31; the collective bargaining agreement covering his employment contains a fair-share clause to help the union defray its costs of collective bargaining and other workplace services. (Joint App'x ("J.A.") 68, 124.) Petitioner is not a member of the union and objects to paying his fair-share fee because he disagrees with the union's "one-sided politicking for only its point of view" and believes the union fails to "appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." (J.A. 87.)

SUMMARY OF ARGUMENT

In the 1960s and 1970s, many States experienced devastating public-sector work stoppages that disrupted the delivery of critical government services. In the wake of those disruptions, States reconsidered how best to manage their public workforces to avoid labor unrest. Many States adopted laws permitting public employees to elect an exclusive representative; some States also adopted laws permitting agency-fee arrangements to ensure adequate funding for the exclusive representative.

Abood permitted States flexibility to make these judgments, and that flexibility should be preserved. As Amici States' experiences have shown, there is no one-size-fits-all approach to managing the millions of state and local public employees across the country. For some public employers, the services of an exclusive representative funded by agency fees may be unnecessary. For others, those services and the agency fees that support them may be critically important to ensure the delivery of core government services. Jurisdictions can disagree about how best to achieve

labor peace, and this Court should continue to respect those judgments as it did in *Abood*.

ARGUMENT

THE STATES HAVE A SIGNIFICANT AND VALID INTEREST IN PRESERVING *ABOOD*

Abood recognized that States have a significant and valid interest in being able to employ the models of collective bargaining that have proved successful for avoiding strikes in the private sector. And *Abood* deferred to the judgments of States that have chosen to permit use of the core elements of private-sector collective bargaining—exclusive representation and agency fees—to manage labor relations with state and local government employees.

In the decades since *Abood*, States have relied substantially on that decision when crafting their public-sector labor-management systems. Petitioner's attack on *Abood* and its approval of public-sector agency-fee rules threatens the labor-relations systems of twenty-three States and the District of Columbia.[5]

Principles of *stare decisis* have special force where States have relied on this Court's precedent in structuring their laws, because the resulting statutes would be invalidated if the Court's precedent is overruled or altered. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785-86 (1992); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991). Here, the *Abood* rule is deeply

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[5] See *supra* n.2, and accompanying Appendix.

entrenched, and is the foundation for thousands of contracts involving millions of public employees across the Nation. Even in constitutional cases, the doctrine of *stare decisis* carries such persuasive weight that this Court has "always required . . . special justification" for overruling settled precedent. *See, e.g., United States v. International Bus. Machs. Corp.,* 517 U.S. 843, 856 (1996) (quotation marks omitted).

Petitioner identifies no special justification for overruling *Abood*. Rather, he bases his call to revisit *Abood* on decisions declining to extend *Abood*'s reasoning to new and different contexts. For example, petitioner relies substantially on *Knox v. Service Employees International Union*, which holds that the First Amendment prohibits a union from charging the non-members it represents in collective bargaining a "special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set." 567 U.S. at 303; *see also id.* at 318, 322. Petitioner also relies heavily on *Harris v. Quinn*, which holds that *Abood*'s rationale does not apply where the government seeks to impose an agency-fee requirement on persons who are not "full-fledged public employees," 134 S. Ct. at 2638. Neither of those decisions addresses the different considerations that are implicated when a State—in its capacity as an employer—devises collective-bargaining rules for its own employees. *See Id.* at 2634; *Knox*, 567 U.S. at 311-12.

I. Agency Fees Are Important to Maintaining the Labor-Management Model That Many States Rely on to Ensure the Effective and Efficient Provision of Services to the Public.

After confronting devastating public-sector work stoppages that caused disruptions in critical government services, many States decided to authorize public-sector employees to select an exclusive union representative, recognizing—as private-sector employers had long understood—that such a representative could provide services in the workplace that would minimize labor unrest. Many States also decided to permit agency-fee arrangements to fund those services, having determined that a secure funding source was important to ensure the union's ability to provide the full range of contemplated workplace services. Even some States that do not generally permit agency-fee arrangements for public-sector unions—including Michigan, which supports petitioner here—have made exceptions for police and firefighter unions in recognition of the especially destructive nature of labor unrest in those fields. These state experiences confirm that exclusive representation supported by agency fees can be an indispensable tool to protect the public from harmful disruptions to government services and programs, and foster efficiency in government workplaces.

A. State Laws Authorizing Public-Sector Collective Bargaining Were Adopted in Response to Devastating Strikes and Labor Unrest by State and Local Government Employees.

Public-sector collective-bargaining laws were enacted to protect the public from the harmful effects

of public-sector work stoppages and other disruptions in government operations. *See* David Lewin et al., Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining 13 (Mar. 16, 2011). Although strikes and other work disruptions by public workers are now rare, they were common at the time that the majority of States first adopted public-sector collective-bargaining laws. *See, e.g.*, David Ziskind, *One Thousand Strikes of Government Employees* 187 (1940) (documenting 1,116 strikes by employees in all sectors of government service through 1940). Much of the labor unrest occurred because state and local workers wanted "a greater voice" in determining the terms of their employment, and lacked other means to air grievances and settle disputes with management. See N.Y. Governor's Comm. on Pub. Emp. Relations, *Final Report* 42, 55 (1966). States thus realized "that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment." *Id.* at 9.[6]

Between 1965 and 1970, for example, there were over 1,400 separate work-stoppages by state and local public workers, involving well over a quarter million employees. *See* Richard Kearney, *Labor Relations in the Public Sector* 226-27 (3d ed. 2001); *see also* Morris

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[6] *See also* Pa. Governor's Comm'n to Revise the Pub. Emp. Law, *Report and Recommendations* 6 (1968) (concluding that the "inability" of public employees to "bargain collectively has . . . led to more friction and strikes than any other single cause"); 5 Ill. Comp. Stat. 315/2 (declaring aim to establish "an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act").

Horowitz, *Collective Bargaining in the Public Sector* 115 (1994). In the 1960s, "strikes by public employees" in New York alone were "too numerous to recall or record"; they included "strikes by transit workers, firemen, sanitation employees, teachers, ferry workers, [and] on other occasions, social workers, practical nurses, city-employed lifeguards, doctors and public health nurses, etc." *DiMaggio v. Brown*, 19 N.Y.2d 283, 289 (1967).

Walkouts and other work stoppages occurred despite state laws that directly prohibited public employees from striking or punished them for doing so. *See, e.g., Association of Surrogates & Sup. Ct. Reporters v. State*, 78 N.Y.2d 143, 152-53 (1991) (recounting New York's historical experience). The States found that direct prohibitions on strikes were ineffective and difficult to enforce, and failed to address the root causes of labor unrest. And it quickly became clear that labor unrest in the public sector had the potential to inflict vast public harm and disruption.

- In Baltimore, a 1974 strike by police officers, jail guards, and other municipal workers resulted in widespread "looting, shooting, and rock-throwing," and "fires ran 150 percent above normal." *See* Md. Dep't of Labor, Licensing & Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 5 (1996) (recounting 1974 strike). State troopers had to patrol the streets to keep the peace. *See* Ben Franklin, *Troopers Patrol Baltimore to Bar Renewed Unrest*, N.Y. Times, July 13, 1974, at 1.
- In 1968, a series of public-school teacher walkouts in New York City resulted in more

than one million children being deprived of education for thirty-six school days. Parents had to physically occupy public schools to keep the schools open. Many children were denied key services provided through public schools. For example, while the city typically provided 400,000 free daily lunches to schoolchildren, only 160,000 were provided during the teacher strikes. *See Strike's Bitter End*, Time, Nov. 29, 1968, at 97.

- Between 1940 and 1980, strikes by public transport workers in Cleveland, Philadelphia, Atlanta, Chicago, Los Angeles, and New York City caused vast disruptions. *See Atlanta Buses Running Again*, N.Y. Times, June 25, 1950, at 50 (Atlanta's transit strike); *Bus Strike Imperils Chicago's Transit*, N.Y. Times, Aug. 26, 1968, at 25 (Chicago strike); *Strike Halts Most Public Transit Runs in Philadelphia*, N.Y. Times, Mar. 26, 1977, at 8 (Philadelphia strike); *Transit Workers Strike Los Angeles Area Bus System*, N.Y. Times, Aug. 27, 1979, at A15 (Los Angeles and Cleveland strikes). In 1966, private businesses suffered over $100 million in losses daily during a twelve-day transit strike in New York City. *See Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33. Moreover, because people could not travel to hospitals to donate blood, the city's blood supply fell to a twenty-year low, causing the postponement of nonemergency surgeries. *Id.*

- During this same period, multiple strikes by sanitation workers caused uncollected trash to pile up on city streets, threatening a serious public-health emergency in many cities. *See,*

e.g., *Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 33; *see also* Joseph Sullivan, *Mediators Seek to Settle Newark Sanitation Strike*, N.Y. Times, Dec. 29, 1976, at 55 (discussing strike in Newark, N.J.); Ziskind, *supra*, at 91-94 (recounting strikes by sanitation workers across the country).

- In 1965, a strike by 8000 welfare workers in New York City forced two-thirds of the city's welfare centers to close for twenty-eight days and led to the interruption of services to more than 500,000 welfare recipients, many of whom were children or elderly. *See* Joshua Freeman, *Working-Class New York: Life and Labor Since World War II* 205-06 (2001); *see also* Emanuel Perlmutter, *Welfare Strike Due in City Today Inspite of Writ*, N.Y. Times, Jan. 4, 1965, at 1.

- Strikes by workers at state mental hospitals also interrupted critical care for patients with mental illness. In 1968, a strike by mental-health workers at four state-run hospitals in New York forced patients to be sent home and led to a reduction in psychiatric treatment and rehabilitation services. *See* Ronald Donovan, *Administering the Taylor Law* 89-90 (1990); Damon Stetson, *Fourth Hospital Moves Patients*, N.Y. Times, Nov. 23, 1968, at 1. Care was likewise interrupted in Ohio in 1974 when half of the workers at the State's mental hospitals went on strike. *See* Louise Cooke, *Workers' Unrest Interrupts Municipal Service*, St. Petersburg Times, July 15, 1974, at 4-A.

As these examples illustrate, the harm of unresolved public-sector labor disputes can be

catastrophic. Public services such as police and fire protection, sanitation, and public-health tend to be provided uniquely by state and local governments, and the absence of those services threatens serious irreparable harm to the public. *See National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Even where private substitutes exist, state and local programs are often made available at no cost (such as public education) or are heavily subsidized (such as public transportation). As a result, disruption of these services especially threatens the most vulnerable citizens—low-income persons or those who have a special need for government support. The harms of public-sector labor breakdowns are thus difficult to predict or to control, and even short-term disruptions in particular services can have vast social and economic spillover effects.

B. In Responding to These Crises, States Looked to the Labor-Management Model That Had Already Proven Effective in the Private Sector under Federal Labor Law.

In the wake of these work stoppages, States sought to implement workforce-management strategies that would minimize the potential for interruption of government services.[7] *See, e.g.*, N.Y. Governor's

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[7] *See, e.g.,* Del. Code tit. 19, § 1301 (collective-bargaining system for public employees is designed "to protect the public by assuring the orderly and uninterrupted operations and functions" of government); Fla. Stat. § 447.201 (same); Iowa Code § 20.1 (same); Kansas Stat. § 75-4321(3) (same); Neb. Revised Stat. §§ 48-802, 81-1370 (same); N.Y. Civ. Serv. Law § 200 (same); Or. Rev. Stat. § 243.656(3) (permitting collective

Comm., *supra*, at 9, 42. In undertaking this task, States understandably sought guidance in solutions that had already proven effective in minimizing labor unrest in the private sector—that is, by permitting employees to select an exclusive representative to deal with management.[8] In fact, nearly every State has adopted the exclusive-representation model that Congress permitted for private employees. See Appendix. Many States did so only after careful study by expert commissions charged with examining the underlying reasons for public-sector labor unrest and devising appropriate solutions.[9]

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bargaining safeguards "the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest"); Vt. Stat. Ann., tit. 3, § 901 (state employees' labor relations act aims "to protect the rights of the public in connection with labor disputes").

[8] *See, e.g.*, Harry Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885, 932 (1973) (noting "accelerating" trend among States towards using "private sector principles to guide the development of labor relations in the public sector"); Russell Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 Mich. L. Rev. 891, 897, 899, 901, 904 (1969) (noting that various state commissions relied on NLRA and other private-sector models in offering recommendations for public-sector labor relations policy in the State).

[9] *See, e.g.*, Milton Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission, 1966-1967*, 21 Indus. & Lab. Rel. Rev. 541, 549 (1968); *see also* Conn. Interim Comm'n to Study Collective Bargaining by Municipalities, *Final Report* 7-8 (1965); Md. Dep't of Labor, *supra*, at 3-6; Mass. Legis. Research Council, Report Relative to Collective Bargaining and Local Government Employees 8-11 (1969); Mich. Advisory Comm. Pub. Emp. Relations, *Report to Governor* (1967), *reprinted in* Gov't Emp. Relations Report, No. 181 (Feb. 28, 1967); N.J. Pub. & Sch.

1. An exclusive representative can provide services in the workplace that reduce labor unrest and yield other benefits for employers.

As in the private sector, exclusive representation can advance a public employer's interest in maintaining workforce stability by providing services to workers that minimize labor unrest. One such service, of course, is collective bargaining. Giving workers a voice in the agreement that will govern the terms and conditions of their employment reduces the likelihood that they will resort to strikes and work stoppages to achieve their demands.[10] Another such service is "grievance adjustment." *See Abood*, 431 U.S. at 225-26. Grievance systems vary among workplaces, but the exclusive representative's central role in administering those systems does not. The union's involvement begins before any grievance is filed, by communicating directly with workers about their concerns in the workplace. The union-trained shop steward, who typically fills this role, thus "plays a vital role in effecting peaceful union-management relations" by serving as "a front-line troubleshooter."

Emps.' Grievance Procedure Study Comm'n, *Final Report* 6, 15-17 (1968); N.Y. Governor's Comm., *supra*, at 34-35, 41-42; Pa. Governor's Comm., *supra*, at ii, 1.

[10] *See, e.g.*, Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 530 (1994) (finding strike incidence highest where parties have "neither a duty to bargain nor dispute-resolution procedures"); Richard Freeman & James Medoff, *What Do Unions Do?*, at 7-10 (1984) (articulating "voice" function of union representation).

Carlton Snow & Elliot Abramson, *The Dual Role of the Union Steward: A Problem in Labor-Management Relations*, 33 Syracuse L. Rev. 795, 795 (1982). The steward investigates worker complaints, organizes and documents them, and then initially presents worker grievances to management. *See* AFSCME, *Steward Handbook* 21-39 (2013).[11] The union also typically provides representation throughout the grievance process. Professional union staff appear with the worker for meetings with management and prepare written submissions and oral presentation on the worker's behalf. If the dispute proceeds to formal arbitration or judicial proceedings, the union representative provides services similar to those that an attorney would provide in traditional civil litigation.

Union participation in the grievance process is an obvious benefit to workers. It increases the likelihood of a positive outcome, relieves the worker of a significant financial burden, and provides support through what can be a stressful experience.

But States' experiences show that a union's participation in grievance adjustment is also a significant benefit for employers. The existence of an advocate for workers who is independent of management means that workers are likely to communicate their concerns more freely, which advances organizational efficiency by reducing employee turnover and

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[11] *See also* Paul Clark, *The Role of the Steward in Shaping Union Member Attitudes toward the Grievance Procedure*, 13 Lab. Stud. J. 3, 3-6 (Fall 1988); Glenn Miller & Ned Rosen, *Members' Attitudes Toward the Shop Steward*, 10 Indus. & Lab. Rel. Rev. 516, 517 (1957) (noting steward's responsibility to "convey information to the members" and to convey "to the officers the attitudes and point of view of members").

promoting workplace productivity. *See* Freeman & Medoff, *supra*, at 103-07, 169; *see also* E. Edward Herman, *Collective Bargaining and Labor Relations* 283-86 (3d ed. 1992). Employers benefit from facing a single advocate, whose experience with the workplace and institutional knowledge of the collective-bargaining agreement help facilitate timely and satisfactory dispute resolution. And by serving as the gatekeeper for worker disputes, a union alleviates the administrative burden of organizing, prioritizing, and raising issues in the workplace that would otherwise fall to the employer.

In addition to its role in the grievance process, an exclusive representative provides important services to workers and employers alike through its day-to-day administration of the collective-bargaining agreement. This may sometimes occur through formal means, such as by participating in joint labor-management committees formed under the auspices of a collective-bargaining agreement. (*E.g.*, J.A. 143-144.) In the experience of many States, such committees are an important and effective tool for improving public services. *See, e.g.*, U.S. Dep't of Labor Task Force on Excellence in State and Local Government through Labor-Management Cooperation, *Working Together for Public Service: Final Report*, i, 2 (1996) ("*Task Force Report*").[12] For instance, in Connecticut, a labor-management committee created a workplace safety

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[12] *See also* E. Edward Herman, *Collective Bargaining and Labor Relations* 311-12 (2d ed. 1987); Freeman & Medoff, *supra*, at 169; *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291-92 (1983) (recognizing state's "legitimate interest" in system of exclusive representation because it ensures that decisions by public employers will be based on "majority view" of its employees).

program that reduced workers' compensation expenses by five-million dollars through a forty-percent reduction in workplace injuries. *Id.* at 15. In Seattle, municipal government officials and a union of public-employee sewer workers worked collaboratively to identify a number of significant cost savings in the maintenance and repair of the City's underground transit tunnel, allowing the city to achieve concrete cost savings while also improving the quality of its transportation infrastructure. *Id.* at 19-20. And in New York City, local government and the sanitation workers' union negotiated to reduce the number of sanitation workers operating a sanitation truck, permitting the city to lower its labor costs by adopting cost-saving technologies. Lewin, *supra*, at 17. Indeed, particularly when faced with a looming economic crisis, government and unions have worked together to develop solutions that are mutually beneficial and ensure the continued provision of indispensable government services.

Administering the collective-bargaining agreement also involves a full range of informal services that the union provides in the workplace every day. These services include core human-resource functions like: (i) advising employees about their pay, benefits, or other contract rights, through published union bulletins and in in-person meetings; (ii) communicating with management to resolve errors in the processing of employee benefits, such as incorrect payroll deductions, leave accruals, or medical benefits reimbursements; (iii) reviewing management's day-to-day personnel decisions, such as setting shift schedules and granting leave requests, for compliance with the collective-bargaining agreement; and (iv) coordinating workplace inspections and worker health and safety

trainings mandated by law or the collective-bargaining agreement. The union's informal support of workers in the workplace plays an important role in improving their day-to-day experience and reducing the possibility that daily resentments will metastasize into full-scale labor unrest.

2. Many States have determined that agency fees help them secure the full benefits of exclusive representation.

In sum, an exclusive representative provides a wealth of services beyond contract bargaining, and a public employer could rationally conclude that those services can be an important ingredient in minimizing labor unrest and assuring a stable and effective public workforce. To ensure that an exclusive representative is able to provide its services in the workplace, many States' laws permit public employers—state or local—to include agency-fee arrangements in their collective-bargaining agreements. See Appendix. These laws typically do not *require* any public employee to pay an agency fee, or *require* any public employer to include an agency-fee arrangement in its contracts. Rather, States that have enacted such measures have decided to give government employers the flexibility to make that choice based on their own circumstances.

As those States have recognized, agency fees can be important to developing a collaborative labor-management relationship that promotes labor peace and ensures the delivery of high-quality services. First, agency fees are an effective way to address the free-rider problem long recognized to exist in this context. *See, e.g.*, *Street*, 367 U.S. at 765-66.

A union needs significant resources to provide the full range of workplace services that States deem helpful for minimizing labor unrest. *See Abood*, 431 U.S. at 221 (recognizing that unions require "[t]he services of lawyers, expert negotiators, economists, and a research staff" to negotiate and administer a collective-bargaining agreement). But experience shows that many employees—even employees who would otherwise join the union—will choose not to pay for such services if they have the option to receive them without charge.[13] This free-rider problem is particularly acute for governments with a history of labor unrest, as it erodes the union's ability to provide the very services that government deems important to securing labor peace. State experiences show that a well-funded union is a more stable advocate for workers and that dealing with such a partner "lead[s] to greater labor peace and stability." Md. Dep't of Labor, *supra*, at 19.

Second, free-riding may itself create labor unrest, in light of the "resentment spawned by 'free riders.'" *Beck*, 487 U.S. at 750. Without agency fees, union members would be required to pay more in union dues—and take home less pay than their colleagues—to subsidize the cost of providing workplace services to non-members. Such inequities create divisions in the workplace that corrode cohesion and morale. *See Ellis v. Railway Clerks*, 466 U.S. 435, 452 (1984). Agency fees eliminate this problem by ensuring that no

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[13] *See* Richard Kearney & Patrice Mareschal, *Labor Relations in the Public Sector* 79 (5th ed. 2014); *see also* Jeffrey Keefe, *On* Friedrichs v. California Teachers Association*: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation* 4 (Econ. Pol'y Inst. Briefing Paper No. 411, 2015).

employees receive "the benefits of union representation without paying for them." *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976).

Furthermore, agency fees address the problems of free-riding with only minimal impact on workers' rights of expression and association. Agency-fee arrangements do not require any worker to join a union or donate to a union's political or ideological activities. Nor do they restrict an employee's speech in any way. An employee remains free to speak against a union's political agenda or negotiating positions, and to oppose the government officials responsible for negotiating the union's contract. Agency fees merely require an employee to pay for services rendered. Thus, in practice, Amici States' experience is that the "grievous First Amendment injury," Pet. Br. 12, of which petitioner warns is not a valid practical concern.

Petitioner argues that an exclusive representative does not need mandatory agency fees to function because it can generate sufficient operating funds through other means. *See* Pet. Br. 37-43. The evidence is to the contrary. See *supra* n.13. In any event, this argument fails to recognize that—based on their different experiences—jurisdictions can reasonably disagree about an exclusive representative's proper role in the workplace and the appropriate method to fund those activities.

For example, federal law permits federal public-sector workers to elect a union to serve as their exclusive representative without any attendant requirement that workers join or financially support the union, but that law also severely restricts the scope of issues that can be collectively bargained, and exempts key topics that would be covered by broader

state collective-bargaining regimes, such as wages and number of employees. *See* 5 U.S.C. § 7106(a)(1); *see also Navy Charleston Naval Shipyard v. Federal Labor Relations Auth.*, 885 F.2d 185, 187 (4th Cir. 1989). Having prescribed a restricted role, a jurisdiction could rationally conclude—as does the federal government—that agency fees are not necessary to guarantee the exclusive representative's proper functioning. This is especially true because the federal government funds union activities through alternate means, for instance by compensating federal employees for time spent performing union-related functions. *See* 5 U.S.C. § 7131; *see also* U.S. Office of Pers. Mgmt., *Official Time Usage in the Federal Government, Fiscal Year 2014*, at 3 (2017).

Likewise, many jurisdictions with so-called "right-to-work" laws—that is, laws permitting exclusive representation but prohibiting mandatory agency fees—lack the history of labor unrest and disruption to government services that many States experienced before *Abood*. *See* Kearney, *supra*, at 65. A jurisdiction that has not experienced a history of public-sector labor unrest could rationally decide not to fund an exclusive representative's services through mandatory agency fees. But that policy choice does not refute the benefits of different policy choices that other jurisdictions have made based on their own different experiences. Even jurisdictions that do not authorize agency fees for most public-sector workers recognize that a different policy might be appropriate in certain circumstances. For instance, Michigan and Wisconsin prohibit agency fees for some public unions but exempt local police and firefighter unions from that prohibition as a matter of public safety. *See* Mich. Comp. Laws § 423.210(3)-(4); Wis. Stat. §§ 111.81(9),

111.845, 111.85; *see also* Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011) (noting Wisconsin governor's comment, in enacting the exemption for public safety employees, that "there's no way we're going to put the public safety at risk"). Thus even the practices of petitioner's own amici call into question petitioner's proposed one-size-fits-all approach.

Abood confirmed that States should have the leeway to adopt the labor-relations systems best suited to their individual circumstances and policy judgments. And States have relied on that flexibility. States have enacted more than one hundred statutes governing state and local labor relations, augmented by local ordinances, court decisions, attorney general opinions, and executive orders. *See* Kearney & Mareschal, *supra*, at 64-66.

Petitioner attempts to deprive States, and ultimately voters, of the ability to judge for themselves what labor-management policies are best suited for their public workforces. States like Illinois authorize agency-fee arrangements because a majority of duly elected representatives determined that affording government employers that flexibility was sound policy. Indeed, legislatures in Michigan and Wisconsin—two of petitioner's amici—also decided that, in some situations, public employers must have the ability to include agency-fee arrangements in their collective-bargaining agreements. This Court should view skeptically the efforts of these States and of petitioner himself to subvert the democratic decisions of voters by seeking to constitutionalize a contrary policy of their own preference.

C. Petitioners' *Amici* Misrepresent the Role of Public-Sector Collective Bargaining in Municipal Bankruptcies.

The States supporting petitioner attempt to justify a constitutional ban on agency fees by claiming that public-sector collective bargaining creates heightened risks of municipal bankruptcy. Br. of Amici Curiae States of Michigan, et al. in Support of Pet. ("Pet. States Amici") 11-19. There is, however, no clear correlation between collective bargaining and a municipality's fiscal health.

First, the vast majority of municipalities across the country have permitted collective bargaining for public-sector employees since the mid-1970s, *see* Kearney & Mareschal, *supra*, at 64-66, but only a very small percentage of municipalities—two-hundred-and-sixty-four in total—have filed for bankruptcy after that time, *see* Chapman & Cutler, LLP, *Primer on Municipal Debt Adjustment—Chapter 9: The Last Resort for Financially Distressed Municipalities*, app. C-1 (2012) (municipal bankruptcies between 1980 and 2012). And a number of those bankruptcies occurred in States that do not permit collective bargaining by state and local government employees or severely restrict it. Texas, for example, ranks third among all States in municipal bankruptcies but does not permit public-sector collective bargaining except by police or firefighters. *See id.* at app. C-2; *see also* Kearney & Mareschal, *supra*, at 66. There is thus nothing to support amici's speculation that it is *collectively bargained* public-sector employee benefits that drive municipal bankruptcies.

Second, municipal bankruptcies occur as a result of a complex mix of factors, often unique to each

locality's particular history and circumstances, and cannot be explained simply as the product of high public-sector labor costs. Indeed, it is traditionally a decrease in revenues that causes a municipality to seek bankruptcy protection. The bankruptcy of Detroit, for instance, is typically attributed to a myriad of factors that depressed municipal tax receipts, such as declining population, poor economic performance, and reductions in state financial support. *See, e.g.*, Wallace Turbeville, *The Detroit Bankruptcy* 13-21, 33-34 (Dēmos Rep. 2013). And a similar story is true in Stockton and San Bernadino, California, whose financial distress and ultimate bankruptcies were driven largely by a unique vulnerability to the "double whammy of unbridled speculation, followed by steep losses of property value" as a result of the 2008 recession. Tracy Gordon et al., *Exuberance & Municipal Bankruptcy: A Case Study of San Bernardino, Stockton & Vallejo, CA* 15-16 (Goldman Sch. Pub. Pol'y Working Paper Series May 2017 draft).[14] Amici's simplistic narrative gloss that high public-sector labor costs cause municipal bankruptcies thus fails to grapple with—and indeed purposely obscures—the diverse causative factors that produced these complicated fiscal incidents.

Amici's reliance on the purported "public impact" of the cost of public-employee pension plans is also misplaced. *See, e.g.*, Pet. States Amici 13. All States—regardless of whether they authorize collective

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[14] *See also* Sydney Evans et al., *How Stockton Went Bust: A California City's Decade of Policies and the Financial Crisis That Followed* 2 (Cal. Common Sense. Rep. June 2012); The Pew Charitable Trusts, *The State Role in Local Government Financial Distress* 9-11 (July 2013).

bargaining in the public sector—establish the terms and conditions of their public-employee benefit plans by statute. It is the legislature, and not unions, that sets the scope of public-employee pension benefits.

II. Petitioner's Constitutional Challenge Should Be Rejected.

Petitioner's attempt to avoid paying his fair share for the services of his exclusive representative is grounded in two mischaracterizations of the nature and effect of agency fees. First, petitioner obscures the fact that agency-fee requirements are conditions of public employment that advance the government's interest in managing its workforce. Second, petitioner confuses his objection to funding his exclusive representative's collective-bargaining activities with a broader challenge to all of the services that an exclusive representative provides.

A. The First Amendment Affords Public Employers Flexibility to Manage Their Workforces.

Petitioner's First Amendment challenge rests centrally on the premise that government may not require a person to support speech absent a compelling interest that is furthered by the narrowest means possible. *See* Pet. Br. 36. But this characterization obscures the fact that agency-fee arrangements are negotiated by the government *acting as an employer to manage its public workforce*. Contrary to petitioner's contention, such a condition of employment is not subject to "strict" or "exacting" scrutiny under the First Amendment.

This Court has long recognized that the First Amendment permits States to adopt reasonable

workforce-management policies to promote effective government operations, even if those policies impact a public employee's First Amendment rights. *See, e.g., Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598-600 (2008); *Garcetti*, 547 U.S. at 417-20; *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality op.). As this Court has explained, the Constitution allows the government flexibility to fulfill its "'mission as employer,'" *Engquist*, 553 U.S. at 598 (quoting *Waters*, 511 U.S. at 674-75), and does not require that a government's employment-related measures be "narrowly tailored to a compelling government interest," *Waters,* 511 U.S. at 674-75; *see also National Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 153-55 (2011).

"[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate" and the government acting "to manage its internal operation[s]." *Engquist,* 553 U.S. at 598 (alteration and quotation marks omitted); *see also Connick v. Myers*, 461 U.S. 138, 143 (1983) (recognizing "the common sense realization that government offices could not function if every employment decision became a constitutional matter"). First, "[t]he government's interest in achieving its goals as effectively and efficiently as possible" commands greater weight, being "elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 U.S. at 675 (plurality op.). Second, the government's "reasonable predictions of disruption" are entitled to "substantial weight . . . even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign [the Court's] review of legislative

predictions of harm is considerably less deferential." *Id.* at 673.

This Court has on many occasions confirmed that the First Amendment is not a mandate for lesser public efficiency. The Court has explained that when an individual "enters government service," he or she "must accept certain limitations on his or her freedom," including limitations that would be imposed in a private employment setting. *Garcetti*, 547 U.S. at 418. These limitations may and often do restrict speech or associational activities that the government could not limit outside of the employment relationship. *See, e.g.*, *Connick*, 461 U.S. at 141 (rejecting employee claim that termination for views expressed in questionnaire distributed to coworkers violated First Amendment); *Public Workers v. Mitchell*, 330 U.S. 75, 99, 101 (1947) (upholding provision of federal statute prohibiting federal employees from active participation in political management or political campaigns).

Abood's holding—that public employers may adopt a model of collective bargaining that utilizes agency fees in support of exclusive representation—is fully consistent with these principles and with the decisions in which the Court has applied them. *Abood* recognizes that the task of crafting a workable labor-relations system is complex and difficult, and requires balancing numerous potentially conflicting interests in areas where there is widespread debate and no clear answer. *Abood* accordingly does not mandate that any State enact any particular labor-relations law. It leaves States free to devise systems based on their own history and particular policy choices, and it gives voters in each State the ultimate say over changes or amendments to labor policy. *See* 431 U.S. at 224-25 & n.20.

The federal government's recent change of heart is strong proof that this Court should not constitutionalize one approach to public workforce management. For decades, the federal government defended *Abood* and the principle that the First Amendment affords States flexibility to adopt reasonable workplace management policies, even if federal policy was to the contrary. Now, the federal government has apparently changed its mind. But the strength of *Abood*—and of our federal system—is that it creates space for this kind of disagreement. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). States whose experiences show the value of exclusive bargaining funded by mandatory agency fees should not be constitutionally bound to the federal policy currently in vogue.

B. Petitioner's Challenge Is Overbroad Because It Encompasses Agency Fees for Union Services to Which He Does Not Object.

Petitioner's First Amendment challenge conflates an exclusive representative's collective-bargaining activities—which petitioner challenges as unduly political—with the range of other workplace-related functions that an exclusive representative performs. Petitioner's request for a judgment categorically prohibiting the collection of agency fees for any purpose is therefore overbroad.

This Court recognized in *Abood* that requiring public employees to pay agency fees to cover the costs of an exclusive representative's services could impact employees' First Amendment rights. *See* 431 U.S. at 222. And the Court made clear that government's

interest as an employer justified this First Amendment injury only so long as those fees were not used for "ideological causes not germane to [the exclusive representative's] duties as collective-bargaining representative." *Id.* at 235; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). Petitioner seeks in effect to revisit that balancing. Thus, he alleges that he objects to the "positions that AFSCME advocates for in collective bargaining" (J.A. 87) and argues that "bargaining with the government is political speech," Pet. Br. 10-11. Petitioner's amici adopt this line of attack, arguing that an exclusive representative's collective-bargaining activity "necessarily implicates matters of public policy." Br. for the United States as Amicus Curiae Supporting Pet. 15.

But even if this characterization of public-sector collective bargaining were accurate—and it is not, *see, e.g.*, AFSCME Resp. Br. 42-45—petitioner's objection to funding his exclusive representative's collective-bargaining activities would not justify his request for a ruling that, as a matter of law, "public employees cannot be forced to pay any union fees whatsoever," Pet. Br. 61. As discussed above (*supra* Point I.B) an exclusive representative does more than collectively bargain on behalf of workers; the union can provide a range of services in the workplace that help to minimize labor unrest and promote stability in the workforce. Thus, even if petitioner can prove on remand the allegation that his exclusive representative's collective-bargaining activities are unduly political, that would say nothing about the permissibility of collecting agency fees to cover other expenses of his exclusive representative, which petitioner does not label "political speech." *See Abood*, 431 U.S. at 236

(political nature of non-chargeable expenses is a fact issue); *see also Lehnert*, 500 U.S. at 513.

Petitioner contends that adjusting grievances "is just as political an act as bargaining for that deal." Pet. Br. 14. But petitioner's complaint does not frame an objection to—or even mention—his exclusive representative's grievance-resolution activities. (*E.g.*, J.A. 87.) And petitioner's brief does not make a serious effort to substantiate his conclusion that the range of activities encompassed by "grievance-adjustment" constitute speech on matters of public concern. *See Abood*, 431 U.S. at 232. Nor is that conclusion self-evident. There is simply no conceivable speech objection, for instance, to a union's receipt and investigation of a workplace-related complaint—steps taken long before the union even adopts a substantive position on the merits of a grievance. And this is true both for the vast majority of grievances, which implicate only the rights of the grievant, as well as for grievances with a potentially broader impact. What is more, grievance adjustment is only aspect of the non-collective-bargaining services that an exclusive representative provides. Petitioner does not articulate, either in his complaint or his brief in this Court, any First Amendment objection to paying for an exclusive representative's informal daily services—for instance, advising workers about dental benefits or inquiring with management about incorrect leave accruals for another coworker.

A public employer could conclude that these services, and the agency fees that support them, are necessary to meet the needs of its workforce and to ensure uninterrupted provision of public services. This Court should respect those judgments and preserve governments' flexibility to adopt labor-

management policies tailored to the unique circumstances confronting their workforces, as this Court did before in *Abood*.

CONCLUSION

This Court should decline to overrule *Abood*.

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Appendix

Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative*

Alabama	No statutory authority
Alaska *Alaska Stat.*	*Public Employees* – §§ 23.40.100, **23.40.110**
Arizona	No statutory authority
Arkansas *Ark. Code Ann.*	*Teachers* – § 6-17-202
California *Cal. Gov't Code*	*Local Government Employees* – § **3502.5** *State Employees* – §§ 3515.5, **3515.7** *Public School Employees* – §§ 3543-3543.2, **3546** *Higher Education Employees* – §§ **3583.5**, **3584**
Colorado *Colo. Rev. Stat.*	*Public Mass Transportation System Employees* – §§ 8-3-104(12), 8-3-107

**Citations in bold indicate authorization for agency or fair-share fees. Some States combine authority for collective-bargaining and for fees in a single statutory provision.*

Connecticut *Conn. Gen. Stat.*	*Municipal Employees* – §§ 7-468 to 7-469 *State Employees* – §§ 5-271, **5-280** *Teachers* – § **10-153a** *Family Child Care Providers* – § **17b-705a** *Personal-Care Attendants* – § **17b-706b**
Delaware *Del. Code Ann.* *[tit.], [§]*	*Public Employees* – 19, §§ 1303-1304, **1319** *Police Officers & Firefighters* – 19, §§ 1603-1604 *Public School Employees* – 14, §§ 4003-4004, **4019**
District of Columbia *D.C. Code*	*Public Employees* – §§ **1-617.07**, 1-617.10, 1-617.11
Florida *Fla. Stat.*	*Public Employees* – § 447.307
Georgia *Ga. Code Ann.*	*Firefighters* – § 25-5-5 Collective-Bargaining Restriction on Teachers – § 20-2-989.10
Hawai‘i *Haw. Rev. Stat.*	*Public Employees* – §§ **89-3**, **89-4**, 89-8

Idaho *Idaho Code*	*Teachers* – § 33-1273 *Firefighters* – § 44-1803
Illinois *[ch.] Ill. Comp. Stat. [§]*	*Public Employees* – 5, § **315/6** *Educational Employees* – 115, §§ 5/3, 5/10, **5/11** *Home Care & Home Health Workers* – 20, § **2405/3**
Indiana *Ind. Code*	*Employees of Correctional Institutions* – § 11-10-5-5 *Employees of State Institutions* – § 12-24-3-5 *Employees of Soldiers' & Sailors' Children's Home* – § 16-33-4-23 *Employees of the Schools for the Blind and for the Deaf* – §§ 20-21-4-4, 20-22-4-4 *Employees of a School Corp. or Charter School* – § 20-26-5-32.2 *Teachers* – §§ 20-29-2-9, 20-29-5-2 *Some Local Public Safety Employees* – § 36-8-22-7
Iowa *Iowa Code*	*Public Employees* – § 20.16
Kansas *Kan. Stat. Ann.*	*Teachers* – § 72-5415

Kentucky *Ky. Rev. Stat. Ann.*	*City & Local Government Firefighters* – §§ 345.030, 345.040 *Local Government Police Officers* – §§ 67C.402, 67C.404 *Urban-County Police Officers, Firefighter Personnel, Firefighters & Corrections Personnel* – §§ 67A.6902, 67A.6903 ***Housing Auth. of Louisville v. Service Emps. Int'l Union, Local 557***, 885 S.W.2d 692, 696-97 (Ky. 1994) (upholding fair-share fees)
Louisiana	No statutory authority
Maine *Me. Stat. [tit.] [§]*	*Municipal Employees* – 26, §§ **629**, **963**, 965, 967 *State Employees* – 26, §§ **979-B**, 979-D, 979-F *University of Maine Employees* – 26, §§ 1023, 1025, 1026 *Judicial Employees* – 26, §§ **1283**, 1285, 1287
Maryland *Md. Code Ann., [subject]*	*State Employees* – State Pers. & Pens., §§ 3-301, 3-407, **3-502** *Teachers* – Educ. §§ 6-404, **6-407** *School Employees* – Educ. §§ **6-504**, 6-505, 6-509 *Family Child Care Providers* – Fam. Law § **5-595.3** *Independent Child Care Providers* – Health-Gen. § **15-904**

Massachusetts *Mass. Gen. Laws [ch.], [§]*	*Public Employees* – 150E, §§ **2**, 4, 5, **12** *Child Care Providers* – 15D, § 17 *Personal Care Attendants* – 118E, § 73
Michigan *Mich. Comp. Laws*	*Public Police & Fire Dep't Employees* – §§ 423.234, **423.210** *State Police Troopers & Sergeants* – § 423.274
Minnesota *Minn. Stat.*	*Public Employees* – § **179A.06**
Mississippi	No statutory authority
Missouri *Mo. Rev. Stat.*	*Public Employees* – §§ 105.510, **105.520; *Schaffer v. Board of Educ. of City of St. Louis***, 869 S.W.2d 163, 166 (Mo. Ct. App. 1993) (finding implicit authority for fair-share provisions in § 105.520) *Personal Care Attendants* – § 208.862
Montana *Mont. Code Ann.*	*Public Employees* – §§ **39-31-204**, 39-31-205, 39-31-305, **39-31-401**

Nebraska *Neb. Rev. Stat.*	*Public Employees* – §§ 48-816, 48-838 *State Employees* – § 81-1372
Nevada *Nev. Rev. Stat.*	*Local Government Employees* – § 288.160
New Hampshire *N.H. Rev. Stat. Ann.*	*Public Employees* – §§ **273-A:3**, 273-A:11; ***Nashua Teachers Union v. Nashua Sch. Dist.,*** 707 A.2d 448, 451-52 (N.H. 1998**)** (§ 273-A:3(I) permits negotiation of agency fees)
New Jersey *N.J. Stat. Ann.*	*Public Employees* – §§ 34:13A-5.3, **34A:13A-5.5**, **34:13A-5.6**
New Mexico *N.M. Stat. Ann.*	*Public Employees* – §§ **10-7E-9**, 10-7E-15 *Family Child Care Providers* – § 50-4-33
New York *N.Y. [subject] Law*	*Public Employees* – Civ. Serv. §§ 204, **208** *Child Care Providers* – Lab. § 695-d
North Carolina *N.C. Gen. Stat.*	Public-sector collective-bargaining restriction – § 95-98

North Dakota *N.D. Cent. Code*	*Meet-and-Confer Authorization for Teachers* – § 15.1-16-13
Ohio *Ohio Rev. Code Ann.*	*Public Employees* – §§ 4117.04, 4117.05, **4117.09**
Oklahoma *Okla. Stat. [tit.] [§]*	*Municipal Firefighters & Police Officers* – 11, § 51-103 *Rural Fire Protection District Firefighters* – 19, § 901.30-2 *School Employees* – 70, § 509.2
Oregon *Or. Rev. Stat.*	*Public Employees* – §§ 243.666, 243.672 *Home Care Workers* – §§ 410.612, 410.614 *Family Child Care Workers* – § 657A.430
Pennsylvania *Pa. Stat. [tit.], [§]*	*Public Employees* – 43, §§ **1102.3**, 1101.606 *Police Officers & Firefighters* – 43, § 217.1
Puerto Rico *P.R. Laws [tit.], [§]*	*Public Employees* – 3, §§ 1451b, 1451f, **1454a**

Rhode Island *R.I. Gen. Laws*	*State Employees* – §§ **36-11-2**, 36-11-7 *Employees, including Public Employees* – § 28-7-14 *Municipal Firefighters* – § 28-9.1-5 *Municipal Police Officers* – § 28-9.2-5 *Teachers* – § 28-9.3-3; ***Town of North Kingstown v. North Kingstown Teachers Ass'n***, 110 R.I. 698, 706 (1972) (fair-share fees permissible) *Municipal Employees* – § 28-9.4-4 *State Police* – § 28-9.5-5 *Statewide 911 Employees* – § 28-9.6-5 *State Correctional Officers* – § 28-9.7-5 *Family Child Care Providers* – §§ 40-6.6-2, 40-6.6-4
South Carolina	Public sector collective bargaining restriction
South Dakota *S.D. Codified Laws*	*Public Employees* – § 3-18-3
Tennessee *Tenn. Code*	*Meet and Confer Authorization for Local Public-School Teachers* – § 49-5-608

Texas *Tex Gov't Code Ann.*	Public-sector collective-bargaining restriction – § 617.002
Utah *Utah Code Ann.*	*Firefighters* – § 34-20A-4
Vermont *Vt. Stat. Ann.* *[tit.], [§]*	*State Employees* – 3, §§ **903**, 941 *Judiciary Employees* – 3, §§ 1011, **1012** *Teachers & Administrators* – 16, §§ **1982**, 1991 *Independent Direct Support Providers* – 21, § **1634** *Municipal Employees* – 21, §§ **1722**, 1723, **1726**, 1734
Virginia *Va. Code Ann.*	Public sector collective bargaining restriction – § 40.1-57.2

Washington *Wash. Rev. Code*	*State Employees* – §§ **41.80.50**. 41.80.080, **41.80.100** *Local Government Employees* – §§ 41.56.100, **41.56.113**, **41.56.122** *School Employees* – §§ 41.59.090, **41.59.100** *Community College Employees* – §§ **28B.52.025**, 28B.52.030, **28B.52.045** *Marine Employees* – §§ 47.64.011, 47.64.135, **47.64.160** *Port Employees* – §§ 53.18.015, 53.18.050 *Long-Term Care Workers* – § 74.39A.270
West Virginia	No statutory authority
Wisconsin *Wis. Stat.*	*Public Safety Officers* – §§ **111.81**, 111.82, **111.85**, 111.825, 111.83
Wyoming *Wyo. Stat. Ann.*	*Firefighters* – § 27-10-103

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 OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 55 national and international labor organizations with a total membership of 12.5 million working men and women.[1] This case addresses the constitutionality of contract clauses that require public employees who benefit from union representation to share the costs of negotiating and enforcing their collective bargaining agreements. A number of AFL-CIO affiliates represent public employees and negotiate collective bargaining agreements containing clauses that require the covered employees to financially support collective bargaining.

SUMMARY OF ARGUMENT

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that public employees may be compelled to subsidize their union representative's participation in the collective bargaining system by which their terms of employment are set. The Court also held that employees may not be compelled to subsidize their union's political or ideological ac-

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[1] Counsel for the petitioner and counsel for the respondents have consented to the filing of *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

tivities unrelated to collective bargaining. The plaintiff challenges the distinction drawn in *Abood* and maintains that compelled subsidization of collective bargaining activities is indistinguishable for purposes of First Amendment analysis from compelled subsidization of political or ideological speech unrelated to collective bargaining.

Abood is one in a long line of compelled-subsidy cases decided by this Court. The compelled-subsidy cases involve a variety of situations in which the government mandates that individuals participate in an association for the purpose of advising the government on a program affecting those individuals. The compelled-subsidy analysis employed in those cases allows the government to require that members of the advisory association financially subsidize the association's participation in the government program. The fact that the association's representation of the members' interests often involves speech directed to the government does not make the compelled subsidization a violation of the First Amendment, because the subsidized speech is germane to the legitimate government program that justified mandating the formation of the association in the first place.

In challenging the distinction drawn in *Abood*, the plaintiff ignores altogether the applicable compelled-subsidy analysis and instead relies solely on cases involving either compelled speech or compelled expressive association. The compelled-speech and compelled-association cases, however, are concerned with direct government interference with individuals' self-expression, either by compelling them to convey a particular message or by compelling

them to associate with others with whom they disagree in a way that affects their ability to convey their own message. Neither of those concerns arise in the compelled-subsidy cases, because individuals are not forced to convey any message nor are they personally associated with any message in a way that affects their ability to express themselves.

First Amendment concerns do arise in the compelled-subsidy context where the mandated association uses compelled subsidies to support speech that is unrelated to the government's regulatory program. To address this concern, the Court has held that compelled subsidization of association speech that occurs outside of the government program is permissible only to the extent that the governmental interests in compelling subsidization outweigh the First Amendment interests of association members who object to the speech. This Court's decisions regarding the use of agency fees to support union lobbying activities are an example of this. The Court has held that public employees may not be compelled to subsidize union lobbying activity except to the extent necessary to secure legislative ratification of a collective bargaining agreement. The plaintiff denies that there is any First Amendment difference between collective bargaining and union lobbying, but this Court's decisions explain the relevant differences and their significance for purposes of the First Amendment.

The plaintiff's objection to *Abood* is nothing less than a full-scale challenge to this Court's entire line of compelled-subsidy cases. By denying the distinction drawn in *Abood* between compelled subsidization of collective bargaining and compelled subsidi-

zation of political or ideological speech unrelated to collective bargaining, the plaintiff denies a distinction that underlies the decisions in all of the compelled-subsidy cases. In conducting an assault on this established aspect of the Court's First Amendment jurisprudence, the plaintiff makes no attempt to come to grips with the Court's compelled-subsidy analysis and instead relies upon a line of compelled-speech/compelled-association cases that address significantly different free speech concerns.

ARGUMENT

In *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 211 (1977), the Court held that requiring public employees to pay a service charge—or agency fee—to their union representative does not violate the First Amendment "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.* at 225. At the same time, the Court also held "that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" to the extent those "expenditures [are] financed from charges, dues, or assessments paid by employees who . . . object to advancing those ideas." *Id.* at 235-36.

The plaintiff in this case challenges "the basic distinction drawn in *Abood*," between " 'preventing compulsory subsidization of ideological activity by employees who object thereto' " and " 'requir[ing] every

employee to contribute to the cost of collective-bargaining activities.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986), quoting *Abood*, 431 U.S. at 237. It is the plaintiff's position that there is no such distinction and that requiring financial support for collective bargaining activities is no different in First Amendment terms than requiring financial support for ideological expression unrelated to collective bargaining.

In challenging the distinction drawn in *Abood*, the plaintiff calls into question not just the holding of that case but the holdings in all of this Court's "compelled-subsidy cases" in which "*Abood* and *Keller* [*v. State Bar of California*, 496 U.S. 1 (1990),] 'provide the beginning point for [the Court's] analysis.'" *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005), quoting *Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 230 (2000). "[T]he compelled-subsidy analysis" drawn from *Abood* and *Keller* "differs substantively" from the "compelled-speech" analysis on which the plaintiff relies in challenging *Abood*. *Id.* at 565 n. 8. Under the "compelled-subsidy" analysis, "an individual [may be] required by the government to subsidize a message he disagrees with, expressed by a private entity," to the extent that the message is "germane to the regulatory interests" of the government. *Id.* at 557-58.

There is no question that union communications "for the purposes of collective bargaining, contract administration, and grievance adjustment," *Abood*, 431 U.S. at 225, are "germane to the regulatory interests" of the government, *Johanns*, 544 U.S. at 558, in negotiating the terms of public employment. Thus,

under the applicable "compelled-subsidy analysis," the plaintiff's challenge to "the basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, fails.

I. COMPELLED SUBSIDIZATION OF A PRIVATE ASSOCIATION THAT HAS BEEN MANDATED IN ORDER TO FURTHER A LEGITIMATE GOVERNMENT INTEREST IS NOT A FORM OF COMPELLED SPEECH SUBJECT TO HEIGHTENED FIRST AMENDMENT SCRUTINY.

A. Compelled Subsidization of Private Speech that is Germane to Legitimate Government Regulatory Interests.

The compelled-subsidy cases involve various situations in which "compelled association . . . [is] justified by the [government's] interest in regulating" aspects of a particular population's activities or relationships. *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). The issue of "compelled association" arises where the government decides to allow "a large measure of self-regulation" by mandating association among members of the regulated community for the purpose of allowing them to advise on "regulation conducted by a government body." *Id.* at 12. For example, public employers frequently provide for employee input on their terms of employment through a system of exclusive representation. Or, to take another "substantial[ly] analog[ous]" example, state courts often require practicing lawyers to join an integrated bar association that "provide[s] specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 12 & 13.

In all of the compelled-subsidy cases, "there is some state imposed obligation which makes group membership less than voluntary" that is justified by "the legitimate purposes of the group [that are] furthered by the mandated association." *United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001). The advisory process inevitably involves speech by the association that is directed toward the government regulator, but compulsory subsidization of that advisory speech does not violate the First Amendment, so long as "objecting members [a]re not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *Id.* at 414.

The earliest compelled-subsidy cases involved collective-bargaining agreements that require covered employees to pay fees equal to union dues and integrated bar associations that require membership as a condition of practicing law. In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 235 (1956), the Court sustained the Railway Labor Act's authorization of union shop agreements against a First Amendment challenge on the ground that, although "[t]o require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course[,] Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce." Treating *Hanson* as controlling First Amendment authority, the Court later held that a state "may constitutionally require that the costs of improving the [legal] profession [with the advice of the integrated bar] be shared by the subjects and beneficiaries of the regulatory program" so long as the State "might reasonably believe"

that the requirement "further[s] the State's legitimate interests." *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961). *See also id.* at 849 (concurring opinion).[2]

When the Court returned to these two forms of compelled subsidization in *Abood* and *Keller*, it began to define the limits of what is constitutionally permissible. *Abood* held that a public employer may require its employees to subsidize the costs of collective bargaining on their behalf but not of "ideological activities unrelated to collective bargaining." 431 U.S. at 225-26 & 236. Applying *Abood* to the integrated bar, *Keller* held that a state may require practicing attorneys to subsidize only those "expenditures [that] are necessarily or reasonably incurred for the purpose of regulating the legal profession." 496 U.S. at 14. In *Keller*, the bar association argued that *Abood* should not apply, because it was possible to "distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more substan-

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[2] Seven Justices in *Lathrop* voted to affirm the decision of the Wisconsin Supreme Court upholding the constitutionality of the integrated bar—six on the basis of *Hanson*, 367 U.S. at 842 & 849. Justice Whittaker concurred on separate grounds. *Id.* at 865. Justice Black agreed that "the question posed" by the "integrated bar" is "identical to that posed" by the union shop, but he dissented on the ground that both are unconstitutional. *Id.* at 871. Only Justice Douglas disputed that the integrated bar and union shop presented analogous constitutional questions, and he maintained that the union shop, unlike the integrated bar, was constitutional based on "[t]he power of a State to manage its internal affairs by requiring a union-shop agreement." *Id.* at 879.

tial public interests." *Id.* at 13. The Court rejected that argument, explaining, "We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result." *Ibid.* Taken together, "*Abood* and *Keller* provide the beginning point for [the] analysis" in the "compelled-subsidy cases." *Johanns*, 544 U.S. at 559 (quotation marks and citation omitted).

"[T]he rule announced in *Abood* and further refined in *Keller*" was applied in reviewing the system by which producers advise the Secretary of Agriculture regarding marketing orders issued pursuant to Agricultural Marketing Agreement Act of 1937. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 473 (1997). *See also id.* at 478 (dissenting opinion) ("[A] proper understanding of *Abood* is necessary for the disposition of this case."). "The orders are implemented by committees composed of producers and handlers of the regulated commodity, . . . who recommend rules to the Secretary governing marketing matters such as fruit size and maturity," *id.* at 462, and "impose assessments on [producers] that cover the expenses of administering the orders," *id.* at 460. "Given that producers were bound together in the common venture" by the marketing orders, the Court held that "the imposition upon their First Amendment rights caused by using compelled contributions . . . was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program." *United Foods*, 533 U.S. at 414-15. Accordingly, "*Abood* and *Keller* would permit the mandatory fee if it were 'germane' to a 'broader regulatory scheme,'" *Johanns*, 544 U.S. at 558, quoting *United Foods*, 533 U.S. at 415, that was "judged by

Congress to be necessary to maintain a stable market," *United Foods*, 533 U.S. at 414.

In each of these situations, the government could have dispensed altogether with any "measure of self-regulation" and provided for unilateral "regulation conducted by a government body." *Keller*, 496 U.S. at 13. Public employers often unilaterally set the terms of public employment. And, even if some employee input were desired, the government could provide for "bargaining carried on by the Secretary of Labor," or some other publicly appointed figure, rather than representation by an independent labor union. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 552 (1991) (Scalia, J., concurring in part and dissenting in part), quoting *Machinists v. Street*, 367 U.S. 740, 787 (1967) (Black, J., dissenting). By the same token, "a state legislature could set up a staff or commission to recommend" rules governing the practice of law. *Lathrop*, 367 U.S. at 864. And, the Secretary of Agriculture could conduct his own "research and development projects" to determine the "rules . . . governing marketing matters," without the advice of "committees composed of producers and handlers." *Glickman*, 521 U.S. at 461-62.

In each instance, were the government to choose to seek advice from a source other than the affected individuals, it could obviously impose "a reasonable license tax," *Lathrop*, 367 U.S. at 865, to "require that the costs of [procuring the advice] be shared by the subjects and beneficiaries of the regulatory program," *Keller*, 496 U.S. at 8, without raising any serious First Amendment question. In the variety of different contexts addressed in the compelled-subsidy

cases, the Court has held that the government may likewise seek advice on its program from the affected group of individuals and may require the group to share the cost of giving that advice.

Finally, in considering a closely related "First Amendment challenge to a mandatory student activity fee imposed by . . . the University of Wisconsin System and used in part by the University to support student organizations engaging in political or ideological speech," the Court treated "[t]he *Abood* and *Keller* cases [as] provid[ing] the beginning point for our analysis." *Southworth*, 529 U.S. at 221, 230. The University could have financed the "program designed to facilitate extracurricular student speech" itself but instead chose to "charge its students an activity fee used to fund [the] program." *Id.* at 220-21. Nevertheless, applying "the constitutional rule" from "*Abood* and *Keller*," the Court held that "a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech of other students," based on the University's "determin[ation] that its mission is well served if students have means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Id.* at 231, 233.

The compelled-subsidy line of cases stands for the proposition that, so long as the state "might reasonably believe" that mandated association will further "a legitimate end of state policy," it "may constitutionally require that the costs of [association] should be shared by the subjects and beneficiaries of the regulatory program." *Lathrop*, 367 U.S. at

843. *Accord Southworth*, 529 U.S. at 233 ("If the University reaches this conclusion [that its mission is well served if students have the means to engage in dynamic extracurricular discussions], it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."). Thus, "using compelled contributions . . . in furtherance of an otherwise legitimate program" does not violate "the First Amendment rights" of those who are "required to pay moneys in support of activities that [a]re germane to the reason justifying the compelled association in the first place." *United Foods*, 533 U.S. at 414-15. *Accord Johanns*, 544 U.S. at 565 n. 8 (the First Amendment is violated only by compelled-subsidy of speech "unconnected to any legitimate government purpose").

B. The Reasoning of the Compelled-Speech Precedents Applies Only to Compelled Subsidization of Private Speech that is Not Germane to Legitimate Government Regulatory Interests.

The plaintiff maintains that compelled subsidization of a public sector union's core collective bargaining activities should be subjected to the same level of scrutiny as that employed in cases of "compelled speech" or "compelled association." Pet. Br. 19-20. However, the heightened level of First Amendment review in the cases on which plaintiff relies "relates to compelled *speech* rather than compelled *subsidy*." *Johanns*, 544 U.S. at 564-65 (emphasis in original). And, as the Court has explained, the First Amendment concerns regarding "compelled speech" or "compelled association" are not implicated in

"compelled subsidy" of private speech within a legitimate government program.

"[T]rue 'compelled-speech' cases" involve situations "in which an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns*, 544 U.S. at 557. This "line[] of precedent . . . exemplified by *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), stands for the principle that government may not force individuals to utter or convey messages they disagree with or, indeed, say anything at all." *Id.* at 573 (dissenting opinion).

The "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message," they "have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 20-21 (1986) (plurality opinion); accord, *id.* at 25 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers). "The compelled-speech violation in [the forced hosting or accommodation] cases, however,

resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63.

The First Amendment problems identified by the compelled-speech cases do not arise in the compelled-subsidy cases, because the mandated self-regulatory associations "impose no restraint on the freedom of any [individual] to communicate any message to any audience" and "do not compel any person to engage in any actual or symbolic speech." *Glickman*, 521 U.S. at 469. Nor do the mandated associations require any covered individual to take any action "that makes them appear to endorse the [subsidized] message." *Johanns*, 544 U.S. at 565 n. 8. In these very important regards, the types of mandatory association at issue in the compelled-subsidy cases are completely unlike partisan political patronage, which causes individuals to "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

"The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree." *Johanns*, 544 U.S. at 557. With regard to "speech with . . . content [that is] not germane to the regulatory interests that justified compelled membership," the Court has held that "making those who disagree[] with [the content] pay for it violate[s] the First Amendment." *Id.* at 558. This is so, because "being forced to fund someone else's private speech *unconnected to*

any legitimate government purpose violates personal autonomy." *Id.* at 565 n. 8 (emphasis added), citing *id.* at 557-58 ("discussing *Keller* and *Abood*"). This First Amendment concern is fully addressed by the rule "that the objecting members [a]re not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *United Foods*, 533 U.S. at 414. *See Southworth*, 529 U.S. at 231 ("In *Abood* and *Keller*, the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association.").[3]

The core holding of *Abood* is that public employees can be compelled to subsidize the cost of collective bargaining with their employer. The speech entailed in such collective bargaining is most certainly "'germane' to a 'broader regulatory scheme'" for establishing terms of public employment. *Johanns*, 544 U.S. at 558, quoting *United Foods*, 533 U.S. 415-16. Thus, compelled subsidization of collective bargaining is *not* an instance of employees "being forced to fund someone else's private speech unconnected to any legitimate government purpose." *Id.* at 565 n. 8. Accordingly, the core holding of *Abood* is fully consistent with this Court "compelled-subsidy analysis." *Ibid.*

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[3] This rule was applied in *Knox v. Service Employees*, 567 U.S. ___ (2012), in deciding "whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." Slip op. 1. *See id.* at 9-10 (discussing *United Food*'s treatment of "compulsory subsidies for private speech" that is unrelated to "a comprehensive regulatory scheme").

II. *ABOOD* REPRESENTS A SOUND APPLICATION OF COMPELLED-SUBSIDY ANALYSIS TO PUBLIC SECTOR COLLECTIVE BARGAINING.

The plaintiff advances two reasons that "*Abood* should be overruled":

> "[i] *Abood* was wrongly decided because bargaining with the government is political speech indistinguishable from lobbying the government; [ii] *Abood* is inconsistent with this Court's precedents that subject instances of compelled speech and association to heightened constitutional scrutiny." Pet. Br. 9.

The decisions in this Court's "compelled-subsidy cases," *Johanns*, 544 U.S. at 559, refute both of these assertions.

A. For Purposes of First Amendment Analysis, Collective Bargaining Over Terms of Public Employment is Not Equivalent to Lobbying.

"[T]he principal reason *Abood* was wrongly decided," according to the plaintiff, is that it failed to recognize that "bargaining with the government is political speech indistinguishable from lobbying the government." Pet. Br. 10-11. From the premise that public sector collective bargaining is indistinguishable from lobbying, the plaintiff draws the conclusion that "[a]gency fees thus inflict the same grievous First Amendment injury as would the government forcing individuals to support a mandatory lobbyist or political advocacy group." *Id.* at 12. The plaintiff's

argument rests on the understanding that "lobbying" encompasses any "meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those parties." *Id.* at 11.

By the plaintiff's lights, *all* of this Court's compelled-subsidy cases, not just *Abood*, involved "the government forcing individuals to support a mandatory lobbyist or political advocacy group." Pet. Br. 12. In *Keller*, "[t]he plan established by California for the regulation of the [legal] profession [wa]s for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar." 496 U.S. at 12. *Glickman* involved "committees composed of producers and handlers of the regulated commodity, appointed by the Secretary [of Agriculture], who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels." 521 U.S. at 462. And, in *Southworth*, the mandatory fee was imposed precisely in order to "support student organization engaging in political or ideological speech." 529 U.S. at 221.

In each of these situations, "the compelled contributions . . . did not raise First Amendment concerns" so long as the "compelled contributions" were "in furtherance of a legitimate program." *United Foods*, 533 U.S. at 415. At the point where "the legitimate purposes of the group were [not] furthered by the mandated association," however, "[a] proper application of the rule in *Abood* require[d] . . . invalidat[ion of] the . . . statutory scheme." *Id.* at 413-14. This Court's decisions in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and *Harris v. Quinn*, 573 U.S.

___ (2014), represent an application of this rule that squarely rejects the identity between public sector collective bargaining and lobbying drawn by the plaintiff.

In *Lehnert*, this Court distinguished "discussion by negotiators regarding the terms and conditions of employment" from "lobbying and electoral speech . . . concern[ing] topics about which individuals hold strong personal views." 500 U.S. at 521. The Court determined that "allowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present additional interference with the First Amendment interests of objecting employees," and on this ground held "that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. at 521-22 (internal quotation marks omitted). The Court explained that, "unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all." *Id.* at 521. The Court also noted that "[t]here is no question as to the expressive and ideological content" of lobbying in these fora, because the "policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." *Ibid.*

By contrast, the negotiation of a collective bargaining does not involve "public discourse [in] public fora open to all" and the subjects of bargaining are "limited to the workplace." *Lehnert*, 500 U.S. at 521.

Collective bargaining involves establishing the terms of employment controlled by the government through negotiations with designated executive branch representatives. *See* 5 ILCS 315/7. Thus, the collective bargaining activities that the employees are compelled to financially support typically "will not seek to communicate to the public or to advance a political or social point of view beyond the employment context." *Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 398 (2011).

The Illinois Public Labor Relations Act, for example, is typical of public sector bargaining laws in providing that in such "closed bargaining sessions" the government will "admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." *City of Madison Jt. School Dist, No. 8. v. Wisconsin Emp. Rel. Commn.*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring). *See* 5 ILCS 315. Such sessions are exempt from the Illinois Open Meetings Law. 5 ILCS 120/2(c)(2). And, what occurs at such sessions is exempt from public disclosure under § 7 of the Illinois Freedom of Information Act. 5 ILCS 140/7(1)(p). Illinois law thus shields collective bargaining from public disclosure in the same manner that it shields other types of commercial contract negotiations. *See, e.g.*, 5 ILCS 120/2(c)(5)("purchase or lease of real property") & (c)(7) ("sale or purchase of securities, investments, or investment contracts"); 5 ILCS 140/7(1)(h)("Proposals and bids for any contract, grant, or agreement") & (r)("records, documents, and information relating to real estate purchase negotiations"). *See City of Madison Jt. School Dist.*, 429 U.S. at 175 n. 6 (drawing a distinction of constitu-

tional significance between the school board's "open session where the public was invited" and "true bargaining sessions between the union and the board [] conducted in private").

Indeed, the holding of *Harris v. Quinn*, *supra*, rests entirely on the distinction between lobbying and collective bargaining drawn in *Lehnert*. In *Harris*, the Court determined that allowing compelled-subsidization of a "union [that] is largely limited to petitioning the State for greater pay and benefits," slip op. 32, rather than collective bargaining, would "amount[] to a very significant expansion of *Abood*," *id.* at 8-9. Based on the distinction between lobbying and bargaining, *Harris* "refuse[d] to extend *Abood*" to allow compelled subsidization of union representation that was effectively limited to lobbying. *Id.* at 39. Thus, while the majority opinion in *Harris* criticizes *Abood* in dicta, the holding of that case reinforces "the basic distinction drawn in *Abood*," between "'compulsory subsidization of ideological activity'" and "'requir[ing] every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

B. The Level of First Amendment Scrutiny Generally Applied in Cases of Compelled Speech and Compelled Association Does Not Apply to Compelled Subsidization of Core Collective Bargaining Activities.

The plaintiff more generally criticizes "*Abood*'s failure to apply [the] heightened scrutiny to agency fees" that often applies in cases of "compelled expressive and political association" or "compelled speech." Pet.

Br. 18-19. However, as we have explained in point I, "th[e] compelled-speech [analysis]" on which the plaintiff relies "differs substantively from the compelled-subsidy analysis" that applies to mandatory association in furtherance of a legitimate government program. *Johanns*, 544 U.S. at 565 n. 8.[4]

The compelled-subsidy analysis establishes that the government "may constitutionally require that the costs of [mandated association] should be shared by the subjects and beneficiaries of the regulatory program," so long as the government "might reasonably believe" a mandated system of self-regulation will further "a legitimate end of state policy." *Lathrop*, 367 U.S. at 843. The decision to set the terms of public employment through collective bargaining is certainly "a reasonable position, falling within the wide latitude granted the Government in its dealings with employees." *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134, 154 (2011) (quotation marks and citation omitted).

To begin with, there is not the slightest doubt that, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers [may be] required to associate with one another" by choosing an exclusive bargaining representative as "the legitimate purposes of the group [a]re furthered by th[at] mandated association." *United Foods*, 533 U.S. at

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[4] In determining whether "unions constitutionally may subsidize lobbying and other political activities with dissenters' fees," the Court has *not* applied exacting scrutiny but rather has balanced "the governmental interests underlying . . . union-security arrangements" against the "burden upon freedom of expression." *Lehnert*, 500 U.S. at 520 & 522.

414. There are strong practical reasons for allowing units of similarly situated employees to choose an exclusive representative in order to avoid "[t]he confusion and conflict that could arise if rival . . . unions, holding quite different views as to the proper [terms] each sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224.

In *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), the Court summarily affirmed a three-judge district court decision that had "rejected [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 278 (1984). As the Court explained, "it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process" leading to a collective bargaining agreement, because "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' See *Abood v. Detroit Board of Education*, 431 U.S. at 224." *Id.* at 291. *See also id.* at 315-16 (Stevens, J., dissenting in part) ("It is now settled law that a public employer may negotiate only with the elected representative of its employees, because it would be impracticable to negotiate simultaneously with rival labor unions.").

"The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones"

that "often entail expenditure of much time and money." *Abood*, 431 U.S. at 221. Precisely because "the union is obliged fairly and equitably to represent all employees . . ., union and nonunion, within the relevant unit," the state could reasonably conclude that requiring all represented employees to contribute "distribute[s] fairly the cost of the[representational] activities among those who benefit, and . . . counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222. On this ground, *Abood* determined that "the permissive use of an agency shop" was a reasonable method of financing exclusive representation. *Id.* at 229. *See also Lathrop*, 367 U.S. at 843 (the state "may constitutionally require that the costs . . . should be shared by the subjects and beneficiaries of the regulatory program").

To the extent that "[t]he reasoning of the[] compelled-speech cases has been carried over to certain instances in which individuals are compelled . . . to subsidize a private message," it has been applied to "invalidate[] the use of . . . compulsory fees to fund speech on political matters" that "was not germane to the regulatory interests that justified compelled membership." *Johanns*, 544 U.S. at 557-58. This application of that reasoning is reflected in "the basic distinction drawn in *Abood*," between "'preventing compulsory subsidization of ideological activity by employees who object thereto'" and "'requir[ing] every employee to contribute to the cost of collective-bargaining activities.'" *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

Abood expressly recognized that "compelled . . . contributions for political purposes" would be "an infringement of [employees'] constitutional rights." *Abood*, 431 U.S. at 234. Accordingly, the Court held that, while "a union [may] constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative . . ., such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Id.* at 235-36. While "*Abood* did not attempt to draw a precise line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities," *Lehnert*, 500 U.S. at 517, the Court has undertaken to do so with great care in subsequent decisions. *See*, *e.g.*, *Ellis v. Railway Clerks*, 466 U.S. 435, 448-57 (1984); *Lehnert*, 500 U.S. at 518-32; *Locke v. Karass*, 555 U.S. 207, 217-21 (2009).

The plaintiff cannot deny that the use of compulsory fees to support collective bargaining over economic terms of employment is "the logical concomitant of a valid scheme of economic regulation." *United Foods*, 533 U.S. at 412. Nor can he deny that, for the most part, the "basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, protects him from "being forced to fund someone else's private speech unconnected to any legitimate government purpose." *Johanns*, 544 U.S. at 565 n. 8. Rather, the plaintiff challenges *Abood* primarily on the grounds that, at the margins, "it is difficult to distinguish chargeable from nonchargeable expenses under *Abood*," singling

out for criticism what he refers to as "[t]he amorphous *Lehnert* and *Locke* tests." Pet. Br. 26 & 27.

Whatever one may think about the Court's subsequent attempts to "draw a precise line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities," *Lehnert*, 500 U.S. at 517, so long as "the extreme ends of the spectrum are clear," the fact that "where the line falls . . . will not always be easy to discern," *Keller*, 496 U.S. at 15, provides no basis for overruling *Abood*'s core holding that public sector agency shop agreements are constitutional "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225. *See Southworth*, 529 U.S. at 232 (upholding compelled subsidization of student speech even though "the vast extent of permitted expression makes the test of germane speech inappropriate").

There is no serious question that, with respect to negotiating economic terms of employment, "the case for requiring [employees] to speak through a single representative would be quite strong," as would be "the case for requiring all [employees] to contribute to the clearly identified costs of collective bargaining," and that "the concomitant limitation of First Amendment rights would be relatively insignificant." *Abood*, 431 U.S. at 263 n. 16 (concurring opinion). While the plaintiff may object to financially supporting bargaining over economic issues, such as, "wage increases" or "health insurance," Pet. Br. 12, he makes no effort to show that the use of agency

fees to support such bargaining is "not germane to the regulatory interests that justif[y] compelled [participation in public sector collective bargaining]." *Johanns*, 544 U.S. at 558. *See* Pet. Br. 12-14 (describing the various subjects of bargaining). *Abood*'s core ruling regarding compelled-subsidy of the cost of collective bargaining thus fits comfortably within this Court's First Amendment jurisprudence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix No. 1 of Materials Submitted by John Craig and Sara Slinn, Canadian Charter of Rights of Freedoms Excerpt

***The Constitution Act, 1982,* Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Appendix No.2 of Materials Submitted by John Craig and Sara Slinn:
Barrett & Craig, "Collective Bargaining, Labour Law, and the Charter in the Supreme Court of Canada, 1987 to 2017"

Collective Bargaining, Labour Law, and the *Charter* in the Supreme Court of Canada, 1987 to 2017

Steven Barrett & John Craig[*]

This chapter provides an overview and analysis of the Supreme Court of Canada's shifting approach to the guarantee of freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*, as it applies to labour relations and collective bargaining. We focus on the Court's treatment of the question of whether section 2(d) includes constitutional protection for the right to organize, the right to collectively bargain, and the right to strike. While the Court's approach in applying the justificatory criteria under section 1 of the *Charter* to legislation it finds unconstitutional and the resulting remedial questions are also significant issues in considering the ambit of associational rights, this chapter is directed at the Court's delineation of the scope and content of section 2(d) itself.

In Part A, we trace the evolution of the Court's thinking as it relates to constitutional protection for organizing, bargaining, and strike activity. In our view, an understanding of the doctrinal development of the Court's understanding of section 2(d) is critical to any appreciation of the Court's present view, and how that view may evolve in future cases.

Part A begins with the initial judicial creation of a virtual "no-go zone" established by the 1987 freedom of association trilogy. This restrictive approach to the recognition of collective bargaining rights under section 2(d)

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was to last for almost fifteen years, but began to erode with a more expansive conception of the protection for union organizing activity in *Dunmore* (2001), and for collective bargaining itself in *Health Services* (2007). This growing recognition of a broader scope for section 2(d) in labour relations and collective bargaining was temporarily interrupted by a more cautious and reactionary pause in *Fraser* (2011), which sanctioned a separate and somewhat anemic collective bargaining regime for agricultural workers. However, four years later, in the 2015 trilogy, the Court returned to a broad and purposive conception of the scope of section 2(d) protection (particularly in *MPAO*, and in *SFL*, which extended section 2(d) protection to the right to strike). Most recently, however, some uncertainty has been created as to the precise contours of the right to bargain collectively by the Court's brief and cryptic reasons in *BCTF* (2017).

Part B then turns to an assessment of what we regard as three of the most important unresolved issues arising from the Supreme Court of Canada's revised approach to freedom of association in the labour relations and collective bargaining field: 1) the role of pre-legislative consultation in satisfying the section 2(d) requirement for a meaningful process of collective bargaining; 2) the current status of the substantial interference test for a violation of section 2(d); and 3) the impact of the Court's revised approach to section 2(d) on the law of forced association.

A. OVERVIEW OF THE SCC'S EVOLVING APPROACH TO SECTION 2(D)

1. 1987 Freedom of Association Trilogy

While section 2(d) applies to all associational activity, it has been most litigated, and its meaning most hotly contested, in its application to labour relations. In the first years after the enactment of the *Charter*, in what came to be known as the 1987 freedom of association trilogy, the Court was faced with three separate challenges to legislation interfering with fundamental components of the collective bargaining system. In the *Reference Re Public Service Employee Relations Act (Alta)* case,[1] the challenged legislation limited the right to strike for public sector workers. In *Retail, Wholesale and Department Store Union v Saskatchewan* (the *Saskatchewan Dairy Workers* case),[2] legislation ordering striking workers

1 [1987] 1 SCR 313 [*Alberta Reference*].

2 [1987] 1 SCR 460.

back to work was at issue. In the *Public Service Alliance of Canada v Canada* case,[3] the legislation under challenge overrode freely negotiated collective agreements and imposed wage controls. The three cases raised the question of whether section 2(d) provided constitutional protection for collective bargaining or the right to strike.

In the 1987 trilogy, the Supreme Court of Canada adopted a restrictive and narrow approach to the scope and content of the freedom of association guarantee, one departing from the broad and purposive approach the Court had articulated in relation to other *Charter* rights and freedoms.[4] In the trilogy, the Court ruled that freedom of association did not include a right to collective bargaining or strike. Rather, the freedom extended protection only to the right to form and join an association (what can be described as "formative activity"). In addition, some members of the Court, while rejecting protection for collective bargaining activity, recognized doctrinally that section 2(d) should extend to the right to engage collectively in those associational activities that were otherwise lawful when carried out by an individual.

While the four members of the Court's 4:2 majority had different reasons for rejecting an expansive reach for collective bargaining in the sphere of labour relations, they put forward four basic rationales in support of the conclusion that the *Charter* did not protect collective bargaining or the right to strike, namely:

a) the rights to bargain collectively and to strike were "modern rights" created by legislation, and were not the kind of "fundamental freedoms" that the *Charter* protected;
b) recognizing a right to collective bargaining would interfere with government regulation of labour relations, and the courts should defer to governments in the sensitive area of calibrating the balance of power between unions and employers;
c) section 2(d) was not intended to protect the "objects", goals or activities of association; and

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3 [1987] 1 SCR 424 [*PSAC*].

4 See, for example, in the section 2(b) context, the Supreme Court of Canada's 1989 decision in *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, dealing with the expression guarantee in section 2(b) of the *Charter*. There, the Court took a very broad approach to the content of section 2(d), rejecting a distinction between belief and action, and ruling that section 2(b) protects any activity intending to convey meaning, i.e., all expressive activity, with violent activity constituting the only exception. By contrast, the majority in the *Alberta Reference* held that there is no section 2(d) protection for purely or inherently associational activity, regardless of its nature or purpose.

d) those members of the Court who recognized that freedom of association protects activities that can be lawfully performed by an individual nonetheless held that there was no individual counterpart to the right to bargain or strike collectively.

The lead case with the most extensive reasoning in the 1987 trilogy was the *Alberta Reference* decision, although, given the importance of the issues, the plurality reasons of LeDain J (joined by Beetz and La Forest JJ) were somewhat concise. For these three judges, freedom of association essentially meant no more than the right to join together, and to form and constitute an association or union; the guarantee was not meant to extend in any way to the protection of any of its collective activities, including the right to strike or collectively bargain. According to LeDain J, section 2(d) protected only "the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal . . . ."[5]

From a policy perspective, these judges were concerned that, if section 2(d) protected some or all group activities, or those activities essential to an association's purposes, then this would potentially constitutionalize too great a range of activity simply because they were engaged in by two or more individuals. Under this approach, there was no basis for understanding freedom of association as safeguarding some independent or inherent value in group or collective activity. In short, since the right extended only to participating in the lawful activities of a trade union, the legislature was free to make any or all union activities illegal.

Justice LeDain also offered an additional policy basis for narrowly reading the section 2(d) guarantee, one specific to the labour relations context — namely, an appeal to the principle of judicial deference, which had been developed by the courts in administrative law review of labour decisions, and that LeDain J suggested was relevant as an aid to interpreting the scope of section 2(d). As LeDain J wrote:

> The rights for which constitutional protection are sought — the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer — are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the

5 *Alberta Reference*, above note 1 at 390–91.

> substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the *Legislature* has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.[6]

A fourth judge, McIntyre J, joined with LeDain J in holding that section 2(d) did not extend to the right to strike, although he articulated, at least in theory, a somewhat more liberal approach to the meaning of freedom of association. In this respect, McIntyre J would have expanded the scope of the freedom of association guarantee to certain associational activities, holding that if an individual has the right to pursue an activity then section 2(d) protected the individual's right to engage in the same activity with others. Applying this approach to the right to strike, however, McIntryre J concluded that there was no lawful or analogous individual counterpart to the right to strike. Therefore, it could not be said that by prohibiting the right to strike, the group or collective had been denied a right that an individual acting alone could lawfully exercise.[7]

At the same time, McIntyre J joined with LeDain J in rejecting altogether the notion that section 2(d) could extend protection to associational activity because it furthered or was essential to the goals or objects of an association. In McIntyre J's view, there was no basis for according:

> . . . an independent constitutional status to the aims, purposes, and activities of the association, and thereby confer greater constitutional rights upon members of the association than upon nonmembers. It would extend *Charter* protection to all the activities of an association which are essential to its lawful objects or goals, but, it would not extend an equivalent right to individuals. *The Charter* does not give, nor was it ever intended to give, constitutional protection to all the acts of an individual which are essential to his or her personal goals or objectives.[8]

Like LeDain J, McIntryre J also relied upon the need for judicial deference to the legislature in matters of labour relations, referring to the sensitivity, instability, and inherently dynamic nature of labour law; the

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6 *Ibid* at 391–92.

7 *Ibid* at 410–11.

8 *Ibid* at 404.

delicate balance between organized labour and employers; the corresponding need to constantly reassess traditional approaches to labour law and policy; the importance of provinces playing a "step by step" role as "laboratories for legal experimentation with our industrial relations ailments; the lack of judicial expertise to adjudicate labour law matters; and a corresponding concern with the incapacity and imprudence of judicial application of section 1 of the *Charter* to reconsider and intrude upon the balance struck by the legislature if section 2(d) were to be interpreted generously in the labour context.

By contrast, the two dissenting judges in the *Alberta Reference* (Dickson CJ joined by Wilson J) held that freedom of association extended to protection for the right to collectively bargain and to strike. Their conclusion was based on an alternative doctrinal approach to the section 2(d) guarantee — one that ultimately came to form the foundation for the renewed life breathed into freedom of association in *Dunmore*, as subsequently further expanded in *Health Services* and in the 2015 trilogy.

In his dissenting reasons, Dickson CJ began by rejecting as "legalistic" and "vapid" the constitutive definition of freedom of association adopted by LeDain J:

> At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's status as a member of an association. It would not protect his or her associational actions . . . .
>
> If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.[9]

Instead, he believed that the scope of freedom of association must be determined in the context of a recognition that association is the critical mechanism through which individuals are able to contest the actions of more powerful institutions:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who

9 *Ibid* at 362–63.

> would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[10]

At the same time, Dickson CJ recognized that not all associational activity should be protected merely because it is engaged in by more than one individual:

> This is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.[11]

In this respect, and agreeing on this point with McIntyre J, Dickson CJ held that freedom of association must at least "embrace . . . the liberty to do collectively that which one is permitted to do as an individual."[12] Thus, in addition to the narrow protection offered by LeDain J, Dickson CJ's approach to section 2(d) would protect individuals engaging in associational activity where an individual could lawfully engage in that same activity. The basis for this protection is that an attack on activity performed in association when the same activity is permitted if performed by an individual is aimed at the "collective or associational aspect" of the activity, and not the activity itself. As Dickson CJ observed:

> Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association.[13]

However, according to the Chief Justice, this principle of equal treatment of the individual and the collectivity cannot be the "exclusive touchstone for determining the presence or absence of a violation of s. 2(d),"[14] since

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10 *Ibid* at 365–66.
11 *Ibid* at 366.
12 *Ibid*.
13 *Ibid* at 367.
14 *Ibid*.

it fails to recognize that some associational activity has no analogous individual counterpart:

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.[15]

For this reason, under Dickson CJ's approach, section 2(d) protection would also extend to certain inherently or uniquely associational activities, i.e., those activities (that in his view included the right to strike) without any individual counterpart. Where it could be established that the restriction is "aimed at foreclosing a particular collective activity because of its associational nature," there would be an interference with constitutionally protected associational activity.[16]

Thus, unlike McIntyre J, for Dickson CJ the fact that the right to strike had no individual analogue was not a reason to deny it protection but rather signalled that it was a form of activity that had a unique and important associational aspect warranting protection. Indeed, precisely because there was no individual equivalent to a strike, which he believed to be qualitatively different than a refusal to work by one individual, Dickson CJ held that the denial of the right to strike was aimed at preventing a particular collective activity precisely because of its associational nature, and so constituted an infringement of section 2(d) of the *Charter*.

Applying this doctrinal approach to the question of whether the right to collectively bargain and to strike were the kind of uniquely collective associational activities falling within the scope of section 2(d), Dickson CJ pointed to the understanding under various international law treaties and instruments that freedom of association encompassed collective bargaining and the right to strike, to the extent that collect-

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15 *Ibid*.

16 *Ibid* at 371.

ive bargaining and strike activity involved not only the pursuit of economic interests but also advanced the interests of dignity, self-worth, and emotional well-being, and to the extent that the activities of collective bargaining and withdrawing services had over time been essential to the capacity of workers to collectively counter the strength of their employers.

2. *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*

Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)[17] was decided by a seven-member Court in 1990, three years after the 1987 trilogy. The case involved a claim that section 2(d) was breached when a group of unionized workers represented by one union under federal legislation were transferred to territorial jurisdiction. The applicable territorial legislation included the workers in a larger bargaining unit represented by another trade union, thereby denying them representation by the union of their choice. Writing for a narrow 4:3 majority, Sopinka J rejected the challenge, which he characterized as being rooted in a claim that collective bargaining — in that case, choosing one's bargaining agent — was constitutionally protected.

While Sopinka J rejected the more expansive view of the right articulated by Dickson CJ, he accepted the conception of the right articulated by McIntyre J, summarizing the scope of section 2(d) with the following four propositions:

> The first proposition, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.[18]

Applying this conception of freedom of association to the case before him, Sopinka J concluded:

> Collective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the

17 [1990] 2 SCR 367 [*PIPSC*].

18 *Ibid* at 402.

> essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented: see McIntyre J. in the *Alberta Reference* . . . . It is difficult, therefore, to conceive of a principle that could bring other aspects of the collective bargaining relationship within the purview of s. 2(d), and yet not overrule the trilogy . . . .
>
> It is simply no longer open to an association (union or otherwise) to argue that the legislative frustration of its objects is a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association — unless the association's activity is another *Charter*-protected right, or an activity that may lawfully be performed by an individual . . . it is equally plain that, as a result of the *Alberta Reference*, the activity for which constitutional protection is sought (collective bargaining for working conditions) satisfies neither of the tests for protected activity.[19]

Ironically, Dickson CJ was the fourth "swing vote" in forming the majority in *PIPSC*. His own judgment makes clear that had he maintained his *Alberta Reference* approach, he would have joined with the dissenting judges and so formed part of a 4:3 majority. However, in the face of the freedom of association labour law trilogy, which he viewed as binding, he ruled that he was constrained to hold that collective bargaining is not protected by section 2(d), and that section 2(d) was only an individual and not a group right.

Justice Cory's dissent in *PIPSC* is notable because, twenty-five years later, his view of the role of free choice under section 2(d), leading in his view to a violation of section 2(d), was expressly relied upon by the Supreme Court in the *MPAO* decision (as discussed in further detail in Part B below).

3. *Delisle v Canada (Deputy Attorney General)*

After the resounding rejection of section 2(d) constitutional protection for collective bargaining and the right to strike, it took another nine years, until 1999, for the court to consider its next section 2(d) labour freedom of association case.

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19 *Ibid* at 404.

In *Delisle v Canada (Deputy Attorney General)*,[20] the Court rejected, by a 5:2 majority, a section 2(d) challenge to an outright exclusion of RCMP officers from access to any legislative collective bargaining scheme.

Writing for the majority of the seven-member court, Bastarache J drew on the previous freedom of association cases to outline his view of the limited scope of section 2(d) protection:

> The outcome of the case at bar has largely been determined by the previous decisions of this Court which have defined the concept of freedom of association, guaranteed in s. 2(*d*) of the *Charter*. The three cases of the 1987 trilogy . . . are especially determinative of this issue as they explore the concept in the labour relations context.[21]

Then, applying the 1987 trilogy and the *PIPSC* decision to the exclusion of RCMP officers from collective bargaining legislation, Bastarache J concluded:

> In accordance with the decision of the majority of this Court in [*PIPSC*] there is no violation of s. 2(*d*) of the *Charter* when certain groups of workers are excluded from a specific trade union regime . . . . Freedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly limit the ability of Parliament or a provincial legislature to regulate labour relations in the public service and would subject employers, without their consent, to greater obligations toward the association than toward their employees individually. I share the opinion expressed by McIntyre J. in *Reference re Public Service Employee Relations Act (Alta.)*, *supra*, at p. 415, when he states that labour relations is an area in which a deferential approach is required in order to leave Parliament enough flexibility to act.[22]

Thus, the *Delisle* majority continued to apply the same restrictive approach to freedom of association originally articulated in the labour relations trilogy, including the same appeal to deference in defining the scope of section 2(d) rights, at least in the context of labour relations.

In his reasons, Bastarache J also characterized the section 2(d) exclusion claim as effectively amounting to a claim that government could be under a positive obligation to enact legislation protecting or advancing constitutional rights. He rejected that argument outright, accepting it only as a possibility in exceptional circumstances, and emphasizing the differences between the fundamental freedoms protected by section 2

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20 [1999] 2 SCR 989.

21 *Ibid* at para 11.

22 *Ibid* at para 33.

of the *Charter*, and the equality guarantee contained in section 15, in the following terms:

> The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground . . . is because this is contemplated in the wording itself of s. 15. The distinguishing feature of s. 15 is that the *Charter* may require the government to extend the special status, benefit or protection it afforded to the members of one group to another group if the exclusion is discriminatory and is based on an enumerated or analogous ground of discrimination . . . .
>
> However, while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard.
>
> . . .
>
> On the whole, the fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances which are not at issue in the instant case.[23]

By contrast, in her concurring reasons, L'Heureux-Dubé J was more hopeful about the possibility that section 2(d) might well impose positive obligations on government in a future case:

> . . . where the employer does not form part of government, there exists no *Charter* protection against employer interference. In such a case, it might be demonstrated that the selective exclusion of a group of workers from statutory unfair labour practice protections has the purpose or effect of encouraging private employers to interfere with employee associations. It may also be that there is a positive obligation on the part of governments to provide legislative protection against unfair labour practices or some form of official recognition under labour legislation, because of the inherent vulnerability of employees to pressure from management, and

23 *Ibid* at paras 25 and 33.

> the private power of employers, when left unchecked, to interfere with the formation and administration of unions.[24]

4. The Dunmore Breakthrough

Two years later, in *Dunmore*,[25] the Court was again required to consider to what extent exclusion from a labour relations regime might constitute a violation of freedom of association, this time involving the exclusion of agricultural workers from access to collective bargaining legislation. Despite having just found in *Delisle* that the exclusion of RCMP officers from collective bargaining legislation did not impinge on associational activity, the *Dunmore* Court found that the exclusion of agricultural workers from the protection of unfair labour practice provisions under collective bargaining legislation violated their associational freedoms, putting particular emphasis on their vulnerability to employer intimidation. From a doctrinal perspective, for the first time, a majority of the Court recognized that section 2(d) extended constitutional protection to certain collective or associational activities — in that case union organizing activity and the ability of workers to make collective representations on working terms and conditions.

Thus, *Dunmore* signalled a fundamental shift in defining the scope of *Charter* protected associational activity under section 2(d) of the *Charter* — both in general doctrinal terms and in the specific context of labour relations and collective bargaining. Indeed, as Bastarache J acknowledged, the conclusion that section 2(d) is violated where the state "has precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals" was an adoption of Dickson CJ's dissenting approach in the 1987 trilogy — where the Chief Justice had said that: "the legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature."[26]

Equally important, until *Dunmore*, the scope of freedom of association, as reflected in the four aspects of section 2(d) protection set out by Sopinka J in *PIPSC*,[27] was firmly anchored in the individual and conceived of only as an individual right. *Dunmore* rejected this narrow view of freedom of association, expanding its scope to include constitutional protection for certain associational or group activity.

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24 *Ibid* at para 7.

25 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 [*Dunmore*].

26 *Ibid* at para 16, quoting *Alberta Reference*, above note 1 at 367.

27 See discussion in text above note 18.

This shift resulted in large measure from a new and revised appreciation of the importance of the purpose of constitutional protection for determining the scope of the freedom of association guarantee. Indeed, in his reasons, Bastarache J identified the purpose of section 2(d) as an additional and "enduring source of insight into the content of s. 2(d)." He accepted the purpose of section 2(d) as "the collective action of individuals in pursuit of their common goals" and, from this, then inferred that "the purpose of s. 2(d) commands a single inquiry: has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?"[28]

Based on this expanded understanding of the purpose of section 2(d), Bastarache J proceeded to reject the Court's previous approach to freedom of association on the basis that:

> [I]t does not capture the full range of activities protected by s. 2(*d*). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which 1) are not protected under any other constitutional freedom, and 2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra,* such activities may be *collective* in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(*d*).
>
> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights . . . . *The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits*. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature. [Emphasis added.][29]

Having resuscitated the purposive approach to section 2(d) articulated in the *Alberta Reference* dissent, Bastarache J emphasized the importance of recognizing "that the collective is 'qualitatively' distinct from the individual: individuals associate not simply because there is strength

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28 *Dunmore*, above note 25 at paras 15–16.

29 *Ibid* at para 16 [emphasis in original].

in numbers, but because communities can embody objectives that individuals cannot." Indeed, echoing Dickson CJ, Bastarache J raised the concern that "to limit s. 2(*d*) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives."[30] According to Bastarache J, "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning."[31] Thus, in addition to the four-part test for freedom of association articulated in *PIPSC*, he held that freedom of association must also protect against legislation that "has targeted associational conduct because of its concerted or associational nature."[32]

In support of this broader approach to freedom of association, Bastarache J also drew on international human rights law (as had Dickson CJ in the *Alberta Reference* dissent), observing that "[t]he collective dimension of s. 2(d) is also consistent with developments in international human rights law, as indicated by the jurisprudence of the Committee of Experts on the Application of Conventions and Recommendations and the ILO Committee on Freedom of Association," and that ILO jurisprudence not only "illustrate[s] the range of activities that may be exercised by a collectivity of employees, but the International Labour organization has repeatedly interpreted the right to organize as a collective right."[33]

Having recognized that certain collective activities must be protected by section 2(d), Bastarache J moved on to consider which collective union activities were deserving of protection, concluding that "certain union activities . . . may be central to freedom of association even though they are inconceivable on the individual level."[34] According to Bastarache J, this included "making collective representations to an employer, adopting a majority political platform, [and] federating with other unions."[35] Later in his reasons, he added "the freedom to organize, that is, the freedom to collectively embody the interests of individual workers."[36]

Nonetheless, while the Court in *Dunmore* extended the understanding of freedom of association to protect certain uniquely collective associational activities (even where they may not have an individual counterpart), the *Dunmore* Court continued to cling to the view that neither collective bargaining nor strike activities were protected by section 2(d).

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30 *Ibid*.
31 *Ibid* at para 17.
32 *Ibid* at para 18.
33 *Ibid* at para 16.
34 *Ibid* at para 17.
35 *Ibid*.
36 *Ibid* at para 30.

This led to the incongruous result that the two most important collective activities for workers were excluded from the fundamental protection offered by section 2(d), while collective activities of lesser importance found protection.

However, most significantly, the *Dunmore* Court's reformulated approach removed, in a fundamental way, the doctrinal underpinning of the restrictive approach to freedom of association that had been adopted in the 1987 trilogy, *PIPSC*, and *Delisle*. Once it was recognized that certain activities were central to the purposes of freedom of association, whether they could be exercised on an individual level or not, and precisely because of their inherently collective nature, the underlying doctrinal basis for rejecting collective bargaining and the right to strike as deserving of protection had been undermined. As set out above, those cases had based their restrictive approach to section 2(d) on a narrow conception of the purposes of section 2(d), which led to the proposition that collective activities which were not constitutive in nature or which could not be performed by individuals acting alone could not be section 2(d) protected; the *Dunmore* Court was now saying the precise opposite. As a result, the only remaining basis for continuing to exclude collective bargaining and strikes from section 2(d) was the concept of judicial restraint in the realm of labour relations advanced by LeDain and McIntyre JJ in the *Alberta Reference*.

5. Health Services and Support — *Facilities Subsector Bargaining Assn v British Columbia*

It took another six years however, until 2007, for the Court to consider the full doctrinal implications of *Dunmore* for the constitutional protection of collective bargaining. The *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*[37] case involved a constitutional challenge to virtually unprecedented legislation, the British Columbia *Health and Social Services Delivery Improvement Act*, which invalidated certain key negotiated job security collective agreement protections contained in collective agreements (including protections against contracting out, layoff, and bumping rights), and precluded future bargaining over those matters.

After the legislation was passed, thousands of non-clinical support staff were laid off from BC hospitals. Those hired by the subcontractor service providers to replace them were subsequently paid substantially

37 2007 SCC 27 [*Health Services*].

less to perform the same services at and for the hospitals from which they had been laid off.

The unions challenged the *Act*, arguing that its interference with their freely negotiated collective agreements, and the prohibition on future bargaining, violated the *Charter*'s guarantee of freedom of association. After their case had been rejected by the British Columbia Supreme Court and by the British Columbia Court of Appeal (on the grounds that there was no section 2(d) protection for collective bargaining based on the current caselaw), the unions successfully appealed to the Supreme Court of Canada.

In accepting that freedom of association should be interpreted to extend constitutional protection to collective bargaining (thereby overruling the 1987 trilogy), the Court concluded that the reasons it had relied on in the past to conclude that section 2(d) did not protect collective bargaining could no longer "withstand principled scrutiny." In particular, the Court held that:[38]

a) the 1987 trilogy notion that the right to bargain collectively was a modern right created by legislation ignored the history of labour relations in Canada. The right to bargain collectively was not created by statute; it pre-existed statutory collective bargaining. Indeed, it was because of the fundamental importance of collective bargaining to labour relations that collective bargaining was incorporated into legislation. This recognition of the non-statutory basis for constitutional protection for collective bargaining echoed the holding in *Dunmore* that the "freedom to organize" existed "independently of any statutory enactment", and that "the effective exercise of this freedom requires legislative protection in some cases . . . ought not change the fundamentally non-statutory character of the freedom itself."[39] In *Health Services*, the Court recognized that this observation applied equally to the right to collectively bargain;

b) the reluctance to interfere with government regulation of labour relations placed too much emphasis on judicial deference. While judicial deference might be appropriate in particular cases, it was not reasonable to declare that no constitutional interests were implicated simply because the courts might get involved in policy

38 See *ibid* at paras 25–31.

39 Although, in a bid to contain section 2(d), Bastarache J had contrasted this with the characterization of the right to bargain collectively and strike in the *Alberta Reference* as "so-called 'modern rights.'"

matters. As the Court observed, "to declare a judicial 'no go' zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far;"[40]

c) while the *Alberta Reference* had rejected constitutional protection for collective bargaining because of the view that section 2(d) protection was limited to activities that can be performed by individuals and not to collective activities, this limitation had been squarely rejected in *Dunmore,* where the Court had recognized that some collective activities are, by their very nature, impossible for one person to perform, yet nonetheless not disqualified from constitutional protection. Indeed, according to the Court in *Health Serv*ices, some collective activities may be central to freedom of association even though they cannot be performed by an individual, so that if the freedom to form and maintain an association is to have any meaning, certain collective activities must be recognized as falling within the scope of section 2(d); and

d) the *Alberta Reference* majority had also dismissed constitutional protection for collective bargaining by characterizing collective bargaining as a union's "object," but this was not a principled reason to deny protection, since any activity pursued by an association could be characterized as its object or goal. While the *Charter* could not be used to protect the substantive outcome of bargaining, the "process" of collective bargaining should be protected, without granting constitutional protection to any particular outcome.

As a result, the Court concluded that it was now necessary to reassess the question of whether collective bargaining was protected by section 2(d) of the *Charter*. In considering this question, the Court examined Canadian labour and legislative history, collective bargaining in relation to freedom of association in an international context, and whether finding collective bargaining to be a constitutionally protected associational activity would be consistent with *Charter* values.

After concluding that workers' participation in collective bargaining long predated its statutory recognition and protection, the Court turned to international law, emphasizing that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[41] The Court relied on the protection of collective bargaining in the *International Coven-*

40 *Health Services,* above note 37 at para 26.

41 *Ibid* at para 70.

ant on Economic, Social and Cultural Rights, the *International Covenant on Civil and Political Rights*, and *ILO Convention No 87* of the International Labour Organization (ILO), noting that all three instruments "extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association."[42] In particular, with respect to *Convention No 87*, the Court noted that it has been interpreted by the ILO to mean that (i) the right to collective bargaining is a fundamental right, which includes a good faith obligation to recognize unions, engage in genuine and constructive negotiations, and respect commitments entered into; and (ii) collective bargaining is a voluntary process, that should be free of interventions by government, save in exceptional situations, following consultations with the unions involved.

The Court also concluded that protecting the process of collective bargaining under section 2(d) would be consistent with the *Charter*'s underlying values, including "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy . . . ."[43] The right to bargain collectively enhances the human dignity, liberty, and autonomy of workers by giving them "the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work."[44] A constitutional right to collective bargaining would also enhance the *Charter* value of equality since it relieves against the historical inequality between employers and employees. It would also enhance the *Charter* value of democracy, the Court held, since "[c]ollective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace."[45]

For all these reasons, the Court concluded that section 2(d) "should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining"[46] or, put another way, "the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issue and terms of employment."[47] Therefore, according to the Court, it guarantees *the process* through which these goals are pursued.

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42 *Ibid* at para 72.
43 *Ibid* at para 81.
44 *Ibid* at para 82.
45 *Ibid* at para 85.
46 *Ibid* at para 87.
47 *Ibid* at para 89.

However, the Court was clear that section 2(d) of the *Charter* does not protect all aspects of the process of collective bargaining. It protects only against "substantial interference" with that process. The Court explained:

> To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.[48]

Thus, according to the Court, if government action or legislation does not substantially interfere with the process of collective bargaining, it will not violate section 2(d). The decision to incorporate a "substantial interference" test in section 2(d) has had significant implications for the caselaw that followed, a matter discussed further in Part B, below.

According to the Court in *Health Services*, there are two factors to consider in determining whether there has been substantial interference in collective bargaining, namely, how important the subject matter is to the process of collective bargaining, and the manner in which the government measure impacts on the collective right to good faith negotiation and consultation. The duty to negotiate in good faith lies at the heart of collective bargaining, the Court held.

As the Court concluded in summarizing the prerequisites to finding a breach of the section 2(d) collective bargaining guarantee:

> In summary, s. 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government

48 *Ibid* at para 92.

> measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation will s. 2(d) be breached.[49]

After reviewing the various provisions of the *Health and Social Services Delivery Improvement Act*, and considering their impact, the Court held that those provisions of the *Act* that eliminated the job security protections, and precluded future bargaining, constituted a substantial interference with the section 2(d) freedom. In so finding, the Court rejected the BC government's argument that the *Act* did not interfere with collective bargaining because it did not explicitly prohibit health care employees from making collective representations, emphasizing that the right to collective bargaining cannot be reduced to a mere right to make representations:

> . . . the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion . . . . While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.[50]

At the same time, while the Court ruled that section 2(d) should be extended to protect meaningful collective bargaining, it also emphasized that section 2(d) protected the right to a general process of collective bargaining, but not to a particular model of labour relations, or a specific bargaining method. In this respect, while the Court held that section 2(d) incorporated principles of good faith bargaining, it did not fully sketch out the content of the associational freedom to engage in meaningful negotiations with their employer.

Significantly, as it turned out, there were important aspects of the Courts' reasons that gave rise to uncertainty over the precise scope and nature of constitutional protection for collective bargaining. On the

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49 *Ibid* at para 109.

50 *Ibid* at para 114.

most restrictive view of the Court's conception of section 2(d) protection for collective bargaining, all that section 2(d) protected was a process of good faith bargaining or discussion so that, as long as government engaged in good faith bargaining or consultation prior to legislatively overriding important collective agreement terms, and/or so long as the restriction on future bargaining was not permanent, there was no breach of section 2(d). More generally, on this view, all that section 2(d) protected was the right of employees to engage in a process of good faith negotiation with their employer. On a more generous view of the Court's approach, legislatively overriding negotiated collective agreement provisions and/or prohibiting future bargaining necessarily undermined the principles of good faith bargaining protected by section 2(d), such that pre-legislative consultation was relevant, if at all, only to the section 1 justification inquiry. Moreover, on this view, section 2(d) protected a meaningful right to collective bargaining, so that legislation that undermined or did not sufficiently facilitate or promote the bargaining process infringed section 2(d).

It did not take long for some of these questions to come before the Court again, in the appeal from the Ontario Court of Appeal's decision in *Ontario (Attorney General) v Fraser.*

6. *Ontario (Attorney General) v Fraser*

Before summarizing the 2011 *Ontario (Attorney General) v Fraser* decision,[51] it is useful to briefly outline the main features of the legislation challenged in that case, namely, the *Agricultural Employees Protection Act* (*AEPA*), which had been enacted by the Ontario government in response to the *Dunmore* decision. The *AEPA* provided some measure of unfair labour practice protection for farm workers, and also granted an employee association representing farm workers the right to make representations to employers respecting the terms and conditions of their employment. However, the *AEPA* did not expressly provide for a duty to bargain in good faith, did not provide for bargaining agency based on majoritarian exclusivity, and did not provide the parties with the right to engage in economic sanctions to resolve collective bargaining impasses, or some other fair, independent, and binding dispute resolution mechanism, i.e., interest arbitration.

In *Fraser*, the Ontario Court of Appeal, applying the principles as it understood them from *Health Services*, found that the failure to legislatively provide for a duty to bargain in good faith, for a system of ex-

51 2011 SCC 20 [*Fraser*].

clusivity based on majority support, and for a statutory mechanism for resolving both collective bargaining impasses and contractual disputes arising during the life of a collective agreement, rendered meaningless the ability of agricultural workers to engage in meaningful collective bargaining (as protected by *Health Services)*, and therefore violated the freedom of association guarantee.

On appeal, the Supreme Court of Canada (with Abella J dissenting)[52] took a very different view. While upholding the ruling in *Health Services* that freedom of association extends to the process of collective bargaining, McLachlin CJ and LeBel J, writing for a five-judge majority, firmly rejected what they considered to be the Court of Appeal's overly expansive view of the scope of constitutionally protected collective bargaining articulated in *Health Services*. As the majority judgment concluded in relation to the Court of Appeal's reasons:

> *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements (C.A. reasons, at para. 80). What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.[53]

The majority's reasons focused on the extent to which the Court's decision in *Health Services* had emphasized that section 2(d) "does not impose a particular process," "does not require the parties to conclude an agreement or

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52 There were also reasons "concurring" in the result, from Rothstein J, joined by Charron J, but this concurrence was actually a dissent from the very notion of constitutional protection for collective bargaining as found by the Court in *Health Services*. The majority reasons also respond to Rothstein J's views. One of us has more extensively explored the tension between the majority and Rothstein J, and critiqued Rothstein J's analysis: see Steven Barrett & Ethan Poskanzer, "What *Fraser* Means for Labour Rights in Canada" in Fay Faraday, Judy Fudge, & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 190.

53 *Fraser*, above note 51 at para 47.

accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse," "protects only 'the right . . . to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method," and "does not require a particular model of bargaining."[54]

While the majority rejected the more generous approach taken by the Ontario Court of Appeal, it also reaffirmed the *Health Services* holding that meaningful collective bargaining is included within the scope of freedom of association. In the *Fraser* majority's view, this "requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace."[55] According to the Court:

> This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer. In this sense, collective bargaining is protected by s. 2(d).[56]
>
> . . .
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> What s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process . . . . Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.[57]
>
> In summary, *Health Services* . . . . requires a good faith process of consideration by the employer of employee representations and of discussion with their representatives is hardly radical. It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations. The protection for collective bargaining in

54 *Ibid* at paras 41 & 42.
55 *Ibid* at para 37.
56 *Ibid* at para 40.
57 *Ibid* at para 42.

> the sense affirmed in Health Services is quite simply a necessary condition of meaningful association in the workplace context.[58]
>
> . . .
>
> In our view, the majority decision in *Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith.[59]
>
> . . .
>
> *Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion. The logic that compels this conclusion, following settled *Charter* jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(d). No particular bargaining model is required.[60]

When it came to applying its understanding of section 2(d) to assessing the constitutionality of the *AEPA*, the majority concluded that the legislation at issue should be interpreted to require a process of good faith collective bargaining (which it at times seemed to equate with good faith consultation or discussion). In this respect, while the legislation itself contained no express duty to bargain in good faith, the legislation did not preclude this. In the majority's view, the statutory provisions requiring the employer to listen to and acknowledge representations made by an employee association could and should be interpreted by implying a duty on agricultural employers to consider employer representations in good faith. As the majority concluded, "[T]he *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer."[61]

In response to the concern that the right to an adjudicative process for resolving bad faith bargaining complaints would be ineffective, the majority responded that insofar as the union had not made a significant attempt to make the process work, and insofar as the process has not yet been fully explored and tested, it was premature to conclude that the

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58 *Ibid* at para 43.
59 *Ibid* at para 51.
60 *Ibid* at para 54.
61 *Ibid* at para 107.

AEPA would not result in good faith bargaining. On this basis, the majority held that the *AEPA* did not violate section 2(d) and allowed the appeal.

At the same time, despite finding that the AEPA did not infringe section 2(d), the majority explicitly reconfirmed the specific holding in *Health Services* that imposing restrictions on the ability of employees to bargain over important workplace matters, by nullifying negotiated collective agreement provisions, and/or by preventing future bargaining, violates the freedom of association guarantee:

> Section 2(d), interpreted purposively and in light of Canada's values and commitments, protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals. The government employer passed legislation and took actions that rendered the meaningful pursuit of these goals impossible and effectively nullified the right to associate of its employees. This constituted a limit on the exercise of s. 2(d), and was thus unconstitutional unless justified under s. 1 of the *Charter*.[62]
>
> . . .
>
> If s. 2(d) merely protected the right to act collectively and to make collective representations, the legislation at issue in that case [*Health Services*] would have been constitutional. The legislation in that case violated s. 2(d) since it undermined the ability of workers to engage in meaningful collective bargaining, which the majority defined as good faith negotiations (para. 90). The majority underlined that:
>
> > the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. *This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations.* While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. [Emphasis added; para. 114.][63]

62 *Ibid* at para 38.

63 *Ibid* at para 50, quoting *Health Services*, above note 37 at para 114.

In this respect, the *Fraser* majority also affirmed that overriding important collective agreement terms and preventing future bargaining over those terms constitutes an infringement of section 2(d):

> *Dunmore* established that claimants must demonstrate the substantial impossibility of exercising their freedom of association in order to compel the government to enact statutory protections. It did not, however, define the ambit of the right of association protected by s. 2(d) in the context of collective bargaining. Relying on *Dunmore*, the majority of the Court in Health Services, per McLachlin C.J. and LeBel J., held that legislation and government actions that repealed existing collective agreements and substantially interfered with the possibility of meaningful collective bargaining in the future constituted a limit on the s. 2(d) right of freedom of association.[64]
>
> . . .
>
> The unions responded by bringing an action claiming that the government had breached s. 2(d) by legislatively interfering with freedom of association. They further claimed that the government had done so in circumstances that could not be justified under s. 1 of the *Charter*. *Health Services* thus put directly in issue the right to collective bargaining. The claimants did not seek the enactment of associational protections. Rather, they asserted that s. 2(d) protected a right to collective bargaining and that the government had violated the constitutional guarantee of freedom of association by legislating to both overturn existing contracts and preclude effective collective bargaining in the future. The unions lost at trial and on appeal but succeeded in this Court.[65]
>
> While *Health Services* concerned the actions of a government employer nullifying collective bargaining arrangements with unions representing its own employees, the Court rested its decision on a more general discussion of s. 2 of the *Charter*. Applying the principles of interpretation established in *Dunmore*, a majority of the Court held that s. 2(d) includes "a process of collective action to achieve workplace goals" (para. 19). This process requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace (para. 90). By legislating to undo the existing collective bargaining arrangements and by hampering future collective bargaining on important workplace issues, the British Columbia government had "substantially interfered" with the s. 2(d) right of free association, and had

64 *Fraser*, above note 51 at para 34.

65 *Ibid* at para 36.

> failed to justify the resultant limitation on the exercise of the right under s. 1 of the *Charter* (paras. 129–161).[66]
>
> . . .
>
> The majority in *Health Services* held that the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining, undermines the s. 2(d) right to associate, not that labour contracts could never be interfered with by legislation.[67]

Despite the majority's repeated emphasis on the continued validity of its finding in *Health Services* that a process of meaningful collective bargaining was constitutionally protected by section 2(d), it is fair to say that the *Fraser* decision was regarded by various provincial superior and appellate courts as a retrenchment of section 2(d) protection. These Courts focused on the fact that the actual reasons in *Fraser* had at times suggested a higher "impossibility" (rather than "substantial interference") threshold for finding an infringement of section 2(d) had diminished section 2(d) protection for collective bargaining by describing it as being merely a "derivative" right, and had equated good faith collective bargaining with mere discussions or consultation or the right to make representations.[68]

As a result, when a new trilogy of section 2(d) cases came before the Court in 2015, it was clear that the Court was faced with the task of determining whether the doctrinal evolution and expansion of section 2(d) which had started in *Dunmore* and continued in *Health Services* should be reinforced, or whether the potential retreat that was at least partially signalled in *Fraser* should continue.

7. The New Trilogy: MPAO, SFL, and Meredith

Over the course of two weeks in January 2015, the Supreme Court of Canada released its reasons in three collective bargaining cases dealing with freedom of association, which have become known as the 2015 freedom of association trilogy. These decisions make clear that, at least for a strong majority of the Court, the doctrinal journey that began with the dissenting reasons of Dickson CJ in the original 1987 trilogy, and

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66 *Ibid* at para 37.

67 *Ibid* at para 76.

68 See, for example, in Ontario, the Court of Appeal's decisions in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2012 ONCA 363; and in *Assn of Justice Counsel v Canada (Attorney General)*, 2012 ONCA 530.

that continued with majority recognition of constitutional protection for the right to organize in *Dunmore* and for collective bargaining in *Health Services*, would not be retreated from, but would instead form a fundamental part of our constitutional and labour law.

a) *Mounted Police Association of Ontario v Attorney General of Canada (MPAO)*

The *Mounted Police Association of Ontario v Attorney General of Canada* case[69] involved a challenge to two separate but related aspects of the legal regime governing RCMP members: a) the imposition of a non-union representational structure on RCMP members (the Staff Relations Representative Program or SRRP), which prevented them from democratically choosing and bargaining through their own independent bargaining agent, and b) the long-standing exclusion of RCMP members from the *Public Service Labour Relations Act*, which had been upheld in *Delisle*.

By a 6:1 majority, the Supreme Court of Canada held that members of the RCMP had the right to be represented by a democratically selected independent association of their own choosing. The Court held that section 2(d) of the *Charter* requires that employees be provided with a degree of choice and independence sufficient to enable them to determine and pursue their collective workplace goals, and, in particular, to engage in meaningful collective bargaining. As the Court concluded in striking down the SRRP and the legislative exclusion: "The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence."[70]

While the earlier *Health Services* decision recognized section 2(d) protections for a process of collective bargaining, the Court had not previously explicitly recognized employee selection of trade union representation, and trade union independence, as core aspects of the section 2(d) guarantee.

The majority decision, written together by LeBel J and McLachlin CJ, brings the approach taken to section 2(d) in line with the approach taken to other fundamental freedoms. The Court emphasized the need for a purposive, generous, and contextual approach to the scope of freedom of association, squarely adopting Dickson CJ's focus in his dissenting reasons in the *Alberta Reference* on the purpose of freedom of association. In particular, in *MPAO*, the Court emphasized that the core purpose of

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69 2015 SCC 1 [*MPAO*].

70 *Ibid* at para 5.

section 2(d) is protection of "collective activity that enables 'those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict,'"[71] also stressing that "freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups whose members' individual voices may be all too easily drowned out."[72] The Court concluded as follows:

> This then is a fundamental purpose of s. 2(d) — to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.[73]

Where associational activity relates to "reducing social imbalances" or joining "with others to meet on more equal terms the power and strength of other groups or entities,"[74] that activity will be constitutionally protected.[75]

Indeed, in language reminiscent of the Court's approach to freedom of expression, while the Court recognized that some collective activity lies outside the *Charter's* protection, the only example it gave was "associational activity that constitutes violence,"[76] going so far as to leave open the question as to "[w]hether there are other categories of activity in addition to violence that are by their very nature entirely excluded from s. 2(d) protection need not be canvassed here."[77]

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71 *Ibid* at para 54.

72 *Ibid* at para 55.

73 *Ibid* at para 58.

74 *Ibid* at para 66.

75 While beyond the scope of this chapter, it is fair to say that the Court's description of the purpose of section 2(d) as redressing inequality and imbalances in power, and its broad definition of associational activities as embracing non-violent associational activities necessary to "reduc[e] social imbalances," and the right to join "with others to meet on more equal terms the power and strength of other groups or entities," may well have broader implications for workers beyond collective bargaining and for other civil society associations outside of the workplace context.

76 *MPAO*, above note 69 at para 59.

77 *Ibid* at para 60.

It is difficult to envision a more expansive approach to the scope of section 2(d). What's more, the Court's reasons made explicit what was implicit in prior decisions, namely, that section 2(d) protects not only individual rights, but also "collective rights that inhere in associations,"[78] recognizing that both individual rights and collective rights are essential for full *Charter* protection.[79] Although the *Charter* generally speaks of individuals as rights holders, the majority held that there is a collective aspect to section 2(d) rights, and that "[r]ecognizing group or collective rights complements rather than undercuts individual rights."[80] As the Court reasoned:

> Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations.[81]

Applying its recognition of both the "redressing power imbalance" purpose of section 2(d) together with the collective rights nature of section 2(d) protection to the workplace context, the Court had no difficulty determining that section 2(d) protects a meaningful process of collective bargaining. As the Court concluded:

> As we have seen, s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*:

78 *Ibid* at para 62.
79 *Ibid* at paras 62–65.
80 *Ibid* at para 65.
81 *Ibid* at para 62.

> "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d).
>
> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.[82]

Significantly, the Court recognized that legislative measures which substantially reduce the ability of employees to negotiate will undermine the freedom of association guarantee. Moreover, the Court included in its list of measures substantially interfering with meaningful bargaining laws and regulations which "restrict the subjects that can be discussed, or impose arbitrary outcomes."[83] This lends strong support to the view that measures which restrict the scope of the subject matter of collective bargaining, or that impose collective bargaining outcomes, will be found to be inconsistent with the section 2(d) guarantee.

Having found that freedom of association mandates a "meaningful process," the majority went on to identify "the features essential to a meaningful process of collective bargaining under s. 2(d),"[84] concluding that "a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[85] Notably, as further addressed in Part B below, the Court relied on Cory J's dissent in *PIPSC* in identifying freedom of choice as a essential feature of meaningful collective bargaining. To quote the Court in *MPAO*:

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82 *Ibid* at paras 70–72.
83 *Ibid* at para 72.
84 *Ibid* at para 81.
85 *Ibid*.

> Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.[86]
>
> But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.[87]
>
> . . .
>
> Independence and choice are complementary principles in assessing the constitutional compliance of a labour relations scheme. *Charter* compliance is evaluated based on the *degrees* of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme. The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals.[88]

The Court identified, as the hallmark of employee choice in the collective bargaining context, "the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations."[89]

So far as the requirement for independence from management is concerned, the Court held it was necessary "that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process."[90] As the Court went on to state:

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86 *Ibid* at para 82.
87 *Ibid* at para 83.
88 *Ibid* at para 90 [emphasis in original].
89 *Ibid* at para 86.
90 *Ibid* at para 89.

> Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.[91]

At the same time, the Court emphasized that no one representational model is required to give effect to employee choice and independence:

> Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the maintenance of the confidence of members in them.[92]
>
> . . .
>
> A variety of labour relations models may provide sufficient employee choice and independence from management to permit meaningful collective bargaining. As discussed, choice and independence are not absolute in the context of collective bargaining.[93]
>
> This Court has consistently held that freedom of association does not guarantee a particular model of labour relations (*Delisle*, at para. 33; *Health Services*, at para. 91; *Fraser*, at para. 42). What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2(d) (*Health Services*, at para. 94; *Fraser*, at para. 40). What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(d) inquiries, the required analysis is contextual.[94]

The Court was also clear that the Wagner model of democratically chosen exclusive bargaining agency within an appropriate bargaining unit, upon

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91 *Ibid*.

92 *Ibid* at para 86.

93 *Ibid* at para 92.

94 *Ibid* at para 93.

which virtually all Canadian collective bargaining legislation is based, meets the twin section 2(d) requirements of choice and independence:

> The *Wagner Act* model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to *choose* to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification — all under the supervision of an independent labour relations board — ensure that an employer deals with the association most representative of its employees . . . .[95]
>
> . . . s. 2(d) does not require a process whereby *every* association will ultimately *gain* the recognition it seeks . . . . As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the *Wagner Act* model) that imposes restrictions on individual rights to pursue collective goals.[96]

Indeed, the Court explicitly recognized that there are other collective bargaining representation models that also are consistent with section 2(d), in that they accommodate "choice and independence in a way that ensures meaningful collective bargaining."[97] In this respect, the Court specifically referred to the bargaining agent designation model under teachers' collective bargaining legislation in Ontario, observing that "although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining."[98] As the Court concluded:

> The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the *Charter*_prevents an employee association from engaging willingly

95 *Ibid* at para 94.
96 *Ibid* at para 98.
97 *Ibid* at para 95.
98 *Ibid*.

> with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.[99]

Turning to the constitutionality of the SRRP, the Court held that both its purpose and effect violated section 2(d). As the Court concluded:

> We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(d). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects.[100]
>
> Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day *RCMP Regulations, 2014* continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.[101]
>
> . . .
>
> [T]he Attorney General appears to concede that the SRRP continues to be imposed on members of the RCMP for the purpose of preventing collective bargaining through an independent association. Its position is rather that s. 2(d) does not guarantee RCMP members a right to form and bargain through an association of their own choosing. We have rejected this view. Accordingly, it follows that the purpose of the imposition of the SRRP, to prevent the formation of independent RCMP

99 *Ibid* at para 97 [emphasis in original].

100 *Ibid* at para 105.

101 *Ibid* at para 106.

> members' associations for the purposes of collective bargaining, is unconstitutional.[102]
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> . . .
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> Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. Accordingly, the element of employee choice is almost entirely missing under the present scheme.[103]
>
> . . .
>
> These constitutional defects in the SRRP are not cured by the election of SRRs. On this point we agree with the conclusion of the application judge, that "agreeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making" (para. 63).[104]

Furthermore, with respect to section 2(1)(d) of the *Public Service Labour Relations Act*, which excluded RCMP members from the protections of that Act, the Court reversed its 1999 decision in *Delisle* (where, as set out above, the Court had found that the exclusion did not breach section 2(d)). The Court reasoned that at the time *Delisle* was decided, the right to collective bargaining had not been recognized under the *Charter*. Further, the majority found that this appeal gave it the opportunity to view the exclusion of RCMP members in its full context, including the impact of the SRRP scheme, which had not been directly challenged in *Delisle*.

The majority found that the government's purpose in excluding RCMP members from the *PSLRA* was itself unconstitutional, as it was "designed to prevent the exercise of the section 2(d) rights of RCMP members." As the Court reasoned:

> The exclusion of RCMP members from the *PSSRA* in 1967 — the only vehicle available for meaningful collective bargaining in the federal public service — was intended to prevent them from engaging in collective bargaining. The then Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: "There is no enabling legislation which allows members to collectively bargain and we must infer that Parliament has not intended that members of the Force have that right" (see A.F., at para. 106).

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102 *Ibid* at para 110.

103 *Ibid* at para 118.

104 *Ibid* at para 120.

> The *PSSRA*'s successor, the *PSLRA,* reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA,* and no other statute permitted RCMP members to engage in a process of collective bargaining . . . .[105]

However, the majority also noted that its conclusion that the exclusion breached the freedom of association guarantee did not mean that Parliament was necessarily required to include RCMP members within the *PSLRA* in the future, and that "it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties."[106] As is typical in successful *Charter* challenges, the Court suspended the effect of its decision for a period of twelve months to provide the government an opportunity to respond with new legislation.

This aspect of the *MPAO* decision may carry positive implications for other groups of workers still excluded from collective bargaining legislation, both in the private and public sectors. While the 1999 *Delisle* decision had seemingly closed the door to these challenges, and while *Dunmore* had opened the door for more vulnerable employees such as agricultural workers, *MPAO* suggests that where it can be established that the purpose (or effect) of legislation is to deprive employees of the only mechanism available for meaningful collective bargaining, this may be a violation of section 2(d).

Finally, from a doctrinal perspective, the decision is also noteworthy due to the majority's clarification of two key aspects of the *Fraser* decision, which some lower courts, and the government, had relied on in an attempt to narrow the scope of section 2(d) protections.

First, the majority confirmed that the proper test for a violation of section 2(d) is the lower threshold of "substantial interference" and not "impossibility" (this is discussed in detail below in Part B).

Second, the majority reasons also clarify that collective bargaining is not to be treated as a "derivative right". After *Fraser,* the Ontario Court of Appeal and some other courts had grappled with the Supreme Court's suggestion in *Fraser* that collective bargaining was merely "derivative" of freedom of association. The lower courts took from this that collective bargaining was only protected "where employees establish that it is effectively impossible for them to [otherwise] act collectively to achieve

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105 *Ibid* at paras 134–35.

106 *Ibid* at para 137.

workplace goals." However, the Supreme Court firmly rejected this view in *MPAO*:

> To the extent the term "derivative right" suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2(d) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a *Charter* right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2(d).[107]

b) *Saskatchewan Federation of Labour v Saskatchewan (SFL)*

Released two weeks after *MPAO*, *SFL*[108] completed the reversal of the earlier 1987 trilogy, first begun in *Dunmore*, substantially advanced in *Health Services*, and affirmed by *MPAO*.

If the 1987 majority reasons in the trilogy were, from a trade union perspective, the black hole of constitutional protection for labour rights, Abella J's reasons for the majority in *SFL* are a super nova, fully resuscitating Dickson CJ's *Alberta Reference* dissenting view that the right to strike is protected by the freedom of association guarantee.

The case involved the issue as to whether Saskatchewan legislation restricting employer-designated essential service employees from engaging in strike action infringed section 2(d) of the *Charter*. The majority unequivocally concluded that section 2(d) protects the right of employees to participate in strike action, at least for the purposes of negotiating the terms and conditions of their employment. Pointing to labour history, caselaw, and Canada's international obligations, the Court found that "the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations."[109]

Moreover, the Court emphasized that "the right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right"[110] that is "vital to protecting the meaningful process of collective bargaining within s. 2(d)."[111] The Court also stated that "the ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is . . . and has historically been, the 'irreducible minimum' of the freedom to associate in Canadian labour relations,"[112] and that (approvingly endorsing Dickson CJ's view

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107 *Ibid* at para 79.

108 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*SFL*].

109 *Ibid* at para 3.

110 *Ibid*.

111 *Ibid* at para 24.

112 *Ibid* at para 61.

in the *Alberta Reference*) "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services."[113]

Based on its review of the historical origins and purpose of the right to strike, the Court readily concluded that "the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining."[114] The Court also emphasized that the right to strike is essential to realizing both *Charter* values in general and section 2(d) values and purposes in particular:

> The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.[115]

Indeed, picking up on the rationale for section 2(d) identified in *MPAO*, the Court emphasized the extent to which the right to strike, which it describes as the "powerhouse" of collective bargaining, is essential to promoting equality (and overcoming individual employee vulnerability) in the workplace:

> This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the Alberta Reference, Dickson C.J. observed that:
>
> > [t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. [p. 368]
>
> And this Court affirmed in Mounted Police that:

113 *Ibid* at para 49.

114 *Ibid* at para 51.

115 *Ibid* at para 54.

> . . . s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way . . . . [The] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. [paras 70–71]
>
> . . . [I]t is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" . . . .[116]

And, directly responding to the dissent of Rothstein and Wagner JJ (who accused the majority, "under the rubric of 'workplace justice,'" of relying on a nineteenth century conception of the relationship between employers and workers, and of reaching back to nineteenth century French novelists and *fin de siècle* France),[117] the majority stated:

> In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying. It drives us inevitably to Anatole France's aphoristic fallacy: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.[118]

Moreover, in response to the dissent's charge that in protecting the right to strike the Court was constitutionally protecting and guaranteeing the objects of trade unions, the majority noted as follows:

> Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. And, as the trial judge recognized, strike action has the potential to

116 *Ibid* at para 55.

117 *Ibid* at paras 117 and 125.

118 *Ibid* at para 56.

> place pressure on both sides of a dispute to engage in good faith negotiations. But what it does permit is the employees' ability to engage in negotiations with an employer on a more equal footing.[119]

The Court also rejected the view that so long as an effective alternative dispute resolution mechanism is provided, there is no interference with the process of meaningful bargaining. To the contrary, the Court held that such a mechanism is not "associational in nature" and does not "realize what is protected by the values and objectives underlying freedom of association."[120] As a result, it amounts to an infringement of section 2(d), which must be justified under section 1 of the *Charter*.

In addition, rejecting the argument that the *Fraser* decision limits section 2(d) protection to good faith consultation (an argument pressed by both employer and government counsel, and accepted in Rothstein and Wagner JJ's dissenting reasons), the Court recognized that a good faith bargaining obligation alone is not at all sufficient to ensure a meaningful process of collective bargaining. Rather, as the Court concluded, "[w]here good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."[121]

With respect to international law and Canada's international law obligations, the Court forcefully turned back the attempt to undermine its earlier reliance on international law in *Health Services* and *Fraser*, concluding that Canada's own binding international law commitments and other persuasive sources of international law all point to "protecting the right to strike as part of a meaningful process of collective bargaining."[122]

Having found that strike action is protected associational activity under section 2(d), the Court readily found that restricting designated essential service employees from engaging in strike action is a violation of freedom of association.[123]

Finally, while the Court recognized that in the case of workers essential to life, health, and safety, restriction on the right to strike can be justified, it also ruled that, in order to be minimally impairing under section 1, the right to strike "must be replaced by one of the meaningful

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119 *Ibid* at para 57.

120 *Ibid* at para 60.

121 *Ibid* at para 75.

122 *Ibid* at para 62. See also *ibid* at paras 62–75.

123 *Ibid* at para 78.

dispute resolution mechanisms commonly used in labour relations."[124] As the Court observed, returning to Dickson CJ's 1987 dissent:

> Not surprisingly, Dickson C.J. was alive to the profound bargaining imbalance the union inherits when the removal of the right to strike is not accompanied by a meaningful mechanism for resolving collective bargaining disputes:
>
> > Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22 of its factum that "It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". *The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers*. [Emphasis added.][125]

c) *Meredith v Canada (Attorney General)*

The Court's decision in *Meredith v Canada (Attorney General)*,[126] released at the same time as *MPAO*, involved consideration of the same RCMP representational scheme that the Court found to be unconstitutional in *MPAO*. However, in *Meredith*, the challenge arose in the context of the part of the scheme that, far from providing a meaningful process of collective bargaining, set out only a limited right of consultation over pay increases through the advisory RCMP Pay Council (with equal representatives of RCMP management and RCMP members and a neutral chair), that in turn made pay recommendations to the RCMP Commissioner, who in turn made recommendations to Treasury Board.

In *Meredith*, the Government had agreed to pay increases for RCMP members through this process, but then reversed and replaced them with lower increases, initially through executive action and then

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124 *Ibid* at para 25.

125 *Ibid* at para 94.

126 2015 SCC 2 [*Meredith*].

through legislation (the federal *Expenditure Restraint Act* (*ERA*)). Meredith and other RCMP members challenged this on the basis that overriding the increases interfered with what they asserted to be a section 2(d) protected associational consultative process.

The first issue the Court faced was how to deal with its finding in the companion *MPAO* case that the Pay Council process itself was part of a representation scheme found to be unconstitutional (in that it did not provide for meaningful collective bargaining through democratically chosen and independent bargaining agents). However, the Court found that in the absence of a *Charter*-compliant meaningful or "true collective bargaining process," RCMP members nonetheless used the Pay Council to develop recommendations for members' pay and to advance their compensationrelated goals.[127] As a result, in the Court's view, despite being constitutionally deficient, the Pay Council consultative process amounted to *Charter*-protected associational activity "even though the process does not provide all that the *Charter* requires."[128] As the Court stated: "the legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(d)."[129]

As it turned out, given the limited consultative nature of the constitutional activity at issue, the majority had little trouble concluding that the legislation did not substantially interfere with RCMP members' constitutionally deficient and limited associational consultative activity.[130] As the Court concluded, "the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place."[131]

On one view, *Meredith* can be regarded as the least significant of the 2015 trilogy decisions. This is because RCMP members could only claim interference with what was, by definition, a constitutionally inadequate, minimal, and thin right to be consulted, falling well short of the meaningful (or "true") collective bargaining process protected and required by section 2(d). For this reason, the majority's analysis, which focused of necessity only on whether the legislation interfered with the *Charter*-deficient "constitutionally inadequate" Pay Council process, arguably sheds little if any light on the approach to be taken in assessing whether legislative

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127 *Ibid* at para 25.

128 *Ibid*.

129 *Ibid*.

130 *Ibid* at paras 28–30.

131 *Ibid* at para 30.

wage control or similar restrictions overriding or precluding negotiated provisions interfere with the thicker section 2(d) right to a meaningful collective bargaining process that unionized employees possess.

On this view, the constitutional right being claimed by RCMP members in *Meredith* — the right to be consulted through the RCMP representational scheme — fell well short of what the Court has found to be protected in *MPAO* and *Health Services*, namely meaningful collective bargaining (and not mere consultation) through a democratically chosen independent association or union, backed up by the right to strike (or in essential services, independent and binding interest arbitration).

On the other hand, if one ignores the limited nature of the constitutional right at issue in *Meredith*, the decision can be viewed as supporting a more impoverished view of the scope of section 2(d) protection, left somewhat ambiguous since *Health Services* — namely, that so long as a government engages in a process of good faith consultation prior to overriding negotiating collective agreement terms, and/or precluding future bargaining, the requirements of section 2(d) have been met.

8. *British Columbia Teachers' Federation v British Columbia*

The Court's most recent foray into the section 2(d) thicket, its November 2016 decision in *British Columbia Teachers' Federation v British Columbia* (*BCTF*),[132] could potentially have firmly resolved lingering ambiguities in the scope of section 2(d) protection for collective bargaining. However, if there is one lesson to learn when it comes to the Supreme Court of Canada's approach to freedom of association in the collective bargaining context, it is that while (as Abella J pronounced in *SFL*) "the [section 2(d)] arc bends increasingly towards workplace justice,"[133] the arc is not necessarily a smooth one, with uncertain twists and bends along the way. The *BCTF* decision is perhaps the latest example.

The *BCTF* case initially arose back in 2002, involving an issue similar to that in *Health Services*, except it arose in the education sector, and the legislation at issue (Bill 28) overrode and removed negotiating collective agreement provisions aimed primarily at placing limits on class size, while at the same time prohibited future bargaining over class size and certain other related working conditions.

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132 2016 SCC 49 [*BCTF, SCC*].

133 *SFL*, above note 108 at para 1.

Following the Supreme Court of Canada's decision in *Health Services*, in 2011 Griffin J of the BC Superior Court found that Bill 28 unjustifiably infringed section 2(d), and declared it to be unconstitutional, with the usual one-year suspension of the declaration of invalidity. The government did not appeal, but instead entered into discussions/consultations with the teachers' unions. Following a period of bargaining/consultation with the unions, the government then enacted Bill 22 one year later, which, in essence, continued in effect the terms of Bill 28 overriding the class size provisions, with the only difference being that Bill 22 permitted bargaining in future rounds over class size.

According to the BC government, relying especially on the *Fraser* decision, all that section 2(d) required it to do was to consult in good faith prior to enacting Bill 22, which it argued it had done. For their part, the teachers' unions had a different view, arguing that section 2(d) precluded the unilateral imposition of legislative terms, and that in any event the government had failed to consult or negotiate in good faith.

At trial again, Griffin J found that Bill 22 was contrary to section 2(d) of the *Charter* and not saved by section 1.[134] According to Griffin J, even if pre-legislative consultation was relevant to determining whether there had been a breach of section 2(d), the government had not consulted in good faith, having come into the process with a closed mind, and having tried to provoke the teachers to go on strike so that they could potentially justify back to work legislation. But Griffin J also held, on the basis of her reading of the prior Supreme Court of Canada caselaw reviewed above, that pre-legislative good faith consultation was not relevant to the section 2(d) inquiry in the first place, i.e., that legislation overriding important negotiating collective agreement terms and/or precluding future bargaining over such terms infringed section 2(d), since it undermined the process of good faith bargaining required by section 2(d).

The BC Court of Appeal, by a 4:1 majority with Donald J dissenting, issued its decision reversing the trial judge and upholding the legislation, in a decision released in April 2015, three months after the Supreme Court of Canada released the 2015 *MPAO*/*Meredith*/*SFL* trilogy. According to the majority of the BC Court of Appeal,[135] the *MPAO* and *SFL* decisions were not relevant to the issues arising in *BCTF*, since "pre-legislative consultations were not a factor in *MPAO* or *SFL*, both of which dealt with the structure of collective bargaining regimes."[136] By contrast, according to the majority, both *Health Services* and *Meredith* sup-

134 *British Columbia Teachers' Federation v British Columbia*, 2014 BCSC 121.

135 *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 [*BCTF, BCCA*].

136 *Ibid* at para 63.

ported the view that, where a government consulted in advance prior to enacting legislation that interfered with the negotiation of important collective agreement terms, that was an important contextual factor against finding an infringement of section 2(d). Moreover, according to the Court of Appeal majority, the fact that the legislation in question overrode terms and conditions of employment involving important matters of public policy was another factor that weighed against a finding of section 2(d) infringement.

The Court of Appeal went on to find that the trial judge had erred in finding that the government had consulted in good faith by *inter alia* having inquired into the substantive reasonableness and motivations of the government's position and, upholding the appeal and reversing the trial judge, determined that the government had followed a good faith process of consultation.

When the appeal was argued in the Supreme Court of Canada on 10 November 2016, the Court ruled from the bench, upholding the appeal and finding the legislation to be unconstitutional, with a seven-judge majority allowing the appeal "substantially for the reasons of Justice Donald,"[137] and two judges (Côté and Brown JJ), dissenting "substantially for the reasons of the majority of the Court of Appeal."[138] Given that the majority allowed the appeal "substantially for the reasons of Justice Donald," and gave no other reasons, it is necessary to consider the reasons of Donald J if we are to understand the rationale for the Supreme Court of Canada's decision. At the same time, the fact that the Court stated that it was in substantial agreement with Donald J's reasons leaves us to speculate as to which aspects of the reasons the majority agreed with, and which it did not.

Significantly, unlike his majority colleagues in the BC Court of Appeal, Donald J did not view the Supreme Court of Canada's decisions in *MPAO* and *SFL* as irrelevant. Rather, in the first section of his reasons dealing with "The Health Services Test and Pre-Legislative Consultation," Donald J specifically emphasizes the importance of the statement in *MPAO* that "a process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d),"[139] and that separate and apart from "bad faith negotiations or the refusal to consider submissions,"[140] collective

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137 *BCTF, SCC*, above note 132 at para 1.

138 *Ibid*.

139 *BCTF, BCCA*, above note 135 at para 344.

140 *Ibid* at para 286.

bargaining is also "protected in the sense that substantial interference with past, present, or future attempts at collective bargaining can render employees' collective representatives effectively feckless, and thus negate the employees' right to *meaningful* freedom of association."[141]

Justice Donald also explains, without any reference to pre-legislative consultation, that unilaterally nullifying collective agreement terms can infringe section 2(d):

> The act of associating for the purpose of collective bargaining can also be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory: see *Health Services* at para. 96. This is not an exercise in "constitutionalizing" the terms of a collective agreement or the result of collective bargaining, but is instead the result of constitutionalizing the right to a meaningful process that is not continually under threat of being rendered pointless.[142]

Moreover, when it comes to considering whether pre-legislative consultation meets the requirements of section 2(d), Donald J emphasized that the union must be given "the opportunity to *meaningfully* influence the changes made, on bargaining terms of approximate equality,"[143] specifically referencing paragraph 55 of the *SFL* decision that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality," and that without it, "bargaining risks being inconsequential — a dead letter."[144] As Donald J concluded:

> Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a *meaningful* substitution. To be meaningful, the bargaining parties must consult from an assumed position of "approximate equality". I note here that in *SFL*, Abella J., writing for the majority of the Court, found that a right to strike was essential in order to maintain "approximate equality" between employees and employers in the collective bargaining process: at para. 55, quoting Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2009–2010), 15 C.L.E.L.J. 333 at 333.[145]

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141 *Ibid* at para 284 [emphasis in original].
142 *Ibid* at para 285.
143 *Ibid* at para 287 [emphasis in original].
144 *SFL*, above note 108 at para 55.
145 *BCTF, BCCA*, above note 135 at para 291.

Finally, Donald J expressly states that he does "not believe that any amount of pre-legislative consultation could . . . prevent a finding of unconstitutionality" where a government passes "legislation that permanently prohibits collective bargaining or associational activities" (such as the previous Bill 28).[146]

At the same time, there are passages in Donald J's reasons that appear to suggest that pre-legislative consultation may in some cases meet the requirements of section 2(d). For example, Donald J expresses his agreement with the majority, and his disagreement with the trial judge, that good faith pre-legislative consultation can never be relevant to determining whether a section 2(d) breach has occurred, since "a *Charter* breach cannot always be seen within the four corners of legislation, but must sometimes be found to occur *prior* to the passage of the legislation" i.e., where "the government failed to consult a union in good faith or give it an opportunity to bargain collectively."[147]

Moreover, after expressing his view as to the relevance of both *MPAO* and *SFL* to the constitutional analysis, Donald J nonetheless states that "if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process."[148] Justice Donald also describes the central issue in the case as being "whether . . . unilateral nullification came after a point of impasse following good faith consultation, and thus gave effect to the BCTF's right to a form of collective bargaining, or whether the Province's 'consultation' was treated merely as a formality."[149]

Certainly, it seems difficult to reconcile these passages with Donald J's earlier emphasis (and the Supreme Court of Canada's emphasis in *SFL*) on the fundamental importance of the right to strike precisely at the point of resolving collective bargaining impasses.

Ultimately, Donald J focuses his finding that the legislation infringes section 2(d) on the basis of his disagreement with the majority over whether the trial judge correctly inquired into the substantive reasonableness and motivations of the government in the pre-legislative consultation process leading to the enactment of Bill 22, and over the failure of the majority to accord the trial judge's factual findings concerning

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146 *Ibid* at para 296.

147 *Ibid* at para 288 [emphasis in original].

148 *Ibid* at para 293.

149 *Ibid* at para 311.

bad faith a sufficient degree of deference on the overriding and palpable error standard.

As a result, there would seem to be considerable uncertainty flowing from the Supreme Court of Canada majority's substantial agreement with Donald J's dissenting reasons in *BCTF.* On the one hand, there are aspects of Donald J's reasons that seemingly accept the distinction between consultation — good faith or otherwise — and the meaningful right to collective bargaining backed up by the right to strike confirmed in *MPAO* and *SFL*, and the inadequacy of the latter for section 2(d) constitutional purposes. On the other hand, there are aspects of Donald J's reasons that put the focus of section 2(d) inquiry on the good faith adequacy of a pre-legislative consultation process.

We can safely predict that debate will continue as to which of the conflicting strands in Donald J's reasoning attracted the agreement of the Supreme Court. Union-side labour lawyers will no doubt argue that Donald J (and the Supreme Court of Canada in substantially agreeing with this reason) was merely recognizing that good faith pre-legislative consultation is a necessary but not sufficient prerequisite for section 2(d) compliance. They can also be expected to emphasize the argument that in substantially agreeing with Donald J's reasons, the majority was simply agreeing with the ratio or core of Donald J's decision, namely, his disagreement within the majority of the BC Court of Appeal over the extent to which a court can probe the substantive reasons and motivations of government in determining whether it acted in good faith, and over the extent to which an appellate court should defer to the factual finding of a trial judge. For their part, government and employer lawyers can be expected to argue that, after *BCTF*, all that is required in the context of legislation interfering with and/or prohibiting the negotiation of important collective agreement protection is a process of advance good faith legislative consultation.

B. DOCTRINAL TENSIONS AND UNRESOLVED ISSUES

After a review of the Supreme Court's evolving approach to section 2(d), it seems fair to say that the original 1987 trilogy has now effectively been buried, with the constitutional labour relations world turned on its head. Chief Justice Dickson's 1987 dissent a quarter of a century later has become 2015's majority outcome. Despite Rothstein J's consistent and repeated dissents attempting to limit this retreat from the previous section

2(d) "no-go zone", we now know that section 2(d) protects not only the right to join and maintain an association, but also protects a meaningful collective bargaining process, including the right to a process of meaningful collective bargain through a democratically chosen and independent union, as well as the right to strike (now recognized since *SFL* as an indispensable element of a meaningful collective bargaining process).

However, despite this apparent paradigm shift, and while the arc of freedom of association has evolved to recognize a significantly larger zone of constitutional protection for organizing, collective bargaining, and the right strike, some caution is warranted. The Supreme Court has been neither consistent nor reliable in its approach to labour rights under section 2(d). Outcomes in this area may well depend on the views of individual judges about the role of the courts in advancing collective rights and workplace justice. Of course, this could change as judges leave the Court and are replaced over time. Of the judges who had substantial labour expertise and spearheaded the expansion of section 2(d) over the past decade, Cromwell and LeBel JJ have retired and the Chief Justice will retire in December 2017. The majority that gave us *MPAO* and *SFL* is now gone. Justice Abella, perhaps the Court's strongest advocate for expanding section 2(d), remains, but she will retire in less than four years. As new judges reach the Supreme Court, little should be taken for granted when it comes to the future direction of section 2(d).

Whatever the composition of the future Supreme Court, it will have to address a number of unresolved questions about section 2(d) amid doctrinal tension and uncertainty. It is beyond this chapter's scope and ambition to identify and analyze all of the areas of contested terrain, and to work through the various and competing ways in which those questions and tensions may be resolved. However, what follows is an analysis of three aspects of the current section 2(d) jurisprudence that are the subject of uncertainty and controversy: 1) the role of pre-legislative consultation in satisfying the section 2(d) requirement for a meaningful process of collective bargaining; 2) the current status of the substantial interference test for a violation of section 2(d); and 3) the impact of the Court's revised approach to section 2(d) on the law of forced association.

1. Pre-legislative Consultation

As noted above in Part A, there are conflicting aspects of the Supreme Court's section 2(d) caselaw regarding the question as to whether government can comply with section 2(d) merely by engaging in good faith consultation prior to enacting legislation overriding important collective

agreement protections. This ambiguity arises from the Court's reasons in *Health Services*, its partial retreat in *Fraser*, the subsequent reinforcement of section 2(d) protection in the 2015 trilogy, and the Court's recent brief and uncertain endorsement in *BCTF*.

No doubt, after the *Fraser* decision, some employer and government counsel posited that section 2(d) protects only a process of good faith bargaining, and that good faith bargaining is all that is needed to ensure a meaningful process of collective bargaining (rather than some form of dispute resolution). From this perspective, in a world where section 2(d) protection for collective bargaining was comprehended as being no more than the right to make collective representations and have those representations considered in good faith, it may well be that advance good faith pre-legislative consultation could be understood as satisfying the section 2(d) obligation.

However, now that the right to strike has been constitutionally recognized as an integral and indispensable component of collective bargaining, it seems difficult to appreciate (despite the uncertainty of the Supreme Court's cryptic reasons in *BCTF* substantially agreeing with Donald J's reasons — which, as set out in Part A above, are themselves ambiguous) how prior legislative consultation can be seen as responsive to or respectful of the fundamental right of workers, as part of the collective bargaining process with their employer, to withdraw their services through strike action where collective bargaining (or for that matter pre-legislative consultation) reaches an impasse.

On this view, after *SFL*, section 2(d) protects more than the right to be consulted, and extends to the right to engage in strike action, and to do so precisely when prior good faith consultation or bargaining has reached an impasse. In this respect, there would seem to be a fundamental distinction between consultation, on the one hand, and section 2(d) protected meaningful or authentic collective bargaining, on the other hand. Consultation requires that the consulting party (whether government or the employer) retains the final authority over the decision. By contrast, meaningful collective bargaining requires that neither party has a unilateral power of decision, and that, in the event of a disagreement, workers have a right to withdraw their services (or resort to interest arbitration in the cases where the right to strike has been justifiably removed) rather than having terms imposed upon them.

From this perspective, the right to a meaningful collective bargaining process backed up by the right to strike would seem by definition to be abrogated where a legislature unilaterally imposes terms following good faith consultation, but without affording workers their

right to engage in strike action (or in the case of essential service workers, the right to an independent and binding interest arbitration process) to contest and shape those terms.

Indeed, in considering this issue, it is constructive and informative to consider the following rationales articulated by the Court in *SFL* in support of constitutional protection of the right to strike:

a) section 2(d) "prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining";
b) "the ability to collectively withdraw services for the purposes of negotiating terms and conditions of employment . . . is an essential component of the collective bargaining process," so that "acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike";
c) "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*" [quoting Dickson CJ in the *Alberta Reference*];
d) "the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining";
e) "the right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse";
f) "the ability to strike . . . allows workers, through collective action, to refuse to work under imposed terms and conditions";
g) it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality";
h) without the right to strike, "bargaining risks being inconsequential — a dead letter";
i) "the ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, the 'irreducible minimum' of the freedom to associate in Canadian labour relations"; and
j) "a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective

> withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."[150]

Given all of these various rationales for constitutional protection of the right to strike — and given the explicit recognition that the right to strike is protected so as to enable employees to attempt collectively to resist the imposition of important employment terms by withdrawing their services precisely at the point of impasse, and when good faith bargaining has broken down — it would seem difficult to support the notion that the right to collective bargaining guarantees no more than a right of consultation, i.e., to make representations to one's employer or government and have those representations considered in good faith. After *SFL*, section 2(d) protects more than the right to be consulted. It extends protection to the right to engage in strike action (or independent dispute resolution in the case of essential service workers), and to do so precisely when prior good faith consultation or bargaining has reached an impasse. Indeed, if legislatures could unilaterally impose important collective agreement terms in the face of an impasse following consultation, the protection afforded by section 2(d) would, perversely, end at the very point at which the constitutionally protected right to strike as an indispensable element of meaningful collective bargaining is most critical.

As noted above, some observers and courts have also suggested that *Health Services* itself only protected a process of good faith bargaining, and permitted legislation to override collective agreement terms or to prohibit future bargaining, so long as the legislation was preceded by a process of pre-legislative good faith consultation. However, whatever the validity of this view as to the intended scope of section 2(d) protection based on the *Health Services* decision alone, any reference to the sufficiency of good faith bargaining alone in *Health Services* could not and would not have contemplated the right to strike as forming an indispensable component of a meaningful collective bargaining process, since the 1987 trilogy finding that the right to strike was not constitutionally protected was neither addressed nor disturbed in *Health Services*. However, now that *SFL* has recognized a constitutional right to strike as an indispensable component of the constitutionally protected collective bargaining process, the focus of the second aspect of the *Health Services* inquiry (into whether the legislation has preserved a process of good faith collective bargaining) must now include inquiring into whether the legislation has respected and preserved the right of employees to with-

150 *SFL*, above note 108 at paras 77, 46, 49, 51, 54, 55, 61, and 75.

draw their services in the event of a collective bargaining impasse over important terms and conditions of employment, since this has now been recognized as an indispensable component of any good faith or meaningful collective process.

2. The Substantial Interference Test for a Section 2(d) Infringement

As discussed in Part A, the Supreme Court has insisted since 2007 that parties claiming a violation of the right of collective bargaining under section 2(d) must establish more than a mere interference in order to demonstrate a violation of freedom of association; generally, the Court's test has required a "substantial interference". This is not the only internal limitation under the existing section 2(d) law. As discussed below, the forced association caselaw has its own internal limitation, requiring "ideological conformity" to be established for a section 2(d) violation.

Over the past decade, successive decisions of the Supreme Court have provided insights into the factors that may be relevant in establishing interference sufficient for a section 2(d) violation. Nevertheless, as will be demonstrated below, the meaning of "substantial interference" remains elusive and potentially quite subjective and impressionistic. What follows is an overview of the leading cases that have developed the substantial interference test and a discussion of some of the emerging issues concerning how substantial interference should be understood and applied in a given context.

a) *Dunmore v Ontario (Attorney General)*

Although *Health Services* introduced the "substantial interference" test as a general requirement for section 2(d), it is important to look back at *Dunmore* where the test first appeared in a majority judgment. In fact, the Court in *Health Services* expressly referred to the "test crafted in Dunmore by Bastarache J, which asked whether 'excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association' (para. 23)."[151]

Indeed, the substantial interference test was a prominent feature of the *Dunmore* decision. What is notable about the above-quoted statement from *Dunmore* is that it was made in a particular context — namely, in circumstances where a group of workers had been excluded from labour

151 *Health Services*, above note 37 at para 41.

legislation and the issue arose as to whether section 2(d) required their inclusion. While the Supreme Court recognized that any distinction between positive and negative state obligations should be "nuanced in the context of labour relations," the distinction was nevertheless an important one in *Dunmore*.[152] Since the claim being advanced to the Supreme Court was based on legislative under-inclusion rather than legislative interference, the Court adopted the proposition that a "substantial interference" in freedom of association would have to be demonstrated before section 2(d) would have the unusual effect of requiring the state to take legislative action.[153] Justice Bastarache linked the requirement of a "substantial interference" directly to under-inclusion cases and even cited Dickson CJ's dissent in the *Alberta Reference* for support:

> . . . the underinclusion cases demonstrate that a proper evidentiary foundation must be provided before creating a positive obligation under the *Charter*. This requirement proved fatal in *Haig*, *NWAC and Delisle* because the claimants in all three cases were unable to prove that the fundamental freedom at issue, as opposed to merely their requested statutory entitlement, was impossible to exercise. On the contrary, it was concluded in *Haig* that "the referendum itself, far from stifling expression, provided a particular forum for such expression" (p. 1040) . . . . Finally, it was concluded in *Delisle* that "it is difficult to argue that the exclusion of RCMP members from the statutory regime of the *PSSRA* prevents the establishment of an independent employee association because RCMP members have in fact formed such an association in several provinces, including Quebec, where 'C' Division was created by Mr. Delisle himself" (para. 31). In my view, the evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a *substantial* interference with the exercise of protected s. 2(d) activity. Such a burden was implied by Dickson C.J. in the *Alberta Reference*, *supra*, where he stated that positive obligations may be required "where the absence of government intervention may in effect *substantially impede* the enjoyment of fundamental freedoms" (p. 361 (emphasis added)).[154]

It is clear from *Dunmore* that judicial restraint was the underlying purpose of the substantial interference test as initially conceived. In other words, courts should respect the legislative function by limiting the circumstances in which they order legislators to take positive action

152 *Dunmore*, above note 25 at para 20.

153 *Ibid* at paras 21–23.

154 *Ibid* at para 25.

pursuant to section 2(d). Only in exceptional circumstances would it be appropriate for the courts to intrude by requiring legislative action.

b) *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*

In *Health Services*, however, the Supreme Court took the substantial interference requirement from *Dunmore* and effectively inserted it into the general test for a violation of section 2(d) in all collective bargaining cases. In the portion of the *Health Services* decision purporting to define the scope of the right to bargain collectively, the Court goes to great pains to make the point that the new right is "limited." To demonstrate its limited nature, the Court cites *Dunmore* for the proposition that the right "protects only against 'substantial interference' with associational activity."[155] The Court even characterizes substantial interference as the most important limit on the right of collective bargaining, where it states, "Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial . . . ."[156]

Health Services includes no discussion or explanation as to how or why a requirement developed in *Dunmore* to address under-inclusion cases could or should morph into a test for all collective bargaining cases. The Supreme Court simply ignores the issue. However, the Court's efforts to provide reassurances about the "limited" nature of the right of collective bargaining suggest that the Court was concerned about the potential impact of unleashing a broad and new collective bargaining right on a heavily regulated labour relations system. The substantial interference requirement was an existing limit within section 2(d); its adoption provided further reassurance to those on the losing side of *Health Services* (i.e., governments and employers) that much of the legislative status quo would still remain beyond the reach of section 2(d).

To assist in understanding how substantial interference would apply in a case of legislative intervention in collective bargaining, the Supreme Court offered additional guidance. As set out above, two lines of inquiry were identified: (1) an inquiry into the importance of the matter affected to the process of collective bargaining (and in particular the capacity of union members to come together and pursue collective goals in concert); and (2) an inquiry into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.[157] The Court then elaborated on these inquiries. In respect of the

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155 *Health Services*, above note 37 at para 90.

156 *Ibid* at para 91.

157 *Ibid* at para 93.

first inquiry, the Court noted that an interference in matters of less importance (like the design of a uniform, the organization of a cafeteria, or the availability of parking) is more likely to fall short of discouraging the capacity of union members to come together and pursue common goals. On the other hand, an interference in significant negotiated collective agreement terms may have that discouraging impact.[158] In respect of the second inquiry, the Court emphasized that legislative interference on a significant matter may still not violate section 2(d) if the state has respected the duty to consult and negotiate in good faith.[159] So long as good faith bargaining and meaningful dialogue occur, the substantial interference test may not be satisfied.

c) Ontario (Attorney General) v Fraser

In *Fraser,* the majority of the Court retreated without explanation from the substantial interference test, instead appearing to apply a more stringent test requiring a claimant to demonstrate the "effective impossibility" of exercising associational rights. In the portion of the decision entitled "The Issue in This Appeal", the majority made the following statements:

> *In every case,* the question is whether the impugned law or state action has the effect of *making it impossible* to act collectively to achieve workplace goals. [160]
>
> If it is shown that it is *impossible* to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the s. 2(d) right is established . . . .[161]
>
> The question here, as it was in those cases, is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals *impossible,* thereby substantially impairing the exercise of the s. 2(d) associational right.[162]

In answering the question of whether the *AEPA* violates section 2(d), the majority again articulated (not once but *twice*) the applicable test using the language of effective impossibility:

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158 *Ibid* at para 96.
159 *Ibid* at para 97.
160 *Fraser,* above note 51 at para 46 [emphasis added].
161 *Ibid* at para 47 [emphasis added].
162 *Ibid* at para 48 [emphasis added].

> The essential question is whether the *AEPA* makes meaningful association to achieve workplace goals *effectively impossible*, as was the case in *Dunmore*. If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer *effectively impossible*, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the *Charter will* have been limited, and the law found to be unconstitutional . . . .[163]

The Court then proceeded to interpret the *AEPA* as not only protecting the right of agricultural workers to make representations to their employer, but also requiring the employer to consider those representations in "good faith."[164] This led the Court to reject the section 2(d) claim.

The *Fraser* decision veered away from *Health Services* by applying a test based on impossibility rather than substantial interference. *Fraser* also made no mention of the two lines of inquiry described in *Health Services*. As noted by the BC Court of Appeal in a later case, "The majority [in *Fraser*] appears to short-circuit the first half of the analysis and move directly to the second half, where it asks whether the effect of the purported infringement is to make good faith resolution of workplace issues 'effectively impossible.'"[165]

What explanation is there for *Fraser's* retreat from the substantial interference test articulated in *Health Services*? As discussed below, the Supreme Court itself later provided a fairly unconvincing explanation in *MPAO*. One can only speculate about the Court's true motivation. However, it is important to recall that *Health Services* had been a controversial decision that attracted criticism and concern. The Ontario Court of Appeal in *Fraser* (and other lower courts and tribunals) read *Health Services* broadly and applied it enthusiastically to constitutionalize aspects of the Wagner Model. Justices Rothstein and Charron were so troubled about the impact of *Health Services* that they characterized it as "unworkable" and argued in their concurring opinion for the decision to be overturned.[166] The majority's departures from *Health Services* may be a reflection of the fact that they were on the defensive and thought that a more restrictive approach would be an effective response to the claim that *Health Services* overshot the mark and was unworkable.

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163 *Ibid* at para 98 [emphasis added].

164 *Ibid* at para 102.

165 *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*, 2016 BCCA 156 at para 48 [*Dockyard*].

166 *Fraser*, above note 51 at para 145.

d) Mounted Police Association of Ontario v Canada (Attorney General)

In *MPAO*, the Court purported to resolve the inconsistency between the effective impossibility test in *Fraser* and the substantial interference test in *Health Services*. The majority confirmed that the test for finding a violation of section 2(d) is whether there is "substantial interference with the right to a meaningful process of collective bargaining."[167]

In attempting to explain the decision in *Fraser*, the Court stated that the decisions in *Health Services* and *Fraser* had used terms like "impossible" and "effectively nullified" merely to describe the effect of legislative schemes rather than the legal test for infringement of section 2(d).[168] The Court also pointed out that *Fraser* reaffirmed the holding from *Health Services* that a substantial impairment is required for a violation of section 2(d).[169] The Court proceeded to state confidently that "the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association."[170]

The Court's explanation cannot easily be reconciled with the actual text of the *Fraser* decision. Certainly, the Ontario Court of Appeal did not read *Fraser* this way when it upheld the RCMP's labour relations system because it did not make it effectively impossible for RCMP members to meaningfully exercise their section 2(d) rights.[171] Justice Rothstein (dissenting) was convinced, like the Ontario Court of Appeal, that *Fraser* mandated a test of effective impossibility. This is clear where he states: "There is no escaping the majority's decision in [Fraser]; it referred to the test of impossibility — either effective or substantial impossibility — *no less than 12 times* . . . . With respect, by resiling from a test so recently established and refusing to acknowledge this departure, the majority undermines the legitimacy of its approach in this appeal."[172] Justice Rothstein added, "Inconveniently for my colleagues, at para. 46, the majority in *Fraser* unambiguously states: '*In every case*, the question is whether the impugned law or state action *has the effect of making it impossible* to act collectively to achieve workplace goals.'"[173]

In a response that tends to validate how the Ontario Court of Appeal and Rothstein J understood *Fraser*, the Court conceded that certain pas-

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167 *MPAO*, above note 69 at para 80.

168 See *ibid* at para 75.

169 See *ibid* at para 76.

170 *Ibid* at para 75 [emphasis in original].

171 *Ibid* at para 28.

172 *Ibid* at para 213 [emphasis in original].

173 *Ibid* at para 214 [emphasis in original].

sages of *Fraser* "seem to unnecessarily complicate the analysis" by referring to both effective impossibility (as the effect of certain state action) and substantial interference or impairment (as the test for infringement of section 2(d)).[174] However, the Court argued that the *Fraser* decision must be understood in context with the earlier decisions in *Dunmore* and *Health Services*, as well as the purposive and generous approach to section 2(d).[175]

In any event, the Court's return to the "substantial interference" test in *MPAO* was unequivocal. It was also one of the reasons (if not *the* reason) that the *MPAO* appeal was allowed. Both the Ontario Court of Appeal and Rothstein J applied the stricter "effective impossibility" test to the facts of *MPAO* and found no section 2(d) violation.

MPAO provided some additional guidance on what a substantial interference with section 2(d) might actually look like. The majority focused on collective bargaining as a means to address the historical power imbalance between employers and employees. Thus, the Court described substantial interference in terms of a disruption in this balance of power. In particular, the Court clarified that a process that "substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power"[176] would violate section 2(d). The majority further elaborated on this notion in the following passage:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.[177]

Although the Court in *MPAO* cited paragraph 90 of *Health Services* in support of the statement that the "ultimate question" is whether the balance between employees and employers has been disrupted, the cited

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174 *Ibid* at para 77.
175 *Ibid*.
176 *Ibid* at para 71.
177 *Ibid* at para 72.

paragraph does not directly address the need for preservation of a bargaining balance. Rather, the paragraph in question is solely concerned with the second inquiry from *Health Services* (discussed above) and the need for good faith to be respected. Preservation of a balance of power between workers and their employer therefore appears to emerge from *MPAO* as a new focus of the substantial interference test.

MPAO is also notable because the Court defined a meaningful process of collective bargaining as one "that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[178] The Court addressed "choice" and "independence" as two distinct aspects of a meaningful process. According to the Court, the hallmarks of employee choice "include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations."[179] Independence refers specifically to independence from management, which is important to ensure that an association acts in the best interests of employees and is not influenced or dominated by the employer. Independence can be assessed based on factors such as the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration, and control over the activities the association chooses to pursue.[180]

Although the Court treated choice and independence as two separate aspects of a meaningful collective bargaining process, the Court also stated that they are "complementary principles" and that *Charter* compliance is evaluated based on the degrees of independence and choice in a labour relations scheme.[181] What then becomes apparent is that the Court's analysis of the substantial interference test, and whether a balance is preserved between RCMP members and their employer, was based on its assessment of whether the RCMP labour relations system provided sufficient independence and choice. The Court described the SRRP as a process that was imposed on RCMP members and lacked independence from management.[182] For these reasons, the Court concluded that "the process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining . . . ."[183] It is,

178 *Ibid* at para 81.
179 *Ibid* at para 86.
180 *Ibid* at paras 88–89.
181 *Ibid* at para 90.
182 See *ibid* at para 106.
183 *Ibid*.

therefore, an absence of sufficient choice and independence that led to a finding of a substantial interference in section 2(d).[184]

While *MPAO* marked a return to the substantial interference test from *Health Services*, the Court's analysis bore little resemblance to the "two inquiry" approach. This is likely because the Court was not addressing legislative interferences in collective agreements under section 2(d) (as in *Health Services*). Rather, the Court was addressing a different type of case concerning whether an entire labour relations system could be sustained under section 2(d) as a meaningful process of collective bargaining. Not surprisingly, the Court's analysis in *MPAO* reflected systemic considerations and, specifically, the minimum requirements for a constitutionally compliant labour relations scheme.

e) *Meredith v Canada (Attorney General)* and *Saskatchewan Federation of Labour v Saskatchewan*

Both *Meredith* and *SFL* confirmed that the correct legal test for a section 2(d) violation is "substantial interference" with employees' collective pursuit of workplace goals.

In *Meredith*, in assessing whether the wage rollback in the *ERA* constituted a substantial interference, the Court compared the situation to what had occurred in *Health Services*.[185] The Court noted that *Health Services* should not be viewed as "a minimum threshold for finding a breach of s. 2(d)."[186] Nevertheless, the Court thought that there was a much more significant interference in *Health Services* than in *Meredith*. Whereas the BC government had imposed radical changes to significant collective agreement terms and had precluded future negotiations on some issues, the *ERA* imposed wage rates that had been negotiated with other bargaining agents and did not preclude consultation from taking place. In fact, according to the Court, there was evidence that RCMP members were still able to achieve significant benefits through the Pay Council process. The Court reasoned that the *ERA* had a relatively minor impact on the appellants' associational activity, and that the requirement of a substantial interference had not been satisfied.[187]

Whereas *Meredith* raised collective bargaining issues that were similar to *Health Services*, *SFL* expanded section 2(d)'s protection of the collective bargaining process into a new area by recognizing the right to strike. However, the Court was clear that the test for an infringement

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184 See *ibid* at para 121.

185 See *Meredith*, above note 126 at para 29.

186 *Ibid* at para 28.

187 *Ibid* at paras 29–30.

of section 2(d) in a right to strike case would still focus on "whether the legislative interference . . . in a particular case amounts to a substantial interference with collective bargaining."[188] The Court then applied this test to the facts of *SFL* in a single sentence: "The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process."[189]

Although the Court refers to the "ultimate question" from *MPAO* as to whether the balance between employees and the employer has been disrupted, the Court does not actually answer this question in its decision. Presumably, the Court must have considered it self-evident that the legislation at issue was so unfair and one-sided that a disruption of the labour relations balance was the purpose and the inevitable effect. Still, it would have been helpful for future cases if the Court had provided a substantive response to the "ultimate question".

In any event, the Court's single sentence analysis of the "substantial interference" test in *SFL* suggests that the bar may not be set high to establish a violation of section 2(d) in the case of the right to strike. A legislative restriction preventing a group of employees from engaging in any strike as part of the bargaining process is, apparently, a substantial interference by definition. This is the case even if the employees are truly "essential" (in the legal sense) and even if strikes and lockouts are replaced by a neutral, fair binding arbitration process. Such matters are relevant only to section 1, not to section 2(d).

Still, the right to strike itself cannot be absolute under section 2(d). The Court's single sentence emphasizes that the substantial interference in *SFL* arises from prohibiting *any* strike as part of the bargaining process. Prohibitions on strikes at particular times (i.e., no strikes for recognition or during the term of a collective agreement) and procedural preconditions to strikes (i.e., conciliation, mediation, provision of notice to the employer and the minister of labour, etc.) would not necessarily rise to the level of a substantial interference because the right to strike is preserved to some extent. In addition, there may be circumstances where workers (through representatives) voluntarily give up their right to strike in a consultation process leading to labour legislation. An example would be the process leading to Ontario's *Agricultural Labour Relations Act* (1993), where a tripartite consensus was reached that farm workers should not have the right to strike and this was reflected in the

188 *SFL*, above note 108 at para 78.

189 *Ibid* [emphasis in original].

legislation.[190] In a circumstance like this, it would be hard to view the limitation on the right to strike as a substantial interference with freedom of association and harder still to see the point of applying section 1 in such a case.

f) *British Columbia Teachers' Federation v British Columbia*

BCTF provided the Supreme Court with an ideal opportunity to review and clarify the "substantial interference" test. After all, the BC Court of Appeal had defined the central question in the case as "whether Bill 22 substantially interfered with teachers' s. 2(d) right to a meaningful process by which they could make collective representations about workplace goals and have those representations considered in good faith."[191] In answering this question, the Court of Appeal was divided; the majority found no substantial interference, while Donald J delivered a strong dissent arguing that a substantial interference had been demonstrated.

As discussed above, the Supreme Court squandered the opportunity, issuing a one-sentence decision in which the majority of the Court substantially adopted Donald J's dissent. Nevertheless, some insight may be gained by reviewing what Donald J had to say on the issue of "substantial interference."

In his reasons, Donald J reviewed the past Supreme Court caselaw and summarized state actions that could rise to the level of a "substantial interference." These actions include:

- Legislative interference with past, present, or future attempts at collective bargaining that render employees' collective representatives effectively feckless;
- Actions by government that reduce employees' negotiating power with respect to the employer;
- Unilateral nullification of previous agreements that discourages collective bargaining in the future by rendering all previous efforts nugatory;
- Bad faith negotiation by the government or the refusal by the government to consider submissions; and
- Imposing absolute barriers to collective bargaining, or prohibiting collective bargaining entirely.[192]

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190 Task Force on Agricultural Labour Relations, *Report of the Task Force on Agricultural Labour Relations: Report to the Minister of Labour* (Toronto: The Task Force, 1992), discussed in *Dunmore*, above note 25 at para 3.

191 *BCTF, BCCA*, above note 135 at para 31.

192 *Ibid* at paras 284–86.

Justice Donald also delivered this caution:

> The mere act of passing the terms of employment through legislation rather than a traditional collective agreement makes no difference to whether the employees were given the opportunity to associate and *effectively* pursue workplace goals. If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to *meaningfully* influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile: Thus, the employees' freedom of association would likely not therefore be breached.[193]

In this sense, Donald J's reasons emphasize that pre-legislative consultation can be seen as a replacement for traditional collective bargaining, but only so long as the consultation occurs within a meaningful and effective, good faith process that reflects an approximate equality of bargaining power.[194] Conversely, Donald J observed that a court must consider the degree and nature of pre-legislative consultation when determining whether a breach occurred, as a *Charter* breach cannot always be seen within the four corners of the legislation.[195]

Justice Donald's finding of a substantial interference ultimately hinged on two points. First, the trial judge found a substantial interference in the right to collective bargaining, and Donald J called for deference to this finding. Justice Donald was particularly persuaded by the fact that the legislative interferences before him were of a much greater scale than those at issue in *Meredith* (where no substantial interference was established), and were in fact analogous to the interferences in *Health Services* (where a substantial interference was found).[196] Second, Donald J was persuaded that the government of BC had engaged in bad faith conduct when it purported to consult about the legislative changes it was contemplating. The government was closed-minded in its dealings with the relevant unions and advanced objectively unreasonable positions.[197]

In summary, Donald J held that the province's consultation efforts were not in good faith and, thus, the trial judge did not err in concluding that Bill 22 substantially interfered in teachers' section 2(d) rights. While the Supreme Court did not expressly adopt the entirety of Donald

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193 *Ibid* at para 287 [emphasis in original].

194 *Ibid* at para 291.

195 *Ibid* at para 288.

196 *Ibid* at paras 309–12.

197 *Ibid* at paras 357–62.

J's dissent in *BCTF,* his reasons provide some insight into the meaning of substantial interference by offering concrete examples of state actions that might rise to this level. Further, his reasons suggest that, regardless of whether the content of legislation itself substantially interferes with section 2(d), substantial interference may in fact also occur at the stage of pre-legislative consultation (or lack thereof).

g) Future Substantial Interference Issues

The Supreme Court's cases suggest that the analysis of "substantial interference" will depend on the specific facts of each case, how judges understand and assess those facts and the surrounding context, and how judges ultimately measure the extent of the impact on workers' participation in a meaningful process of collective bargaining. Given the dramatically different facts and context of each case, no single coherent approach has emerged. In terms of future issues arising from the substantial interference test, one can look to how the test is being viewed and applied in the lower courts. Two issues are addressed below: (i) the role of balance of power in the substantial interference test, and (ii) the status of the two lines of inquiry set out in *Health Services*.

i) Balance of Power in the Substantial Interference Test

As noted above, *MPAO* established that "the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining."[198] In several cases, lower courts have adopted and applied the notion that a substantial interference arises from disrupting the labour relations balance. For instance, in *Canada (Attorney General) v Canadian Union of Public Employees, Local 675*, substantial interference was described as follows:

> Interference is substantial when, despite not being the worst conceivable violation, it nevertheless disturbs the power balance that s. 2(d) seeks to protect by discouraging the collective pursuit of common goals or by seriously compromising collective action.[199]

Presumably, everyone should be able to agree that an interference in freedom of association does not have to be the "worst conceivable violation" to run afoul of section 2(d). Beyond this (hopefully) narrow category of extreme violations, there are bound to be a wide range of

198 *MPAO*, above note 69 at para 72.

199 2016 QCCA 163 at para 47.

legislative intrusions in meaningful collective bargaining that may be constitutionally suspect. The question is whether a focus on the power balance between employers and employees should drive the substantial interference analysis.

On one side, *Canadian Union of Postal Workers v Canada (Attorney General)*[200] suggests that power imbalance is a crucial consideration under the substantial interference test. *CUPW* was a challenge to back to work legislation introduced to bring an end to a work stoppage at Canada Post. Drawing on the discussion of substantial interference in *MPAO* and *SFL*, the Ontario Superior Court of Justice concluded that the determination of substantial interference depends on whether there has been a disruption in the balance between employer and employees.[201] In analyzing whether the impugned Act had this disruptive impact, the court noted that after the impugned legislation was introduced in Parliament, the union modified its bargaining proposals to be "less ambitious" than their previous positions, while the employer hardened its positions. According to the court, "[t]hese facts emphatically demonstrate[d] the disruption in the balance between the parties wrought by the Act."[202]

A recent BC Court of Appeal decision paints a different picture of the role of the balance of power within the substantial interference test. In *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*,[203] the appellants argued that the *ERA* (the same legislation at issue in *Meredith*) infringed their section 2(d) rights by disrupting the balance between employers and employees. The Court of Appeal took issue with the fact that the appellants attached particular significance to the "balance" aspect of the test as described in *MPAO*. In particular, the Court of Appeal stated:

> I disagree with the appellants' articulation of the test as whether an enactment "disrupts the balance" the *Charter* achieves between employers and employees. While *MPAO* discusses the importance of s. 2(d) in negotiating a balance of power in the workplace, I agree with the respondent British Columbia that the Supreme Court was not attempting to articulate a new version of the substantial interference test. In my view, the remarks in question are best understood in the context of the historical discussion of the purpose of according workplace association s. 2(d) protection. *MPAO*, *Meredith* and *Saskatchewan Federa-*

200 2016 ONSC 418.

201 *Ibid* at para 183.

202 *Ibid* at para 193.

203 *Dockyard*, above note 165.

> *tion of Labour* firmly establish "substantial interference" as the relevant threshold.[204]

As such, the Court of Appeal emphasized that the substantial interference test remains a holistic and contextual inquiry. In applying the test, the Court of Appeal upheld the trial judge's conclusion that the level of interference was not constitutionally impermissible, stating "I am not persuaded the rollback of this single wage increase undermines the capacity of the union to collectively and effectively pursue its goals."[205]

These cases reveal a tension in the law with respect to how the substantial interference test should be applied. While *CUPW* suggests that a primary consideration in the section 2(d) analysis is whether the impugned legislation disrupts the balance of power between employees and the employer, *Dockyard* suggests that the Supreme Court's reference to the balance of power in *MPAO* was largely a rhetorical device and not intended to change the substantial interference test.

Whatever the Supreme Court's intent and meaning in linking the issue of substantial interference to a disruption in the balance of power between bargaining parties, there are reasons to question whether collective bargaining power can, on its own, be a reliable or workable basis for courts to assess a section 2(d) violation. Consider the analysis in *CUPW*. There, the Court assumed that the parties' pre-legislation bargaining positions were a true reflection of the balance of power between them. The Court then assumed that the balance of power was disrupted when the parties changed their positions upon the introduction of the legislation. However, many events during collective bargaining will cause parties to review and change their positions — consider how positions can change in response to a successful strike vote or the issuance of a strike or lockout notice. Such events can serve as a "reality check," forcing a party to review and change its positions to reflect its actual power position and what it can reasonably expect to achieve. It is entirely possible that the introduction of back to work or other state interventions in collective bargaining can play the same "reality check" role. Those experienced in labour relations know that parties commonly "overplay their hand" in collective bargaining, often with full awareness that their bargaining power is insufficient to achieve their demands. The fact that parties changes their demands in response to an event, including a legislative intervention of some sort, may be a tenuous basis on its own for concluding that the event disrupted the balance of bargaining power

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204 *Ibid* at para 90.

205 *Ibid* at para 91.

between those parties. Of course, this is not to say that there would not be other grounds for finding that legislation prohibiting strike activity by employees and ordering them back to work substantially interferes with section 2(d); rather, the point is that merely focusing on whether the pre-existing balance was disrupted may not be appropriate.

Focusing on the impact of legislation on the relative power of an employer and a union can also be problematic, because most judges will lack the labour relations experience and expertise to assess and appreciate the true impact of the legislation. Given how often collective bargaining parties themselves fail to appreciate their respective power positions, judges can hardly be expected to figure them out. A substantial interference test concerned principally with the impact of legislative interventions on the balance of collective bargaining power may only be workable with the assistance of evidence from industrial relations experts. Even with expert assistance (and, as always, there will be competing experts with different opinions!), an assessment of relative bargaining power may be elusive.

Finally, if the balance of power is now an important aspect of the substantial interference test, then it is unclear whether the test is satisfied by any disruption in the balance of power between the parties, or only by a disruption that is itself "substantial." It is also possible that a disruption can be one factor that, in combination with others, could amount to a substantial interference. On this issue, the "ultimate question" specified in *MPAO* is not particularly helpful: "whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining."[206]

Given that the origin of the substantial interference test is judicial restraint and that the test probably still performs this role to some extent, one would assume that the test would have to screen out disruptions in the balance of power of a lesser magnitude. If so, then the judicial task will be even more challenging: judges will not only have to identify whether an alleged disruption in the balance of power has actually occurred, but also *measure* it.

ii) Are There Still Two Lines of Inquiry?

Another question arising from the recent jurisprudence is whether the courts must apply the two separate inquiries as originally articulated in *Health Services*: namely (1) the inquiry into the importance of the matter affected to the process of collective bargaining, and more specifically,

206 *MPAO*, above note 69 at para 72.

to the capacity of the union members to come together and pursue collective goals in concert; and (2) the inquiry into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

In *Dockyard*, the BC Court of Appeal did not apply these two lines of inquiry, commenting that "the [Supreme] Court has not always applied the formalistic two-part test set out in *Health Services*."[207] Rather, the Court of Appeal stated that that the appropriate test involves a blended, holistic inquiry, taking into account the nature of the matter subject to the interference, the effect of the interference, and the circumstance of the interference.[208]

In contrast to *Dockyard*, the two-part inquiry articulated in *Health Services* was applied by the Ontario Court of Appeal in *Gordon v Canada (Attorney General)*.[209] The Court of Appeal noted that the Supreme Court did not expressly distinguish between the two inquiries in the 2015 labour trilogy.[210] Nonetheless, the Court of Appeal applied the two inquiries because the parties had accepted that these two inquiries were relevant on the facts. In analyzing the prior jurisprudence regarding the two lines of inquiry, the Court of Appeal stated as follows:

> As I read *MPAO* and *Meredith*, the Supreme Court did take the two inquiries into account. In *MPAO*, the court addressed squarely the absence of a meaningful collective bargaining process, which is the focus of the second *BC Health Services* inquiry. In *Meredith*, the real focus of the decision was on the wage rollback issue — an outcome or matter — which is the focus of the first *BC Health Services* inquiry. In each instance, the Supreme Court simply applied that branch of the *BC Health Services* test most relevant to the particular case.[211]

Thus, while most of the cases since *MPAO* seem to have blended the two-part inquiry into a single analysis, *Gordon* illustrates that some courts continue to pursue the substantial interference test as two separate lines of inquiry as originally framed in *Health Services*.

Indeed, the Supreme Court's treatment of "substantial interference" in cases since *Health Services* has hardly been a model of rigour, consistency, and clarity. Judges seem to reach conclusions about whether or not an interference is "substantial" based on subjective and even impressionistic

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207 *Dockyard*, above note 165 at para 82.

208 *Ibid* at para 83.

209 2016 ONCA 625.

210 *Ibid* at para 46.

211 *Ibid* at para 48.

assessments. Over the past decade, the most appropriate metaphor to describe the test has been "shifting sand."

At this stage of the jurisprudence, it is possible to identify at least four distinct categories of section 2(d) cases where the substantial interference test appears to apply: (1) legislative interferences in collective bargaining and collective agreements (*Health Services*, *Meredith*, *BCTF*), (2) legislative interferences in strike activity (*SFL*, *CUPW*), (3) alternative labour relations systems that deviate from the Wagner model (*MPAO*), and (4) legislative failures to protect workers (*Dunmore*). In a future case, it would be helpful for the Supreme Court to synthesize the various factors and considerations that the Court has referenced in applying the substantial interference test, explain how these factors and considerations relate to the two lines of inquiry from *Health Services*, and perhaps identify those categories of cases where different lines of inquiry may be necessary. If, for example, a disruption in the balance of power is now a separate line of inquiry, the Court may wish to provide additional guidance. To his credit, Donald J attempted to do much of this work for the Court in *BCTF*, but, as noted above, it is unclear to what extent his dissenting reasons were adopted by the Supreme Court.

To summarize, while the substantial interference test now seems clearly entrenched in the section 2(d) jurisprudence, it is now so far removed from its first iteration in *Dunmore* that it is almost unrecognizable. How the test is to be applied to particular facts and categories of cases remains unclear. Lower courts are primarily left to their own devices in interpreting what substantial interference means in any given context. The lack of clear guidance and the high level of discord in the jurisprudence is troubling, especially given that judges often lack the labour relations expertise required to determine whether a given legislative scheme substantially interferes with meaningful collective bargaining. In future cases, the Supreme Court will have to determine the role of relative bargaining power in assessing whether an alleged interference rises to the level of "substantial." The Court will also have to grapple with the factors and considerations that are relevant to the substantial interference test in particular categories of section 2(d) cases.

The Supreme Court may also wish to review the section 2(d) substantial interference test in the context of its jurisprudence concerning other fundamental freedoms. In the case of freedom of conscience and religion under section 2(a), for example, the Court has held that a trivial

or insubstantial interference does not amount to a *Charter* violation.[212] The cases suggest that the test for section 2(d) imposes a stronger internal limitation than the test for section 2(a) (and certainly stronger than section 2(b), which has always been treated as a broad, almost-unlimited freedom[213]). In the future, the Court may wish to explore why different elements of section 2 attract different internal limitations, and perhaps consider whether a more uniform approach would be preferable.

3. Forced Association under Section 2(d)

As set out above, during the period prior to 2007 and the *Health Services* decision, section 2(d) played a very limited role in the labour law field in relation to protecting the right of individuals to advance their collective interests as workers. There was one notable area prior to 2007, however, where the Supreme Court recognized another potential role for section 2(d) — protecting workers from "forced association." The key cases are *Lavigne v Ontario Public Service Employees Union*[214] and *R v Advance Cutting and Coring Ltd*.[215]

Given that the Supreme Court has overruled so many of the pre-2007 section 2(d) decisions (e.g., *Alberta Reference*, *PIPSC*, *Delisle*) and consigned them to the trash heap of *Charter* history, it is necessary to consider the current status of the forced association cases.

a) *Lavigne v Ontario Public Service Employees Union*

The Supreme Court first acknowledged the existence of a freedom not to associate within section 2(d) in the 1991 case of *Lavigne.* Lavigne was a unionized teacher at a community college. The applicable collective agreement provided for the "Rand formula" whereby members of the bargaining unit had to pay union dues but did not have to join the union in order to remain an employee of the college. Since the employer was a state actor, any collective agreement to which it was a party could be

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212 See *Syndicat Northwest v Anselem*, 2004 SCC 47 at para 59: "It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs *in a manner that is more than trivial or insubstantial*" [emphasis in original]. See also *R v Jones*, [1986] 2 SCR 284 at paras 67–69, Wilson J; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 97, Dickson CJ; and *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 91.

213 See above note 4 and accompanying text.

214 [1991] 2 SCR 211 [*Lavigne*].

215 2001 SCC 70 [*Advance Cutting*].

challenged directly under the *Charter*.[216] Lavigne therefore challenged the Rand formula provision, arguing that the union used dues to fund political causes and other matters unrelated to the representation of college employees in collective bargaining. He claimed that a requirement to pay union dues resulted in him being forced to associate with the union on matters with which he fundamentally disagreed.

Although the Supreme Court unanimously denied the appeal, it was split into three distinct camps on the question of whether the Rand formula provision violated section 2(d):

1. Three members of the Court (Wilson J, joined by Cory and L'Heureux-Dubé JJ) found that section 2(d) did not include a right against forced association at all.
2. Three members of the Court (La Forest J, joined by Sopinka and Gonthier JJ) held that freedom of association includes the negative freedom not to associate. Justice La Forest reasoned that the portion of union dues applied to causes other than collective bargaining activity violated section 2(d) of the *Charter* because it would bring an employee into "*association with the Union in its capacity as an organization which speaks on matters of local, national and world politics*."[217] Justice La Forest was careful, however, to distinguish the forced association at issue from association within the labour relations system that arises through democratic principles. He observed that, "some of the concerns which might normally be raised by a compelled association are tempered when that association is, as in this case, established in accordance with democratic principles". If "democracy in the workplace has been kept within its proper or constitutionally permissible sphere", then there is no section 2(d) violation when individuals are forced to associate in the labour relations system.[218] Hence, La Forest J provided a reassurance that the majority exclusivity principle, and collective bargaining activities undertaken by a union based on the majority view, cannot be challenged as forced association under section 2(d) since they are consistent with democratic principles.
3. Justice McLachlin (as she then was), agreed that freedom of association included a right not to associate, but she added an important caveat — section 2(d) is only violated by forced association when it results in "ideological conformity." She did not see a collective

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216 A Rand formula provision negotiated into a private sector collective agreement could not be challenged under the *Charter*.

217 *Lavigne*, above note 214 at 330.

218 *Ibid*.

> agreement requirement to pay union dues as an issue of forced association, since membership in the union was not compelled, and employees were able to disassociate from the union's non-collective bargaining activities and thereby avoid ideological conformity.[219]

Although the majority view in *Lavigne* was that section 2(d) included the freedom from association, there was no majority view as to the appropriate test for a violation of section 2(d) in a case of alleged forced association. This left forced association in a state of jurisprudential limbo; in theory, it existed as an aspect of section 2(d), but, in practice, there was no clear direction on how to analyze and identify a violation.

b) *R v Advance Cutting and Coring Ltd*

Ten years later, the Supreme Court had a second opportunity to examine freedom from association in the 2001 case of *Advance Cutting*. The case concerned a Quebec law that required construction workers to join one of five trade unions in order to obtain a certificate of competency. The law made it an offence for an employer to hire a construction worker who had not obtained a certificate from one of the five unions, as well as for an individual to work without a certificate. The result of the legislative scheme was that a Quebec construction worker was forced to join a union in order to obtain work. Advance Cutting was charged with the above-noted offence, as were a group of workers hired without certificates. They defended the charges by arguing that the law in question violated section 2(d) of the *Charter* and was invalid.

Once again, the Supreme Court was divided, with a slim 5:4 majority finding that the legislation violated section 2(d) and a differently constituted 5:4 majority finding that the violation was justified under section 1. Eight of the nine judges acknowledged the existence of a right to be free from compelled association under section 2(d).[220] Some of the uncertainty arising from *Lavigne* was resolved when a clear majority (seven of the nine judges) agreed that the appropriate test for a violation of forced association was McLachlin CJ's "ideological conformity test" from *Lavigne*.[221] However, considerable uncertainty remained as a result of the judges splitting into two camps on the question of whether this test was met on the facts of the case:

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219 *Ibid* at 343–51.

220 The lone holdout was L'Heureux-Dubé J, who repeated her position from *Lavigne* that section 2(d) does not include any right against forced association at all.

221 Justice Iacobucci adopted a test focusing on whether "liberty interests" were impacted by forced association (which he characterized as a broader test than the "ideological conformity" test).

1. Justice Bastarache (joined by McLachlin CJ and Major and Binnie JJ) adopted a broad view of the "ideological conformity" test,[222] finding that mandatory union membership leads necessarily to ideological conformity in violation of section 2(d). He reasoned that unions are inherently political and social actors. Membership in such associations should be free.[223] Being forced to join a union associates a worker not only with the union but with the political and social causes that the union supports. Notably, his analysis of section 2(d) attracted McLachlin CJ's concurrence, thereby giving it added credibility since, after all, she had developed the test in *Lavigne*. Moreover, Like La Forest J in *Lavigne*, Bastarache J observed that forced association in the labour relations system does not violate section 2(d) where it is based on democratic principles like majoritarianism.[224] However, the forced association at issue in *Advance Cutting* was an example of "a situation whereby the democratic rights of workers are taken away."[225]
2. Justice LeBel, joined by Gonthier and Arbour JJ, did not find a violation of section 2(d). He cited decisions like the *Alberta Reference* and *PIPSC* to advance the proposition that the courts have adopted a "non-intervention policy" in the field of labour relations.[226] While acknowledging that labour laws are not immune to *Charter* review, he nevertheless referenced the need for the Court to "maintain . . . an attitude of reserve towards constitutional interventions in labour relations."[227] Unlike Bastarache J, who was prepared to find that forced union membership satisfies the ideological conformity test due to the social and political nature of trade unions, LeBel J refused to do so. He took a narrower view, stating that ideological conformity arising from forced union membership cannot be presumed and is not "self-evident." There would have to be evidence in a particular case to support a finding of ideological conformity and, in his view, the record was insufficient in *Advance Cutting*.[228]

Since a clear majority of the Supreme Court agreed that section 2(d) protected against forced association *and* that the test required an analysis of ideological conformity, *Advance Cutting* moved beyond *Lavigne* in two

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222 *Advance Cutting*, above note 215 at para 9.
223 *Ibid* at para 17.
224 *Ibid* at para 36.
225 *Ibid* at para 34.
226 *Ibid* at para 160.
227 *Ibid* at para 162.
228 *Ibid* at paras 227–32.

important ways. First, *Advance Cutting* appeared to close the door to any argument that freedom from association fell beyond the reach of the *Charter*. Second, *Advance Cutting* resolved that the test for forced association would focus on ideological conformity. However, as in *Lavigne*, there was no clear majority view. On the question of whether forced union membership actually violates section 2(d), the Court was divided. A majority coalesced around a finding that section 2(d) had been breached, but this majority relied on the vote of Iacobucci J, who disagreed with the ideological conformity test and applied a different (and arguably even broader) test focused on the violation of liberty interests.

Although *Lavigne* and *Advance Cutting* provided little clarity as to what would constitute forced association contrary to section 2(d), there was at least some clarity about what would *not* violate section 2(d). The Supreme Court appeared satisfied that aspects of the labour relations system giving rise to forced association could not be challenged so long as they respected democratic principles. An individual could therefore be brought into association with others within a bargaining unit, and be required to pay union dues to the bargaining agent, without offending section 2(d), so long as this occurred through a process directed by the will of the majority (i.e., majority exclusivity). However, absent a process premised on democratic principles, it appeared that freedom from association could be engaged to challenge aspects of the labour relations system.

c) Forced Association Post-2007

Since *Health Services*, the Supreme Court of Canada has only dealt with freedom from association in one case, *Bernard v Canada (Attorney General)*.[229] There, the Court upheld a decision of the Public Service Labour Relations Board, finding that it was reasonable to require an employer to provide home contact information about bargaining unit members to their representative union, since the union was under a statutory duty to represent all bargaining unit members fairly. The appellant, Bernard, argued that providing her home contact information to the union amounted to compelled association, contrary to section 2(d) of the *Charter*. The Court unanimously rejected this argument, finding it reasonable for the board to uphold the requirement that the employer provide contact information to the union. The Court agreed that home contact information was required for the union to represent all bargaining unit members effectively.

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229 2014 SCC 13.

Justices Abella and Cromwell, writing jointly for the majority of the Court, found that Bernard's section 2(d) claim had no legal foundation. They first reviewed *Lavigne*, and distilled the various judgments down to a single majority proposition: ". . . s. 2(d) does not provide protection from all forms of involuntary association, and was not intended to protect against association with others that is a necessary and inevitable part of membership in a modern democratic community."[230] They cited La Forest J's judgment in *Lavigne* as support for the proposition that section 2(d) is not violated where employees are required to associate with a union on matters where there is a "natural association," such as working terms and conditions. They then observed (without further elaboration) that while there were three distinct approaches to forced association in *Advance Cutting*, none of them would provide Bernard with a plausible claim.[231]

Justice Rothstein (dissenting in part, but concurring on the section 2(d) issue) spent considerably more time than Abella and Cromwell JJ analyzing Bernard's forced association claim. He observed that two distinct tests emerged from *Lavigne* and *Advance Cutting*: the "ideological conformity" test (applied by the majority in *Advance Cutting*) and the "liberty" test (applied by Iacobucci J in *Advance Cutting*). He then proceeded to discuss and apply *both* tests.

On the question of whether Bernard was exposed to ideological conformity contrary to section 2(d), Rothstein J identified two essential requirements of the ideological conformity test that were not met. First, Bernard would have to show that she was forced to associate in the sense of being required to establish, belong to, maintain, or participate in an association. Providing the union with Bernard's home contact information results in no such forced association. She remains free to "hang up the phone, discard any mail received, or close the front door" whenever the union tries to contact her.[232] Second, Bernard would have to show that any forced association resulted in compelled ideological conformity. According to Rothstein J, "*mere contact [by a union] does not amount to such compulsion*."[233]

In very brief reasons, Rothstein J also addressed Iacobucci J's liberty test. Justice Rothstein found that being required to establish, belong to, maintain, or participate in an association is also an essential require-

230 *Ibid* at para 38.
231 *Ibid* at para 39.
232 *Ibid* at para 107.
233 *Ibid* at para 109.

ment of this alternative test, and that this requirement was not satisfied by Bernard.[234]

Although "forced association" has not received a great deal of judicial attention since 2007, the *Bernard* decision suggests that *Lavigne* and *Advance Cutting* remain good law to the extent that freedom from association is still a part of section 2(d). Nevertheless, *Bernard* cannot be relied upon as a definitive statement from the Supreme Court on freedom from association, since none of the judges who wrote decisions offered any resolution of the doctrinal issues that remained outstanding after *Advance Cutting*.

d) Future Forced Association Issues

So what are the issues that may emerge? Two in particular come to mind: first, since the section 2(d) jurisprudence has shifted so dramatically since 2007, what is the impact on freedom from association?; and second, what is the relationship between freedom from association and the new concept of freedom of choice that emerged in *MPAO*?

i) What is the Impact of the Caselaw after ***Health Services****?*

Lavigne and *Advance Cutting* were decided years before the section 2(d) caselaw was turned on its head in 2007 in *Health Services*. As the caselaw has evolved (and the arc of section 2(d) has bent in the direction of workplace justice), an obvious question arises about the potential impact of the post-2007 jurisprudence on freedom from association. *Bernard* arguably confirmed the continued existence of freedom from association under section 2(d), but it is probably more accurate to say that it simply allowed the doctrinal controversies from *Lavigne* and *Advance Cutting* to linger.

Given the Supreme Court's tendency to either overturn its previous section 2(d) caselaw or engage in revisionism about what it previously decided, it is worth considering whether the freedom from association cases are next on the Court's chopping block. One can imagine a future case in which a party argues that protecting against forced association prior to 2007 was a "sign of the times" that is now out-dated and should be reversed based on the modern judicial view of section 2(d). Indeed, prior to cases like *Dunmore* and *Health Services*, the Supreme Court's guiding approach to section 2(d) was to protect the individual and ensure the exclusion of collective activities from the *Charter*. While, on one view, recognizing a right against forced involvement in unions and collective action can readily be reconciled with this approach, on another

234 *Ibid* at para 110.

view, the Supreme Court's post-2007 adoption of workplace justice as the guiding principle for section 2(d) is harder to square with constitutional protection against forced union membership, particularly given the Court's emphasis in *MPAO* on "the associational rights protected by section 2(d) . . . [being] not merely a bundle of individual rights, but collective rights that inhere in associations."[235] If union membership and collective action are desirable, and even necessary, for workplace justice, then why would section 2(d) protect against forced union membership? Can it be argued that the arc of section 2(d) has swung so far in the direction of workplace justice that the principles of freedom from association can no longer be sustained?

The challenge with such an argument is that it requires courts to view section 2(d) exclusively as a right that promotes collective activities and interests rather than a freedom that first and foremost protects individual choice and autonomy. It is worth recalling La Forest J's observation in *Lavigne* that freedom of association and freedom from association "are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations."[236] On this view, section 2(d) remains today, at its core, an individual right that, through evolution, has expanded from its individual roots to also include protection for collective activities. Section 2(d) has not somehow abandoned individual protection or been transformed to become hostile to individual choice about whether to associate or not. Pre-2007 decisions like the *Alberta Reference* and *PIPSC* were overruled because they had failed to protect collective activities like collective bargaining and strikes under section 2(d). They were not overruled because they offered too much protection to individuals.

In fact, on this view, protecting against forced association is a fairly straightforward application of the basic section 2(d) principle (accepted in the *Alberta Reference* and still accepted today) that an individual should be free (subject to section 1) to decide whom he or she wishes to associate with. This is the *individual* conception of freedom of association. Preventing a person from associating with others, and forcing a person to associate with others, are, on this view, equally violative of an individual's liberty and autonomy.

In any event, the fact that the Supreme Court in *MPAO* favourably cited the decisions in *Lavigne* and *Advance Cutting* as examples of the purposive approach to section 2(d)[237] would tend to suggest that the cur-

235 *MPAO*, above note 69 at para 62.

236 *Lavigne*, above note 214 at 213.

237 *MPAO*, above note 69 at para 42.

rent Court sees no inconsistency between freedom from association and the jurisprudential developments since 2007.

Interestingly, the post-2007 caselaw could potentially resolve the debate between Bastarache J and LeBel J in *Advance Cutting* as to whether the "ideological conformity" test should be applied broadly or narrowly. As noted above, LeBel J's preference for a narrow approach was influenced by the decisions in the *Alberta Reference* and *PIPSC*, and the Court's adoption prior to 2007 of a "non-intervention policy" when it came to applying the *Charter* to labour matters. Ironically, LeBel J was one of the biggest proponents after 2007 of overturning the very cases he expressly relied upon in *Advance Cutting*. On this view, given that the jurisprudential underpinnings of LeBel J's narrow approach to freedom from association have been eliminated, and given that more judges in *Advance Cutting* favoured a broad approach to freedom from association, it may be that a future Supreme Court would rely on these doctrinal developments to support Bastarache J's reasons and approach.

In more general terms, the test for freedom from association could benefit from developments in the post-2007 section 2(d) caselaw. As discussed above, the decisions concerning freedom of association and collective bargaining have focused since *Dunmore* on the existence of a "substantial interference." Section 2(d) therefore already has an internal limitation — an interference with collective bargaining will only rise to the level of a violation of section 2(d) if it is "substantial."

In *Lavigne* and *Advance Cutting*, the Supreme Court also saw the need to impose an internal limitation on freedom from association in order to distinguish between forced associations that are a normal part of life in modern society and forced associations that are coercive in nature. The Court eventually settled on "ideological conformity" — a forced association would only violate section 2(d) if it imposes ideological conformity. However, the Court struggled and failed in *Advance Cutting* (and did not really try in *Bernard*) to articulate a coherent approach for applying the ideological conformity test.

There may be significant advantages to "mainstreaming" (or perhaps "rebooting") freedom from association in section 2(d) and applying a substantial interference test rather than a test based on a difficult and abstract notion of ideological conformity that requires courts to draw inferences and make presumptions about what it entails to be a member of an association. A focus on substantial interference would filter out forced associations that are necessary for social and economic life in modern society (since they would hardly be considered substantial) but would permit the Court to identify factors and circumstances that in

certain cases of forced association could lead to violations of section 2(d). Freedom from association could then become the fifth category of section 2(d) cases where substantial interference applies, perhaps benefiting from jurisprudential developments involving the other four categories.

ii) What Is the Impact of the Concept of Freedom of Choice from ***MPAO****?*
In *MPAO*, the Supreme Court stated that a process of meaningful collective bargaining had to include at least two features: the freedom of employees to choose a bargaining representative and the right of employees to a bargaining representative independent of the employer.[238] In its analysis, the Supreme Court found that the employer-imposed SRRP deprived RCMP members of their ability to choose and control their representation and, as such, impeded their right to a meaningful process of collective bargaining.

MPAO was not argued as a forced association case. However, it is hard to ignore the fact that the flip side of the argument of the appellant police associations was that RCMP members were compelled to engage in associational activities through an association they did not choose.[239] As noted above, *Lavigne* and *Advance Cutting* were favourably cited by the Court in *MPAO*. In fact, they were lauded as cases establishing the purposive approach that led to the present-day jurisprudence:

> Parallel to these cases, the Court considered the "negative" aspect of freedom of association — the freedom not to associate: *Lavigne v. Ontario Public Service Employees Unio*n, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; affirmed in *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227. But, *Lavigne* and *Advance Cutt*ing are significant because they applied a purposive approach to s. 2(d). In *Lavigne*, at p. 318, La Forest J. suggested that, in keeping with democratic ideals, the guarantee of freedom of association should be interpreted as protecting "the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it". (See also *Lavigne*, at p. 344, per McLachlin J.; and *Advance Cutting*, at paras. 15–17, per Bastarache J., and at paras. 170–71, per LeBel J.)

238 *Ibid* at para 5.

239 The appellants may have realized early on that they could not succeed in challenging the SRRP as forced association, since no RCMP member was required to become a member of the SRRP and the SRRP itself had a very limited mandate that did not allow for political and social activities. In other words, it would have been very difficult for the appellants to establish "ideological conformity." The appellants framed their challenge as a denial of choice and independence rather than forced association, and succeeded.

> Both judgments emphasized the importance of a purposive interpretation of s. 2(d).
>
> These cases marked the beginning of a more generous, purposive approach to s. 2(d) — an approach that was resoundingly affirmed in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016.[240]

Justice Rothstein, who was the lone dissenter and would have upheld the constitutionality of the RCMP labour scheme, saw a more direct connection between forced association and free choice. In criticizing the majority's adoption of freedom of choice as a basis for the constitutional protection of collective bargaining, Rothstein J observed that free choice is circumscribed in numerous ways by the labour relations system (e.g., imposing a bargaining representative on all employees based on majoritarian exclusivity, limiting the ability of employees to choose a different bargaining representative, requiring the payment of union dues under the Rand formula, etc.), and that *Lavigne* and *Advance Cutting* had closed the door to the existence of unbridled employee choice in labour relations.[241]

MPAO ultimately decided that "choice" was a necessary aspect of freedom of association — i.e., workers should be able to choose their bargaining representative and not have the representative imposed upon them. This sounds quite analogous to a claim to freedom from association. Admittedly, the majority decision in *MPAO* does not expressly connect the principle of choice to the forced association cases. However, it may well be significant that the majority relies on Cory J's dissent in *PIPSC*, a 1990 case pre-dating both *Lavigne* and *Advance Cutting*.

In *PIPSC*, the majority decision of Sopinka J relied on the *Alberta Reference* to find that the *Act* did not violate the freedom of association. In dissent, Cory J (joined by Wilson and Gonthier JJ) found that the provisions of the Act were such that the government was able to control all aspects of the collective bargaining process, including determining which association would become the collective bargaining agent. Justice Cory saw the legislation as being strongly in favour of the government, referring to it as "an untrammelled governmental discretion" that would *prima facie* violate the freedom of association. The basis of the violation, in his view, was the denial of an individual employee's right to choose the association that represents them in collective bargaining.[242]

Justice Cory's dissenting reasons in PIPSC have now been endorsed by the Supreme Court and presumably reflect the proper approach to

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240 *MPAO*, above note 69 at paras 42–43.

241 *Ibid* at para 183.

242 *PIPSC*, above note 17 at 381.

collective bargaining under section 2(d). While Cory J did not expressly rely on forced association as a basis for developing the freedom of choice (in fact, the forced association cases did not yet exist when he wrote his judgment), there are clear linkages. In particular, both the freedom from association and the freedom to choose an association are strongly linked to the majoritarian principle.[243]

On this view, freedom of choice as first described in *PIPSC,* and now elevated to the law of the land in *MPAO,* seems complimentary to freedom from association and is potentially even broader. For example, a denial of freedom of choice does not depend on a claimant establishing ideological conformity resulting from having a bargaining representative imposed. Instead, the imposition of a bargaining representative — particularly where it occurs contrary to the majoritarian principle — could be enough to establish the substantial interference required for a violation of the right to a process of meaningful collective bargaining.

On the other hand, while there are reasons to think that freedom of choice in *MPAO* overlaps with, and potentially even subsumes, freedom from association, one should be cautious for at least two reasons.

First, the Supreme Court suggested in *MPAO* that section 2(d) may not require freedom of choice in some circumstances. As set out in Part A above, in a passage concerning the potential constitutionality of designated models such as the one applicable to Ontario teachers, the Court observed that the legislature may be able to impose a bargaining representative and deny employee choice if the representative is independent from the employer.[244] This is a puzzling statement that was presumably included to reassure governments that designated bargaining representatives are not presumptively in violation of section 2(d). Perhaps the statement signals that a denial of freedom of choice is simply one factor among many that courts should take into account in applying the substantial interference test. However, the Court also went out of its way in *MPAO* to stress the crucial importance of freedom of choice within section 2(d): "If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice." The Court then characterized freedom of choice as one of the two principles that "are the most appropriate in assessing s. 2(d) compliance

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243 *Ibid* at 388. Justice Cory observed that one of the most important aspects of choice, as reflected in statutory certification processes, is that "*a majority, or at least a substantial number, of the employees are members of the union applying for certification, or wish that union to be their bargaining agent*."

244 *MPAO*, above note 69 at para 95.

in the context of labour relations"[245] (the other being independence). This suggests that freedom of choice is not just a factor in assessing section 2(d) but, in many cases, is a *requirement* for compliance with section 2(d).

Second, it could be argued that freedom of choice under section 2(d) is merely the freedom to choose amongst potential bargaining representatives and does not include the freedom to choose *not to have* a bargaining representative at all. Does the imposition of a bargaining representative potentially violate section 2(d) *only* because it denies individual workers the right to choose a different union than the one designated? Or does it also potentially violate section 2(d) because it deprives those workers of the choice of not having a union at all? Given the general trend of the section 2(d) caselaw over the past decade, it may be hard to believe that the Supreme Court in *MPAO* would be affirming, let alone expanding, the right of individual workers to resist unionization. On the other hand, the initial decision to unionize or not is usually more fundamental and impactful for a person's working life than the decision about which union to choose. This could influence the Supreme Court's view of the scope of freedom of choice.

The potential overlap between freedom from association and freedom of choice could be resolved, at least in part, by emphasizing majoritarianism, which is embedded in both aspects of section 2(d) and serves as a unifying principle. It is apparent that there can be no violation of either freedom of choice or freedom from association under section 2(d) where an individual participates in a process that respects democratic principles. If affected workers get the opportunity to express their choice in a democratic system, then the losers have no basis to complain under the *Charter* that their choice did not win the day or that they are being forced into some form of association. However, the freedom of choice (and therefore section 2(d)) would be violated where the individual is deprived of a choice at all, or the choice is illusory because it does not respect majoritarianism and therefore offends the basic democratic principle.

In any event, in a future case the Supreme Court may well be required to explore the relationship between freedom from association and the freedom of choice principle that was first identified by Cory J in *PIPSC* and is now considered by the Court to be a key principle in assessing section 2(d) compliance in the labour relations context. Are they overlapping elements of section 2(d), or are they distinct aspects that perform unique roles in protecting associational rights?

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245 *Ibid* at paras 101 and 103.

4. Conclusion

In this Part, we have touched on only three of the doctrinal issues the Court may have to confront in further delineating the scope and content of the freedom of association guarantee in the labour law context. There are, of course, various other doctrinal and substantive issues that may well arise in future cases. These include challenges to statutory exclusions from collective bargaining; the extent to which section 2(d) protects the right to organize, bargain, and/or strike of non-unionized or managerial/excluded employees; legislative restrictions on the scope of collective bargaining and on what may be negotiated or arbitrated in collective agreements; whether protection for the right to strike implies or includes positive protections for striking employees as well as the implications of *SFL* for the common law to strike; the implications of constitutional protection for the right to strike on long-standing *Wagner Act* restrictions, such as the ban on mid-contract strikes, including political strikes; the potential relationship between section 2(d) and section 2(b) freedom of expression in protecting the right to strike and other collective activities with an expressive quality; and the constitutional threshold for essential service employees accessing interest arbitration together with the extent to which section 2(d) ensures the independence of the interest arbitration process.

If there is one lesson to be learned from this chapter's overview and analysis of the doctrinal evolution of section 2(d) protection in the sphere of labour relations and collective bargaining, it is that while many issues have been resolved in a manner that broadly advances workplace justice, there remains a high level of uncertainty about the nature and scope of section 2(d) protection in many contexts and on many issues. The Supreme Court's ambiguous one-sentence decision in *BCTF* suggests that the Court itself may not be eager at this time to provide direction to the lower courts and counsel. Given the claims currently proceeding through the courts testing the limits and uncertainties of the current section 2(d) jurisprudence, and given the likelihood that more claims will be coming, we predict that it will not be long before the Supreme Court is once again dealing substantively with freedom of association in the labour context. We may even see yet another section 2(d) labour trilogy before the next decade is out.