

Summary of Union Respondents' Brief

I. ***Abood* Announced a Sound First Amendment Principle Rooted in a Public Employer's Right to Manage their Internal Employee Relations**

A. *Abood v Detroit Board of Education*, 431 U.S. 209 (1977), set out a straightforward, common-sense principle: the First Amendment permits States to require non-union public sector workers to cover their fair share of union costs associated with the "collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225-26, that the union conducts on behalf of all members and non-members alike. But the First Amendment does not permit States to compel non-members to pay for union expenditures related to "political and ideological purposes unrelated to collective bargaining." *Id.* at 232.

Abood's holding rests on the fundamental understanding that public employers, no less than private ones, must have the discretion and flexibility to manage their workplaces in a way that achieves labor stability and the efficient provision of public services. Private employers have long been able to use collective bargaining supported by fair share fees to order their workplace relations. *Abood* recognizes that States have equally compelling interests in such personnel management systems, under which the majority of employees may choose to be represented by the union, and if they so choose, all employees must pay their fair share of the costs of the union's representation.

Such systems allow States to deal with a single exclusive representative of employees for purposes of determining workplace conditions and prevent the free-riding that would inevitably occur if the exclusive union representative was required to represent employees for free. At the same time that commonsense arrangement, as *Abood* itself recognized, allows individual employees to continue to speak out as citizens on any matters of concern in all of the many public forums available to all citizens; "a public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy, is not barred from expressing his viewpoint." 431 U.S. at 230.

B. The balance struck in *Abood* between the States' prerogatives as an employer and the individual First Amendment interests of employees is consistent with the Court's longstanding public employee-speech jurisprudence, which gives great deference to the State's interest as an employer.

Since the 1950's the Court has crafted a limited departure from "the unchallenged dogma" 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, 141 (1983), to hold that the State may not condition public employment on employees sacrificing "liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Accordingly, where a

public employee speaks as a citizen, and on a matter of public concern, the Court will balance the interests of the employee in the speech in question, against the interests of “the State, as an employer, in promoting the efficiency of the public services it performs.” *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The bargaining activities that are funded by fair share fees are not speech by citizens on matters of public concern. The content and context of those activities, which concern bread-and-butter employment issues that are resolved through an employer created process, in which the employer determines what may be negotiated and what may not, and how such negotiations will be conducted, establish that such activities are the type of employee speech that falls squarely within the State’s prerogative to manage.

C. The Court has reaffirmed and applied *Abood’s* core holding in six subsequent cases over a 40 year period, five of which were unanimous. Indeed, just six years ago in *Locke v. Karass*, 555 U.S. 207, 213 (2009), the Court unanimously upheld *Abood’s* “general First Amendment principle.” And the Court has applied *Abood* in other contexts as well including bar association dues, agricultural marketing subsidies and student activity fees.

In all, since *Abood* was decided, 17 Justices – including every member of the current Court and Chief Justice Rehnquist and Justices Brennan, Stewart, White, Marshall, Stevens, O’Connor, and Souter – have authored or joined opinions applying *Abood* as the governing rule. The Court’s repeated reliance on *Abood* confirms its soundness as a matter of First Amendment principle.

II. Stare Decisis Principles Support Reaffirming *Abood*

“Stare decisis . . . is ‘a foundation stone of the rule of law,’ *Kimble v. Marvel Entm’t LLC*, 135 S. Ct. 2401, 2409 (2015), which ensures that the Court’s decisions are “founded in the law rather than in the proclivities of individuals.” *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). For that reason, “overturning a long-settled precedent,” requires “special justification, not just an argument that the precedent was wrongly decided.” *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

Abood is a longstanding precedent that has been repeatedly reaffirmed and on which no less than 23 States have enacted scores of public sector collective bargaining laws requiring or permitting fair share fees as an integral support for their personnel management systems. Overruling *Abood* will override the judgments of all of those States, throw into disarray tens of thousands of collective-bargaining agreements governing millions of teachers, police officers, firefighters, and other public employees, and undermine the effectiveness of the personnel management systems under which those employees work.

In our federal system, the authority of States to organize their own internal operations to meet their needs is entitled to broad deference. Pursuant to that authority, States have come to different conclusions on whether to permit fair share fees. Twenty-five States have enacted “right-to-work” laws that functionally prohibit the collection of fair-share fees, and twenty-three States and the District of Columbia permit such fees. The ongoing robust public debate over the wisdom of such arrangements is exactly how our system of government is supposed to work. The Court should not end that ongoing debate by overruling *Abood* to constitutionalize a First Amendment right to free ride.

Rather than any special justification, Petitioners attack on *Abood* is devoted entirely to rearguing *Abood* based on criticisms leveled against it in dicta in *Knox* and *Harris*. But neither of those cases implicated the interests of States as employers. *Knox* concerned only the interest of a union in the process used to collect certain non-chargeable fees. And in *Harris* the Court held that the State’s interest as an employer was not at issue. Petitioners’ arguments that *Abood* was wrongly decided are no more persuasive now than they were when the Court rejected them in *Abood*, and provide no basis for overruling *Abood*’s long settled rule.

Indeed, Petitioners’ request that the Court overrule *Abood* is particularly problematic given Petitioners’ refusal to allow the development of any factual record. The sweeping rule that Petitioners ask the Court to adopt by holding unconstitutional any fair-share fees collected by *any* union in *any* State for *any* purpose is breathtaking in scope and exemplifies the type of facial challenge the Court disfavors.

III. Requiring Objecting Employees to Opt-Out of Fair-Share Fees For Non-Chargeable Activities is Consistent with *Abood*’s Framework and Well-Settled First Amendment Principles

The Court’s well-settled opt-out framework for implementing the balance struck in *Abood* fully protects the interests of an individual in not being compelled to pay for politics. The Court has held in many contexts that individuals must invoke their constitutional rights or they waive them. If individuals object to a union’s political activity they can readily check the box on the one page opt-out form and mail it back to the union.