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Massachusetts Teachers Association

Barbara Madeloni, President
Janet M. Anderson, Vice President
Ann Clarke, Executive Director-Treasurer

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CAMBRIDGE, MASSACHUSETTS

December 9, 2015

Councilor Leland Cheung
c/o Donna Lopez, City Clerk
City of Cambridge
795 Massachusetts Avenue
Cambridge, MA 02139

Dear Councilor Cheung,

I understand that you expressed support for and offered to join the amicus brief that was filed by school districts around the country in support of the right of unions to collectively bargain with school districts over agency fee arrangements. On behalf of the Massachusetts Teachers Association, I would like to offer our thanks and appreciation for your support and your willingness to take a strong stand on an issue of great importance to MTA members and our local associations.

I am attaching the amicus brief that was filed. Due to the pressure of the briefing deadline, many school and municipal supporters were not included as signatories. Nonetheless, we know that the principles and arguments are important and will have impact on the Court. Through our local education associations, we work with hundreds of school districts, and we are proudest of the places where positive labor relations generates fair contracts and advancements in educational quality. Your willingness to join us in defending against an attack on all public sector unions is a clear sign of a mature and healthy relationship between the school district and the representative of its teachers. That is something we can all be proud of.

Thank you,

Barbara Madeloni
President

Janet Anderson
Vice President

Cc: Robert Travers
Jill Coleman

No. 14-915

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CAMBRIDGE, MASSACHUSETTS

In The
Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR CITIES, COUNTIES, AND ELECTED OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are cities and counties that engage in collective bargaining with unions chosen by their workers, as well as elected officials. *Amici* are concerned that a decision to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), will seriously harm their interests by: (1) destabilizing existing contractual relationships and effectively forcing the immediate renegotiation of countless collective bargaining agreements; (2) undermining the stability of this Court's public employee speech jurisprudence, and particularly those aspects of that jurisprudence that the Court has specifically crafted to protect the interest in the efficient delivery of public services; and (3) undermining cooperative labor-management arrangements that have led to significant cost savings for *Amici* and other municipalities. *Amici* therefore urge this Court to leave *Abood* intact.

Amici are:

City of Fairbanks, Alaska
City of Los Angeles, California
City of Oakland, California

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. Letters from the parties providing blanket consent for the filing of *amicus* briefs in this matter have been filed with the Clerk of this Court.

City and County of San Francisco, California
County of Santa Clara, California
City of Hartford, Connecticut
City and County of Honolulu, Hawaii
City of Chicago, Illinois
City of Louisville, Kentucky
Montgomery County, Maryland
City of Boston, Massachusetts
City of Minneapolis, Minnesota
City of Saint Paul, Minnesota
City of Jersey City, New Jersey
City of Santa Fe, New Mexico
City of Canton, Ohio
Cuyahoga County, Ohio
City of Columbus, Ohio
City of Dayton, Ohio
City of Toledo, Ohio
Lucas County, Ohio
City of Youngstown, Ohio
Allegheny County, Pennsylvania
City of Pittsburgh, Pennsylvania
King County, Washington
City of Seattle, Washington
City of Madison, Wisconsin[2]

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[2] Although Wisconsin law bans the collection of agency fees for "general municipal employees," it permits the collection of such fees for "public safety employees." Wis. Stat. Ann. § 111.70.

Dan Drew, Mayor, City of Middletown, Connecticut

Toni Harp, Mayor, City of New Haven, Connecticut

Daryl Justin Finizio, Mayor, City of New London, Connecticut

Catherine A. Osten, First Selectwoman, Town of Sprague, Connecticut

Setti Warren, Mayor, City of Newton, Massachusetts

Christopher Taylor, Mayor, City of Ann Arbor, Michigan

Emily Larson, Council President, City of Duluth, Minnesota

Rick Blake, Councilor, City of Grand Rapids, Minnesota

Michael O. Freeman, County Attorney, Hennepin County, Minnesota

Mark Mandich, Commissioner, Itasca County, Minnesota

Rob Ecklund, Commissioner, Koochiching County, Minnesota

Mark S. Rubin, County Attorney, Saint Louis County, Minnesota

Pete Orput, County Attorney, Washington County, Minnesota

Rey Garduño, Council President, City of Albuquerque, New Mexico

Isaac Benton, Councilor, City of Albuquerque, New Mexico

Diane Gibson, Councilor, City of Albuquerque, New Mexico

Klarissa J. Peña, Councilor, City of Albuquerque, New Mexico

Ken Sanchez, Councilor, City of Albuquerque, New Mexico

Art De La Cruz, Commissioner, Bernalillo County, New Mexico

Maggie Hart Stebbins, Commissioner, Bernalillo County, New Mexico

Debbie O'Malley, Commissioner, Bernalillo County, New Mexico

Charles Adkins, Commissioner, Athens County, Ohio

Mark Owens, Clerk of Dayton Municipal Court, Ohio

John A. McNally, Mayor, City of Youngstown, Ohio

Jules Bailey, Commissioner, Multnomah County, Oregon

Judy Shiprack, Commissioner, Multnomah County, Oregon

Jim Kenney, Mayor-Elect, City of Philadelphia, Pennsylvania

Steve Williams, Mayor, City of Huntington, West Virginia

SUMMARY OF ARGUMENT

Overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), would threaten significant interests of *Amici* and other municipal employers. First, *Amici* and other municipalities have directly

relied on *Abood* in entering into collective bargaining agreements with agency fee provisions. A decision to overrule *Abood* may require the renegotiation of those agreements, threaten renewed labor strife, and divert the attention of municipal officials from the efficient and effective delivery of public services to restructuring their previously-settled bargaining relationships with their employees. Such disruption is precisely what this Court's doctrine of *stare decisis* seeks to avoid.

Overruling *Abood* would have unsettling consequences for the legal regime that governs *Amici* and other municipalities as well. A decision to overrule *Abood* could throw into doubt this Court's rulings limiting the First Amendment rights of government workers to instances in which those workers speak as citizens on matters of public concern. That limitation, the Court has repeatedly explained, serves the important interest in ensuring the efficient and effective delivery of public services – an interest that is of particular salience when the government acts as employer. *Amici* and other municipalities thus are deeply concerned to preserve the stability of this Court's public-employee speech jurisprudence. To overrule *Abood*, however, the Court would have to hold that collecting money from government workers to finance the negotiation and administration of agreements involving the terms and conditions of employment violates the First Amendment. Such a holding would threaten to dissolve the important distinction between speech-as-a-citizen and speech-as-an-employee on which the Court's public-employee

speech doctrine rests. *Stare decisis* is designed to prevent this sort of doctrinal unraveling.

Finally, overruling *Abood* would threaten important joint labor-management projects that have improved the efficient delivery of municipal services. *Amici* and other municipalities have worked with the unions that represent their employees to find ways of serving their taxpayers more effectively, at lower cost, through such matters as reducing employee turnover and overtime expenses, saving on healthcare costs, identifying circumstances in which municipalities which had been outsourcing work could more cheaply perform the work in-house, and providing more effective safety and other training to municipal workers, among other examples. These efforts have relied crucially on the existence of strong, stable unions that have the time and staffing to identify efficiencies, as well as on functioning grievance-arbitration systems – the very capacities that agency fees make possible. If this Court were to overrule *Abood*, it would threaten the gains that *Amici* and other municipalities have made by working jointly with their unions to improve the delivery of public services.

ARGUMENT

Petitioners ask this Court to overrule its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). "Overruling precedent is never a small matter." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015). To the contrary, this Court has

emphasized that *stare decisis* "is 'a foundation stone of the rule of law.'" *Id.* (quoting *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2036 (2014)). Overruling *Abood* would be inconsistent with this Court's doctrine of *stare decisis*. *Amici* focus in particular on the reliance that government employers have placed on the stability of current First Amendment doctrine in the public employment context. "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton v. S. Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991).

Amici, like hundreds if not thousands of municipalities throughout the Nation, have entered into collective bargaining agreements with agency-fee provisions. They have done so in reliance on *Abood*. These agreements, and the strong, stable bargaining representatives they have fostered, have promoted the efficient delivery of services while avoiding needless costs to the taxpayer. They have thus served important interests that this Court has recognized in its public-employee-speech cases. See *Engquist v. Oregon Dept. of Agriculture,* 553 U.S. 591, 598 (2008) ("'The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.'") (quoting *Waters v. Churchill,* 511 U.S. 661, 675 (1994) (plurality opinion)).

Overruling *Abood* would pull the rug out from under these municipalities. It could undermine the stability of their operations and budgets by forcing them immediately to renegotiate collective bargaining agreements. It would unsettle key conceptual underpinnings of First Amendment doctrine that have ensured that governments can manage their operations without facing lawsuits from employees who object to being told what to say on the job. And it would put at risk the significant efficiency benefits that municipal employers have reaped by working with the stable union partners that agency-fee arrangements make possible. This Court should thus decline Petitioners' invitation to overrule *Abood*.

A. Overruling *Abood* Would Destablilize Existing Contractual Relationships Entered into in Reliance on That Longstanding Precedent

If this Court were to declare it unconstitutional to collect agency fees from employees who are not union members, *Amici* would be forced to stop collecting those fees immediately. But *refusing* to collect agency fees may itself violate the collective bargaining agreements *Amici* signed in reliance on *Abood*. *Amici* thus would be forced immediately to confront the question whether those agreements remained valid and binding in the absence of their agency-fee provisions. Answering that question would likely be complex. It would involve interpretation of severability clauses that appear in the agreements themselves, as well as of background state-law principles of

severability in contract law. Because most unions would likely take the position that they made significant concessions to obtain the agency-fee provisions, *Amici* would confront significant uncertainty regarding whether their collective bargaining agreements would stand following a decision overruling *Abood*.[3]

A decision to overrule *Abood* thus could force *Amici* and other municipalities immediately to renegotiate their collective bargaining agreements. Such a result would destabilize existing bargaining relationships and create the opportunity for renewed labor tensions, strike threats, and work stoppages that would disrupt local government's mission of providing needed services to the public. Even if *Amici* could negotiate new agreements, the renegotiation process would divert the attention of elected and appointed officials from other pressing business.

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[3] See Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 Ga. L. Rev. 41, 43-44 (1995) ("In contracts law, severability turns on the intent of the parties to the agreement. A court will sever an illegal term and enforce the remainder of an otherwise valid contract where the court concludes the term was not 'an essential part of the agreed exchange,' that is, where the court concludes the parties would have made the agreement even without the illegal term. The language of the written memorial of the agreement – even a clause providing for the severance of illegal terms – will not necessarily dispose of the question. Because severability turns on the intent of the parties, a court may examine extrinsic evidence, including the contract's negotiating history, to discover whether the parties in fact believed the illegal term to be essential.") (footnotes omitted).

These unsettling and costly consequences highlight the reliance that *Amici* and other municipalities have placed on *Abood*. This Court has, of course, long affirmed that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The strong reliance interests that *Amici* have in the stability of *Abood*, reflected in entrenched contractual relationships, provide ample reason to adhere to that longstanding precedent.

B. Overruling *Abood* Would Threaten Longstanding First Amendment Principles That Have Ensured That Government Employers Can Efficiently Run Their Operations

Overruling *Abood* would have unsettling effects that extend well beyond collective bargaining. To overrule *Abood*, the Court will have to conclude that charging agency fees as permitted by that case impinges on the protected speech of government employees. But any such conclusion would "throw into doubt previous decisions from this Court" outside of the union context, a fact that counsels in favor of adhering to precedent. *Hilton*, 502 U.S. at 203.

In its public-employee speech cases, this Court has consistently distinguished between speech by government workers in their capacities as *citizens* and speech by those workers in their capacities as *employees*. In *Borough of Duryea v. Guarnieri*, 131

S. Ct. 2488, 2493 (2011), the Court reaffirmed its longstanding view that "[w]hen a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern," and it held that the same speech-as-a-citizen test applies to the Petition Clause, see *id.* at 2500-2501. And in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."

The constitutional distinction between speech-as-a-citizen and speech-as-an-employee serves important interests of government employers. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418. If every statement a government worker made – or grievance he or she filed – regarding the terms and conditions of employment constituted protected speech, managerial discretion would disappear. The Court explained this point in the context of the First Amendment's Petition Clause in *Duryea*, but the analysis applies just as well to the Speech Clause:

> Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial

> superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. See Brief for National School Boards Association as *Amicus Curiae* 5. Every government action in response could present a potential federal constitutional issue. Judges and juries, asked to determine whether the government's actions were in fact retaliatory, would be required to give scrutiny to both the government's response to the grievance and the government's justification for its actions. This would occasion review of a host of collateral matters typically left to the discretion of public officials. Budget priorities, personnel decisions, and substantive policies might all be laid before the jury. This would raise serious federalism and separation-of-powers concerns. It would also consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public.

Borough of Duryea, 131 S. Ct. at 2496. By "'constitutionaliz[ing] the employee grievance,'" *Garcetti*, 547 U.S. at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)), a rule eroding the distinction between speech-as-a-citizen and speech-as-an-employee would disregard the careful compromises and accommodations to government interests reflected in the many statutory enactments protecting

public workers. See *Borough of Duryea*, 131 S. Ct. at 2497.

Needless to say, *Amici* – whose imperatives for managerial efficiency this Court's public-employee speech jurisprudence was specifically designed to protect – have a strong interest in the stability of that jurisprudence. *Abood*, and the many cases implementing it, are built on the same distinction between speech-as-a-citizen and speech-as-an-employee that undergirds cases like *Garcetti* and *Borough of Duryea*. *Abood* allowed the union to use agency fees to finance activities such as "collective-bargaining, contract administration, and grievance-adjustment," *Abood*, 431 U.S. at 232 – matters that are centrally about the government's relationship to its workers as employees, not citizens. But it did not allow the union to use agency fees "to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative," *id.* at 234 – quintessential acts of speech-as-a-citizen. See also *Locke v. Karass*, 555 U.S. 207, 210 (2009) (allowing the collection of agency fees to finance activities that are "appropriately related to collective bargaining rather than political activities").

In a footnote, the Court recently said that it did "not doubt that a single public employee's pay is usually not a matter of public concern. But when the issue is pay for an entire collective-bargaining unit involving millions of dollars," the Court observed, "that matter affects statewide budgeting decisions." *Harris v. Quinn*, 134 S. Ct. 2618, 2642 n.28 (2014).

But that is hardly enough to transform the activities financed by agency fees into speech-as-a-citizen under this Court's existing First Amendment cases. For one thing, whether or not those activities relate to "matter[s] of public concern," there is no doubt that the requirement to pay an agency fee in no way stems from fee-payers' out-of-work life as citizens but instead owes its entire existence to their status as employees. See *Garcetti*, 547 U.S. at 421-422 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). To the extent that payment of an agency fee is speech, therefore, it is speech-as-an-employee – even if an out-of-work public statement about the matters *financed* by agency fees might be speech-as-a-citizen.

In any event, agency fees finance a number of activities that necessarily relate to work-focused matters that center on particular employees. The most notable example is grievance adjustment, which this Court's agency-fee decisions have long treated as a paradigm case in which nonmembers can be required to pay their fair share of union expenses, see *Abood*, 431 U.S. at 232 – and which this Court's public-employee speech cases have long treated as a paradigm case involving conduct that does *not* receive protection as speech by a citizen on a matter of public concern, see *Borough of Duryea*, 131 S. Ct. at 2496; *Garcetti*, 547 U.S. at 420; *Connick*, 461 U.S. at 154. See also *Borough of Duryea*, 131 S. Ct. at 2506

(Scalia, J., concurring in the judgment in part and dissenting in part) ("A union grievance is the epitome of a petition addressed to the government in its capacity as the petitioner's employer.").

Even if it were limited to collective bargaining, the distinction hinted at in the *Harris* footnote would not provide public employers with the certainty they need in going about their daily affairs. This Court has held that matters involving disputes between government employees and their employers over garden-variety workplace questions do not constitute speech-as-a-citizen even if they "are related to an agency's efficient performance of its duties." *Connick*, 461 U.S. at 148. And the *Harris* footnote seemed to agree – at least if a sufficiently small number of employees were involved. See *Harris*, 134 S. Ct. at 2642 n.28 (taking as given "that a single public employee's pay is usually not a matter of public concern"). But there is no principled way to determine how many employees must be involved before their grievances become constitutionally protected: Ten? A hundred? A thousand? Twenty thousand? Cf. *Harris*, 134 S. Ct. at 2646 (Kagan, J., dissenting) (noting that the "total workforce" at issue in that case "exceed[ed] 20,000"). This uncertainty will inhibit public employers from taking the vigorous and decisive action that is often necessary in the efficient management of an enterprise's day-to-day affairs. Uncertainty of this sort breeds constitutional litigation, which "itself may interfere unreasonably with both the managerial function (the ability of the employer to control the

way in which an employee performs his basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted." *Garcetti*, 547 U.S. at 449.

But there is more. Even when a public employee speaks as a citizen on a matter of public concern, this Court's cases allow the government employer to restrict that speech to serve "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. *Abood* itself noted that public employers agree to agency-fee arrangements precisely to serve their important managerial interests. See *Abood*, 431 U.S. at 224. And as the balance of this brief demonstrates, see Section C, *infra*, *Amici* have found that agency-fee arrangements play a crucial role in facilitating the efficient delivery of public services. If this Court were to overrule *Abood*, it would have to disregard those key interests and thus undermine the established principle that the government's managerial interests must be weighed in the balance when public employers restrict the speech of their workers.

Abood thus "is not the kind of doctrinal dinosaur or legal last-man-standing for which [this Court] sometimes depart[s] from *stare decisis*." *Kimble*, 135 S. Ct. at 2411. "To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others." *Id.* If this Court

were to overrule *Abood*, it would necessarily have to hold that public employees are protected by the First Amendment when they engage in activities related to bargaining and contract administration, such as filing garden-variety grievances against their employers. However, as *Borough of Duryea* explained, such grievances are paradigmatic examples of speech-as-an-employee, which this Court's cases have refused to protect lest municipalities be hamstrung in their efforts to deliver services efficiently. See *Borough of Duryea*, 131 S. Ct. 2496-2497. See also *id.* at 2506 (Scalia, J., concurring in the judgment in part and dissenting in part) ("When an employee files a petition with the government in its capacity as his employer, he is not acting 'as [a] citize[n] for First Amendment purposes,' because 'there is no relevant analogue to [petitions] by citizens who are not government employees.'") (quoting *Garcetti*, 547 U.S. at 423-424).

If this Court were to hold that public employees have a First Amendment interest in avoiding being charged for the administration of such grievances – which it would have to do to overrule *Abood* – that holding would threaten to unravel the key conceptual underpinning of the public employee speech doctrine. If this important framework collapsed, it would place *Amici* at risk of uncertain liabilities and undermine the important governmental interests in the efficient delivery of public services that *Borough of Duryea*, *Garcetti*, and *Connick* were specifically crafted to

protect. Given these risks, the Court certainly should not "unsettle stable law." *Kimble*, 135 S. Ct. at 2411.

C. Overruling *Abood* Would Undermine Cooperative Arrangements, Achieved Through Collective Bargaining, That Have Brought Great Value and Efficiency to Government Employers

In addition to unsettling the *legal* obligations of municipalities under existing collective bargaining agreements and this Court's First Amendment law, a decision to overrule *Abood* would undermine many valuable instances of effective, cooperative collective bargaining. These instances of labor-management cooperation have served the interest in efficient delivery of public services that this Court has recognized as important. See *Engquist*, 553 U.S. at 598; *Connick*, 461 U.S. at 150. And they would not have happened without the strong and stable unions that agency fees make possible.

1. Research Highlights the Value of Cooperation Engendered by Bargaining with Strong Unions in Promoting Efficient Delivery of Public Services

As researchers have long noted, public employers frequently draw on the expertise of unions who identify inefficiencies in municipal operations, point those inefficiencies out to the municipalities, and thereby save taxpayer money. In 1988, Professors

Jeffrey Zax and Casey Ichniowski highlighted examples of municipal unions using their superior knowledge of employee turnover to recommend the elimination of unnecessary budget lines for new hires. See Jeffrey Zax & Casey Ichniowski, *The Effects of Public Sector Unionism on Pay, Employment, Department Budgets, and Municipal Expenditures*, *in* When Public Sector Workers Unionize 323, 326 (Richard B. Freeman & Casey Ichniowski, eds., 1988). Only a union with the resources to analyze trends in staffing patterns – and the strength to ensure that its workers would reap some benefit from the savings – would have the capacity and incentive to bring such inefficiencies to a municipal employer's attention. Zax and Ichniowski concluded that "[p]ublic unions may succeed in their objectives, in part, because organized public sector employees are better prepared than other citizens are to assess service needs and to ensure effective service provision." *Id.* at 356-357.

In 1996, a task force chaired by former New Jersey Governor James J. Florio and then-Louisville Mayor Jerry Abramson identified numerous cases in which public employers were able to incentivize their unions to generate innovations that improved service delivery within existing "financial resource constraints," and that "in many cases also led to cost savings and stable tax rates." Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation, Working Together for Public Service (1996), available at http://www.dol.gov/dol/aboutdol/history/reich/reports/

worktogether/chap1new.htm. The task force found "increases of 30 percent to 50 percent in productivity and decreases of 25 percent in time-loss expense, such as workers' compensation, overtime and absenteeism" to be "not uncommon" in these efforts. *Id.* Among the examples described by the task force included the following (*id.*):

- The unions representing workers for Peoria, Illinois, helped to propose changes in the city's employee health care plan; those changes saved the city over $1 million in health care costs the next year.
- The union representing building inspectors in Madison, Wisconsin – one of the *Amici* that have signed this brief – developed a training program for electricians who work in the city. The program improved relationships between city inspectors and private building contractors and, by promoting better practices among electricians, reduced the number of necessary inspections by 25 percent.
- The union representing sanitation workers in Los Angeles, California – another of the *Amici* – identified a need for closer cooperation between drivers and mechanics to increase the availability of sanitation trucks. With the union's input, the city implemented changes that substantially increased the availability of those trucks, and thus cut in half the city's need to pay overtime to sanitation workers.

- The union representing transit workers in King County, Washington – another of the *Amici* – saved hundreds of thousands of dollars by identifying work that the municipality had been contracting out but that could be performed more cheaply in house.

The report listed many similar examples from around the Nation. See *id.*

Shortly after publication of the task force report, Louisville's water authority entered into a contract with its union to create "a new labor-management team to oversee the implementation of [a] joint strategic plan and partnership agreement." Allyne Beach & Linda Kaboolian, Working Better Together: A Practical Guide for Union Leaders, Elected Officials and Managers to Improve Public Services 28 (2005). The team saved the water authority millions of dollars by avoiding unnecessary contracting out. See *id.* (Louisville is one of the *Amici* that have signed this brief.) A number of recent studies have found that such "contracting back-in" (also known as "in-sourcing" or "reverse contracting") often represents the most efficient means of delivering public services – and that it frequently results from "internal process improvements undertaken by labor management cooperation." Jeffrey Keefe, *Public Employee Compensation and the Efficacy of Privatization Alternatives in US State and Local Governments*, 50 Brit. J. Indus. Rel. 782, 794 (2012).

Municipal employers have continued to receive important assistance from their unions in avoiding unnecessary costs. As a recent report details, the union representing operating engineers in a Minnesota municipality recommended that all bargaining-unit engineers be moved into the same job classification. "Once these changes were agreed upon through bargaining, employees were all given raises and were cross-trained to perform all of the types of work needed." Erin Johannson, Improving Government Through Labor-Management Cooperation and Employee Ingenuity 5 (2014), available at http://www.jwj.org/wp-content/uploads/2014/01/140122publicpartnership report.pdf. The change increased managerial flexibility, which "enabled the work to go more smoothly, as managers didn't have to ensure that every classification of operator was present on the site in order to get the job done." *Id.*

Just this year, the union that represents Chicago's garbage collectors identified changes to garbage truck routes that will save the city $7 million, which can now be used for other pressing public needs. See Fran Spielman, *Emanuel Adjusts Garbage Grid to Save $7M Before Imposing Fee*, Chicago Sun-Times, Sept. 6, 2015 ("In partnership with Laborers Union Local 1001, the city has identified adjustments to grid boundaries that will allow the city to reduce the daily deployment of garbage trucks from 310 to 292. The savings generated will free up resources for other vital services like tree-trimming and rodent control, the mayor's office said."). Chicago is one of the *Amici* that have signed this brief.

Efforts like these depend on the unions that represent municipal employees having sufficient resources to identify and pursue possible efficiencies in the delivery of public services. Rank-and-file workers have an informational advantage over managers in discovering wasteful work processes. But without strong and stable organizations that can collect the information and direct it to managers who will take action to realize efficiencies and allow workers to share in their benefits, government employers may never learn about existing inefficiencies. Functioning grievance-arbitration systems, which result from collective-bargaining relationships and are financed by agency fees, are also crucial to ensure that employees who have concerns about the inefficiencies in current operations can raise those concerns with the knowledge that they will be protected against retaliation by managers who may be offended. Cf. Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses' Unions on Heart-Attack Mortality*, 57 Indus. & Lab. Rel. Rev. 422, 425 (2004) (arguing that union grievance procedures, by providing "protection from arbitrary dismissal or punishment," may "encourage nurses to speak up in ways that improve patient outcomes but might be considered insubordinate and, hence, career-jeopardizing without union protections").

But if this Court overrules *Abood* and bans agency-fee arrangements, the resource base available to unions to perform this task will erode. As the Court has long recognized, in the absence of an agency fee

workers will be tempted to free ride on the union's obligation to represent all bargaining-unit employees. See, *e.g.*, *Abood*, 431 U.S. at 222; *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). Such free riding will itself limit the resources available to the union – and the prospect of such free-riding will force the union to devote additional time, money, and human-power to giving short-term benefits to its members to obtain their allegiance, rather than seeking municipal efficiencies that may pay off for the workers only in the longer term. Municipalities – and their citizens who depend on the efficient delivery of services – thus have a strong stake in the continuing vitality of *Abood*.

2. *Amici* Have Repeatedly Drawn on the Knowledge and Expertise of Strong Unions in Promoting Efficient Delivery of Public Services

The research discussed in the previous section resonates with the experience of the *Amici* that have signed this brief. *Amici* have, on countless occasions, drawn on the knowledge and expertise of the unions that represent their employees to identify cost savings and efficient work practices. These cooperative efforts have been especially important in addressing the difficult budgetary issues that have persisted in the wake of the Great Recession. By implementing the ideas they have developed in cooperation with their unions, *Amici* have been better able to discharge

their duties toward the citizens who depend on their services and the taxpayers who finance them.

For example, Lucas County, Ohio, formed a labor-management committee in the 1980s to address health care costs. The committee has succeeded in developing a health insurance package that employees support and that has saved the county money. The committee regularly reviews health insurance programs and products and interviews providers to ensure that county employees receive high-quality health care at a low cost to the taxpayers. See Health Care Cost Containment Board, https://www.co.lucas.oh.us/index.aspx?NID=248.

The municipal government of King County, Washington, relied heavily on the unions that represent its employees in a number of initiatives that improved service delivery while reducing costs. From 2001 through 2011, the County's Wastewater Treatment Division engaged in a collaborative Productivity Initiative with its unions. That initiative resulted in "savings of almost $73 million," while the Division "took on a significant amount of new work and new facilities without increasing staff." King County Dept. of Natural Resources & Parks, Wastewater Treatment Div., Productivity Initiative: Internal Comprehensive Review Report v (2011). One of the terms of the Initiative provided that cost savings would be shared by the ratepayers (in the form of lower rate increases) and the workers (in the form of bonuses and additional training programs). See *id.* at vii. The close involvement of municipal unions in drafting and

implementing these terms provided a crucial incentive and mechanism for workers to provide ideas that would promote the efficient delivery of public services.

Unions also worked jointly with King County to develop the municipality's groundbreaking "Healthy Incentives" program. During its first five years, that program "invested $15 million and saved $46 million in health care spending with sustained participation by more than 90 percent of [the County's] employees." Christine Vestal, *King County's Wellness Plan Beats the Odds*, Stateline, July 22, 2014. In 2012, as a result of the program, "$61 million in surplus health care funds were returned to county coffers because cost growth was lower than actuaries had projected." *Id.*

Other *Amici* have worked with their unions to realize significant efficiencies in their day-to-day operations. For example, the City and County of Honolulu and one of its public employee unions agreed to create a "multi-skilled" worker class in which employees were trained to do multiple blue-collar tasks. These "multi-skilled" workers received an increase in pay for assuming new duties, but Honolulu ultimately saved money by reducing overtime costs and the need to hire additional staff who performed only one type of skill. See also p. 22, *supra* (discussing similar efforts in a Minnesota municipality).

Several *Amici* have worked jointly with the unions that represent their employees to develop safety training programs for their workers – programs that have saved substantial sums for the taxpayers. In Toledo, Ohio, for example, the union that represents the city's employees developed a program in which union members serve as peer trainers to promote the use of safe work practices. Under that program, which the city has now specifically embraced in its collective bargaining agreement, employee injuries have decreased, with the result that the city has saved money previously lost to workers' compensation payouts and lost work time. See generally Collective Bargaining Agreement Between AFSCME Ohio Council 8, Local 7, and City of Toledo, 2011-2014 at § 2117.87, available at http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/11-MED-03-0500.pdf (including this safety training program). Without the resources to develop and implement this program, the union could not have provided this service to the City of Toledo.

The agency-fee regime has helped to build strong and stable unions on which *Amici* have relied in reducing municipal costs in other ways as well. In San Francisco, for example, public employee unions played a crucial role in developing a strategy to reform the municipal pension system. During the recent economic downturn, San Francisco's once-thriving pension investment fund, which covered the City's annual pension contribution as well as that of its employees, lost $4 billion. See Joshua Sabatini,

San Francisco's Public Pension System is Drowning in Red Ink, S.F. Examiner, Aug. 14, 2011. The City was forced to begin contributing millions of dollars per year from its annual revenues to sustain the pension system, with costs continuing to rise. *Id.* The City contributed $325 million to the pension system in the 2010-2011 fiscal year, and its contribution was expected to increase to $576 million within three years. Dept. of Elections, City and County of San Francisco, Voter Information Pamphlet 77 (2010). The need for reform was clear: Rising pension costs threatened the City budget and the stability of employee pension plans.

In response to this crisis, and in the wake of a failed 2010 effort at pension reform, the unions that represent San Francisco's municipal workers engaged in extensive negotiations with Mayor Ed Lee, other city officials, and business leaders to develop a consensus reform proposal. See Joshua Sabatini, *Pension Reform Measure Backed by Ed Lee Bests Opposing Proposition*, S.F. Examiner, Nov. 9, 2011; Gerry Shih & Zusha Elinson, *Mayor's Political Machine Goes Into High Gear in Quest for Full Term*, N.Y. Times, Oct. 21, 2011; Zusha Elinson, *Bay Citizen/USF Poll: Unions Winning Pension Reform Battle*, The Bay Citizen, Oct. 18, 2011. The City Controller estimated that the proposal would reduce the City's costs to fund employee retirement benefits by approximately $40 to $50 million in the next fiscal year and approximately $100 million annually in the long term. Dept. of Elections, City and County of San Francisco, Voter

Information Pamphlet 55-56 (2011). Thanks in large part to the strong union support for the measure, the consensus reform proposal prevailed at the ballot box, with 68.91% of voters voting in favor. See Dept. of Elections, City and County of San Francisco, Results Summary: November 8, 2011 – Consolidated Municipal Election, http://www.sfelections.org/results/20111108/. See also Zusha Elinson, *Unions Win Pension Reform Battle*, The Bay Citizen, Nov. 9, 2011 (noting that "the unions' stamp of approval helped San Francisco voters make up their minds"). The unions could not have worked cooperatively with the municipality without the strength and stability that the agency-fee regime had enabled them to acquire over time.

Efforts like these, by public employers across the country, would be put at risk if this Court were to overrule *Abood*. *Amici* and other employers have found that the agency-fee regime creates strong and stable unions that are well-positioned to enter into cooperative relationships that help to reduce municipal costs. These relationships, which grow out of successful collective bargaining, serve the important government interest in the efficient delivery of public services – an interest this Court has found especially significant in public-employee speech cases. To overrule *Abood* would threaten that interest and the labor-management cooperation that has served it well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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