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No. 14-915

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 OF SCHOOL DISTRICTS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

Amici are school districts from communities across the country. [Describe characteristics of specific districts here] Amici also include X California school districts, which collectively employ more than Y personnel responsible for educating more than Z students.

Amici face the common challenges that affect school districts throughout the United States, as well as unique circumstances in the varied communities that they serve. Amici share a common interest in providing high-quality public education to every student. And amici share the belief that collaboration and close relationships among administrators, teachers, staff, parents, students, and communities are vital to the success of public education.

Amici have firsthand experience bargaining and collaborating with unions. Through that experience, amici have concluded that stable, financially secure unions are indispensable partners in improving the quality of public education.

Amici submit this brief to explain why state and local governments have compelling interests in preserving their discretion to adopt agency fee arrangements. Those interests extend beyond ensuring the existence of an exclusive representative for collective bargaining—though that interest is vital.

¹ No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this matter have granted blanket consent for the submission of amicus curiae briefs in support of either or neither party.

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Amici's experiences show that agency fee arrangements are also essential to effective collective bargaining, close working relationships, and innovative labor-management collaboration—all of which improve public education.

Amici are also gravely concerned that overturning *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977), will upset collective-bargaining arrangements and invite discord into public schools. The fallout would be felt not only by amici and their employees, but also by the children they work together to educate.

SUMMARY OF THE ARGUMENT

In the face of many challenges, American public schools must work collaboratively and innovate boldly if they are to provide students the best possible education. School districts have thus long had discretion to organize their labor relations in the manner they judge most effective for their communities.

Petitioners seek to limit that discretion. They claim that school districts' "only" relevant interest is "in negotiating with a single exclusive representative" and that an agency fee arrangement furthers that interest "only" if it prevents a union bankruptcy. Pet. Br. 30, 49. But schools have much more at stake.

Amici and other school districts enter agency fee arrangements because their schools deliver better results for students when working with stable, financially secure unions. For collective bargaining to be effective, school districts need to deal with unions that can act in the long-term interests of employees and students, even when doing so requires unpopular short-term sacrifices. Agency fee arrangements create

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financial security that mitigates the risk that concerns for health of the union itself will influence those hard choices. Unions without agency fee arrangements, in contrast, have an incentive to take hardline positions and pick battles to constantly prove their worth.

Agency fee arrangements also advance schools' strong interest in fostering close working relationships among staff and between management and union leaders. They reduce the risk that staff will be divided by resentment of free riders and distracted by constant pressure to join a union. They also help unions represent a broad base of employees, both by encouraging union membership and by facilitating robust communication with those members. Those benefits, along with the stability brought by agency fee arrangements, promote collaborative relationships between union leaders and school administrators—which have a well-recognized positive impact on educational outcomes.

School districts also adopt agency fee arrangements because partnership with a stable, financially secure union is a powerful vehicle for innovation. In districts with such arrangements, unions and employees take on nontraditional roles that improve public education—including through proven programs that train struggling teachers and remove those who fail to perform. Agency fee arrangements foster this creative collaboration, which may be the most promising means of overcoming the challenges facing public schools.

Petitioners do not acknowledge these interests. Should they prevail, great harm will come from limiting the discretion of local school districts to seek these benefits through agency fee arrangements.

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But that is not all.

In reliance on this Court's decisions, amici and school districts across the country have entered into collective bargaining agreements that contain agency fee provisions. If petitioners prevail, hundreds of school districts would face legal challenges, demands for re-negotiation, and uncertainty. This disruption would introduce discord into public schools, interfere with long-term planning and collaboration, and distract from schools' educational mission. This chaos would most negatively affect current students.

ARGUMENT

I. AGENCY FEE ARRANGEMENTS ADVANCE SCHOOLS' COMPELLING INTEREST IN WORKING WITH STABLE, FINANCIALLY SECURE UNIONS TO ENHANCE PUBLIC EDUCATION

American public schools strive to provide the best possible education to their students in the face of extraordinary challenges. Their ability to innovate to meet these challenges is essential to achieving this common goal.

For that reason, this Court's recognition that government employers need "wide discretion and control over the management of [their] personnel and internal affairs" holds special purchase in the domain of public education. *Connick v. Myers*, 461 U.S. 138, 150-151 (1983). As this Court has long acknowledged, "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Board of Educ. of Oklahoma City Pub. Sch., Indep.*

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Sch. Dist. No. 89, Oklahoma Cnty., Okl. v. Dowell, 498 U.S. 237, 248 (1991).

Consistent with this latitude, school districts across the country include agency fee provisions in their collective-bargaining agreements. Petitioners disparage this arrangement and blithely assert that public school districts' "only" interest in such arrangements is "in negotiating with a single exclusive representative," and the "only conceivable link" between that interest and agency fees "is the possibility that, absent compelled subsidization, the union will go bankrupt." Pet. Br. 30, 49. This radically understates the scope of public school districts' constitutional interests.

To be sure, public school districts have an interest in dealing with a single union, and agency fee arrangements prevent free riding that would undermine that interest. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 220 (1977). But that is not the end of the analysis.

Public school districts that choose agency fee arrangements do so because they have compelling interests in working with stable, financially secure unions that can effectively represent their members and serve as partners for long-term, collaborative innovation. Amici and hundreds of other school districts find that agency fee arrangements are an essential mechanism for advancing those interests.

A. Agency Fee Arrangements Allow Unions To Take A Long-Term Approach In Collective Bargaining

In negotiating collective-bargaining agreements, public school unions often face difficult choices between

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the short- and long-term goals of their members and other employees. And when budgets are tight, school districts may ask unions to sacrifice important short-term interests without any clear offsetting benefit other than preserving the district's immediate ability provide a certain level of educational services. Agency fee arrangements make collective bargaining more effective by giving unions the financial security to make difficult agreements, which may be unpopular but are in the long-term interests of employees and public schools.

This interest ties directly to the free-rider problem. There is always a risk of free riding when a union is supplying a collective good that must be provided to all employees regardless of union membership. *See, e.g., Zax & Ichniowski, Right-to-Work Laws and Local Public Sector Unionization*, 19 Pub. Fin. Rev. 293, 309-310 (1991). But that risk is especially high when circumstances require short-term sacrifices by employees, such as layoffs or salary cuts. Such controversial decisions make it more likely that individual members will refuse to pay their share of collective-bargaining costs.

Disallowing agency fee arrangements also vastly increases the leverage of dissident factions over the *entire* bargaining unit's behavior—rather than organizing for the next election, these factions can now threaten an immediate loss of funds. *Cf. Brooks v. National Labor Relations Bd.*, 348 U.S. 96, 100 (1954) (explaining that a union's bargaining rights are insulated from a competing union's challenge for one year so that the union is not “under exigent pressure to produce hot-house results or be turned out”).

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Financial insecurity thus discourages unions from agreeing to hard choices and instead creates an incentive to take hardline positions, press grievances, and even demonize school leadership to “demonstrate that they can ‘get something’ for their members.” Zwerdling, *Union Security in the Public Sector*, 17 B.C.L. Rev. 993, 1012 (1976) (quoting N. Chamberlain & D. Cullen, *The Labor Sector* 173-174 (1971)). For example, the regime governing federal labor relations—which does not allow agency fees—has bred an adversarial and litigious environment in which unions have the incentive to “concentrate on the problems raised by ‘malcontents.’” See General Accounting Office, *Federal Labor Relations: A Program in Need of Reform* 18-23, 33 (1991).

The same dynamic can be seen in states where agency fees are banned. See Marvit & Schriever, *Members-only Unions*, The Century Found. (Oct. 1, 2015) (members-only unions—“located [predominately where] legal conditions ... such as right-to-work laws make it difficult to organize a majority union”—have adversarial relationships with employers, defining success as “retaining a significant membership and winning discrete battles in the workplace”).

In contrast, unions with agency fee arrangements can work with school districts to reach necessary, but hard agreements—even in the face of substantial opposition within the bargaining unit.

Recent events in San Diego Unified School District (SDUSD) provide one example. In March 2012, in the midst of a recession, the SDUSD School Board took a painful but unanimous vote to layoff 1,656 teachers. The move prompted an outcry from local school employees. See San Diego Education Ass’n (SDEA),

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1,000+ March Against Education Cuts and Layoffs, SDEA.net (May 3, 2012). Nevertheless, local union leaders kept talking to the district, challenging its proposed budget while explaining the severity of the problem to school employees. The union leaders' efforts to cooperate faced bitter resistance from vocal dissenting factions. See, e.g., *The Breakfast Club Action Group (Breakfast Club), The SDEA Board Voted Last Night To Open Our Contract* (Jun. 8, 2012) (accusing union leaders of "[lying]" and "bargain[ing] away the hard-fought pay of thousands"); see also Steussy & Devine, *Teacher Contract Talks Continue Into The Night*, NBC San Diego (June 12, 2012) (discussing protest petition organized by Breakfast Club and signed by 700 union members). SDUSD and the union, however, had an agency fee arrangement in place.

Ultimately, the union agreed to various concessions that could cut employee pay by ten percent or more in exchange for reduced layoffs and other measures. SDEA, *An Important Letter from the SDEA Board of Directors*, SDEA.net (June 19, 2012). Although the deal was ratified, one-third of union members voted to reject it. And that fall, union leaders faced an unsuccessful recall petition charging that they had replaced "strong union organizing targeting the District" with "collaboration." BCAG, *SDEA Can Do Better* (Sept. 2012).

As this example illustrates, under an agency fee arrangement, dissenting employees have the freedom to speak out and in time can replace leadership or decertify the union. But they cannot threaten immediate withdrawal of financial support, which could paralyze union decision-making when the need for

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quick and decisive action is paramount. And that danger would be present even if a majority of the bargaining unit supports the union's position. It is one thing to lose 33% of a ratification vote; it is quite another to immediately lose 33% of your chargeable funding.

Over time, facilitated by the stability of agency fee arrangements, school districts and unions can develop the trust and collaborative relationships to manage even the most difficult circumstances.

For example, in suburban Cleveland, Ohio, the Berea City School District faced an unprecedented budget shortfall during the recession. Ghizzoni, *Economic Turbulence in the Economy Impacts District, in Inspiring Excellence* (Berea City School District Newsletter), Winter 2014, at 1. To stabilize the budget, the district—which has long had an agency fee arrangement with its teacher and administrator unions—was forced to close and consolidate schools and substantially reduce staff. *Id.*; see also Berea City School District, Comprehensive Annual Financial Report at S27-28, S34 (June 30, 2013). The teacher and administrator unions worked closely with management to determine how best to place staff into the consolidated buildings. Berger DuMound, *Berea School District's Consolidation Update*, Cleveland.com, (Apr. 5, 2013). They agreed to forgo a 1.5% raise they had bargained for in a previous contract; when the agreements came up for renegotiation, they agreed to freeze base salaries with no planned increases and increase contribution rates for health insurance. Berger DuMound, *Berea Teachers, Administrators Contracts See No Base Pay Increases*, Cleveland.com (Apr. 11, 2013). School district and union leaders

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attributed the successful negotiation to the parties' open, trusting relationship and cooperative, non-adversarial approach to bargaining. *Id.*

Berea City's success would not have been possible without the financial security afforded to unions by agency fee arrangements. In many states without agency fee regimes, unions have been unable to work together with school districts and promote teacher buy-in—contributing to vicious cycles of budget cuts, low employee morale, rapid turnover, and poor student performance. See Richmond, *Kansas's Teacher Exodus*, *The Atlantic*, July 15, 2015 (describing teacher shortages in Kansas, Nevada, Arizona, and Indiana, none of which allows for agency fees).

B. Agency Fee Arrangements Advance School Districts' Interest In Close Working Relationships With And Among Staff

Agency fee arrangements also foster trusting, close relationships in the workplace, which this Court has repeatedly recognized is an important interest for a government employer. See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (“[P]ertinent considerations” for First Amendment balancing include “harmony among coworkers” and “close working relationships for which personal loyalty and confidence are necessary[.]”); *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495-2496 (2011) (recognizing a “substantial government interest[.]” in avoiding “a serious and detrimental effect on morale”); *Connick*, 461 U.S. at 151 (“[I]t is important to the efficient and successful operation of [government] for [employees] to maintain close working relationships with their superiors.”). Amici know from firsthand experience that close relationships

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and open channels of communication have significant, positive impacts on student education and learning.

1. Agency fee arrangements promote close relationships among staff in at least two ways.

First, they avoid resentment and punishment directed at free riders. The threat of such retaliation is real. See Chaison & Dhavale, *The Choice Between Union Membership and Free-Rider Status*, 13 J. Labor Research, 355, 360 (1992) (“[G]roups may devise special incentives to serve as a counterforce to the tendency to free ride.”); *id.* at 361 (“[F]ree-rider status may carry significant social costs that can be reduced only by union membership.”); see also Fehr & Gächter, *The Economics of Reciprocity*, 14 J. Econ. Perspectives 159, 163–164 (2000) (when “self-interested types” free ride on a public good, “reciprocal types” are motivated to inflict punishment). Agency fee arrangements reduce the risk of such corrosive interactions because employees who elect not to join a union still bear their fair share of the costs.

Second, agency fee arrangements greatly reduce the need for informal pressure and constant workplace solicitation to encourage bargaining unit employees to support their elected representatives. As one education union coaches its members: “Without the ability to collect fair share fees from non-members, [a] union will have to continuously organize new members.” AAUP-CBC, *Organizing in Challenging Contexts*. “Continuous[] organizing” can mean continuous workplace discord and distraction—which school districts have a strong interest in avoiding.

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2. Agency fee arrangements also contribute significantly to promoting effective management-staff relations in two key ways.

First, agency fee arrangements promote broader union membership by reducing the financial benefit of non-membership. Chaison & Dhavale, *supra*, at 366. Broader membership increases the legitimacy of the union at the negotiating table, providing the school district greater assurance that the union represents all employees.

Second, by increasing membership and securing more financial resources, agency fees arrangements facilitate more effective communications concerning collective bargaining and other subjects of union-management discussion. Stable, financially secure unions can invest in communicating with employees and members alike through newsletters, meetings, employee-to-employee outreach, and other channels. See *Ellis v. Brotherhood of Ry. Employees*, 466 U.S. 435, 450-451 (“The union must have a channel for communicating with the employees” and such means are “important to the union in carrying out its representational obligations[.]”). More regular communication with employees gives unions a better understanding of their views, which in turn improves the quality of collective-bargaining negotiations. School districts would have difficulty developing such strong communication channels on their own—being unable replicate the trust that employees have in their elected representatives. Rubinstein, *Unions As Value-Adding Networks: Possibilities For The Future Of U.S. Unionism*, 22 J. Labor Research 581, 585 (2001).

Those communications channels also facilitate the transmission of school districts’ speech to employees.

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Talk of fiscal constraints might be dismissed as negotiating rhetoric when voiced by administrators. But, as in San Diego, when a trusted union advocates for its members' interests and simultaneously conveys the gravity of management's concerns, union membership is demonstrably more receptive to management's views and perceptions, facilitating collective resolution of problems that require cooperative attention.

3. These close working relationships have tremendous value. See U.S. Dep't of Education, *Shared Responsibility* 3, 23 (2012) (articulating and supporting "[t]he Department's working hypothesis ... that collaboration is a more effective and efficient way to develop great teachers and strong instructional systems, and that it is a more sustainable approach over time than the ups and downs of adversarial relationships"). Studies consistently show that strong union-administration relationships improve educational outcomes.² Agency fee arrangements make those partnerships much more likely to develop.

² *E.g.*, Rubinstein & McCarthy, Cent. For American Progress, *Teachers Unions and Management Partnerships* 2 (2014) (among other findings, "[f]ormal partnerships improve student performance" and "[p]artnerships lead to more extensive communication between teachers"); WestEd, *Labor-Management Collaboration in Education* 1 (2013) ("A key finding ... is that collaborative partnerships often build trust and strengthen professional relationships among local leaders. The partnerships have been crucial for districts attempting to implement innovative practices that improve teaching and learning."); see also Kochan, Emp't Policy Research Network, *Will the Supreme Court Support or Block Development of a Modern Collective Bargaining System for Homecare Workers?* 9 (2013) ("The value added of high performance, transformed union-management relationships serves

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One example of this dynamic at work can be seen in the turnaround at Broad Acres Elementary School in Montgomery County, Maryland—where the school district and its unions have long shared an agency fee arrangement. Broad Acres had been the lowest performing elementary school in the district.³ Faced with Broad Acres' chronic underperformance, the Montgomery County superintendent determined that it might be necessary to “re-constitute” the school by removing the principal and bringing in new staff—a disruptive and expensive process. Broad Acres Case Study 4. But after conferring with the teachers union, the superintendent agreed to an alternative plan: reinvesting in employees who signed on to a sweeping plan to improve the school. *Id.* at 5. Through their union and in exchange for a pay increase, employees at Broad Acres agreed to receive more training, work more hours each week and during the summer, and commit to stay at the school for at least three years. *Id.* at 7; see also Gowen, *Initiative Aims to Give Broad Acres New Direction*, Washington Post, Aug. 30, 2001. Teachers also agreed to play an active part in planning, analyzing, and leading efforts to improve student achievement. Broad Acres Case Study 6-7.

This ambitious plan would have been unthinkable without employee support, which required rebuilding trust after the threat of re-constitution. Broad Acres Case Study 8. The union, as a trusted advocate for the employees, helped explain the benefits of the new plan.

as the modern day equivalent of the labor peace argument for agency shop arrangements.”).

³ See generally Simon, Tom Mooney Institute for Teacher and Union Leadership, *Transformation at Broad Acres Elementary* (2007) (“Broad Acres Case Study”).

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Id. at 8-9. Two-thirds of teachers decided to stay rather than take preferential transfer status. *Id.* at 9.

The collaborative plan worked. Administrators and employees developed innovative approaches tailored to the special challenges of the student body, which was the poorest in the district and included many recent immigrants. Broad Acres Case 9. Within a few years, the collaborative effort raised testing proficiency rates by up to 50 percentage points. *Time to Celebrate Big, Broad Jumps In Test Scores*, Washington Post, June 3, 2004; see also Fisher, *A School That Works By Working Together*, Washington Post, January 8, 2009. Amici—which include the school district that negotiated these arrangements—firmly believe that agency fees helped create the conditions to allow these relationships to thrive.

C. Agency Fee Arrangements Promote Innovative Collaboration Between Schools And Unions

This Court has long recognized that local control over education “allows innovation so that school programs can fit local needs.” *Dowell*, 498 U.S. at 248. Thus, even where school districts have limited their employees’ speech as citizens—which agency fee arrangements do not—the Court has weighed heavily the government’s interest in a “teacher’s proper performance of his daily duties in the classroom” and in the “regular operation of schools generally.” *Pickering v. Board of Educ.*, 391 U.S. 564, 572 (1968).

1. School districts’ ability to innovate and experiment to improve their performance turns in large measure on their ability to work collaboratively with their employees. In many districts, unions have

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worked with administrators to develop and carry out policies that fundamentally reimagine the role of unions, teachers, and other district personnel in school administration. In particular, unions have taken on non-traditional roles—such as participating in teacher evaluations or testing policy discussions—that improve student experiences and outcomes. As discussed in sections I.A and I.B, agency fee arrangements set the conditions for such innovative collaboration, by promoting long-term planning, non-adversarial mindsets, experimentation, and effective communication.

For example, a number of districts have implemented “Peer Assistance and Review” (PAR) programs. These programs, which are jointly administered by the local teachers and principals unions, evaluate and mentor new and struggling teachers. *See generally* Harvard Graduate Sch. of Educ., *A User’s Guide To Peer Assistance and Review* (2009). In a typical PAR program, teams of “consulting teachers”—expert teachers chosen through a competitive process—are responsible for coaching and evaluating new and struggling teachers. *Id.* at 5. During the course of a school year, these consulting teachers document their assigned teachers’ performance, provide feedback and hands-on guidance, and ultimately present their recommendations to a panel of administrators and union representatives about whether their teachers should be dismissed, re-hired, or provided another year of PAR support. *Id.* at 5-6. *See also* Montgomery County Public Schools, *Teacher-Level Professional Growth System Handbook* 9-17 (2015). PAR programs ensure that underperforming teachers get the support they need, alleviate the burden on principals to single-handedly

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administer evaluation programs, and ultimately allow schools to dismiss ineffective teachers without a prolonged adversarial process.

PAR programs save money by reducing turnover and the costs of dismissing tenured teachers. See Harvard Graduate Sch. of Educ., *What Are The Financial Benefits of PAR?* (replacing novice teacher costs \$10,000 to \$20,000); Ferlazzo, *Creating a Culture of Improvement With Peer Assistance & Review*, Education Week Teacher, Feb. 1, 2013 (five-year retention rate of 65% in PAR-adopting Montgomery County, compared to 50% nationally). Furthermore, PAR programs have helped contribute to “significant increases in student achievement and a substantial narrowing of the achievement gap.” Marietta & Johnson, Harvard Graduate Sch. of Educ., *The Unions in Montgomery County Public Schools* 1 (2011); see also, Malin, *Education Reform and Labor-Management Cooperation*, 45 U. Tol. L. Rev. 527, 531 (2014) (peer review helps explain academic success of Toledo City District, which has typical urban demographics “but sustains top scores on state performance indices for grades 3-6, has the highest graduation rate and second highest attendance rate among large urban districts in Ohio, and boasts [a high school] ranked in the top 10% of high schools by U.S. News & World Report”).

In 2009, long-struggling Detroit Public Schools reached a tentative agreement with the Detroit Federation of Teachers that was “historic in setting major reforms initiated by both the teachers union and the Detroit Public Schools.” Press Release, Detroit Federation of Teachers, DFT and DPS Reach Tentative 3-Year Agreement (Dec. 3, 2009). These

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collaborations included a PAR program like that used by Montgomery County and other districts. *Id.* But in the wake of Michigan's prohibition of agency fees, budget shortfalls, and the contentious contract negotiations that followed, *see* Dawsey, '*Without It You Have Nothing*': *Detroit Teachers Urged To Ratify New Contract*, Detroit Free Press (Mar. 19, 2013), the fledgling Detroit PAR program was dismantled, *see* Morris, *Detroit Public Schools Fails Students Without Standards For Under-qualified Teachers*, Motor City Muckraker (Apr. 25, 2014). Indeed, successful PAR programs are overwhelmingly located school districts that have adopted agency fee arrangements. *See, e.g.*, Johnson et al., Cent. for Amer. Prog., *Realizing the Potential of Peer Assistance and Review* 25 (2010); Am. Fed'n of Teachers and Nat'l Educ. Assoc., *Peer Assistance & Peer Review* A3, B1-9 (1998); Sawchuk, *Judging Their Peers*, Education Week, Nov. 18, 2009, at 22.

2. Agency fee arrangements have also allowed unions to take on roles outside of collective bargaining and support (financially and otherwise) a wide range of services beneficial to schools as a whole, including professional development, mentoring, and benefits counseling. *See, e.g.*, Kaboolian, *Win-Win Labor-Management Collaboration in Education* 55-56 (2005) (Minneapolis teachers union helped develop and fund professional development program).

These services can fill crucial gaps created by budget constraints. *See* Kaboolian, *supra*, at 57 (Pittsburgh teachers union provided funds and expanded professional development program when school district "significantly reduced its financial support"). They can also bring national resources and

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attention to local school districts and teachers pursuing innovative and ambitious programs. *See, e.g., Nat'l Educ. Assoc. Found., Grants to Educators*, (“[O]ver the last 10 years, we have awarded more than \$7.1 million to fund nearly 4,500 grants to public school educators to enhance teaching and learning.”); Am. Fed’n of Teachers, *AFT Innovation Fund* (“The AFT Innovation Fund will invest approximately \$500,000 to support four local AFT affiliates’ work with their local partners to expand career and technical education opportunities.”).

For example, Connecticut’s Meriden Public Schools worked with their union, which is supported by an agency fee arrangement, to apply for an AFT Innovation Fund grant to fund extended-hour school days at two high-poverty elementary schools over a three-year period. Am. Fed’n of Teachers, *It’s About Time 1-2* (2014); *see also* Dubin, *Moving Meriden*, *American Educator* 29, 30 (Winter 2013-14). The collaborative district-union relationship helped obtain the support of employees for the new, longer schedules and adapt quickly to challenges in implementation. AFT, *It’s About Time 2-6*, 23. The schools saw strong improvements in test scores, attendance, and satisfaction—prompting the program to expand to other schools, including in two other Connecticut districts. *Id.* 2-3.

Another example is California’s ABC Unified School District, where the local union helped create the “South Side Schools Reading Collaborative” to address poor performance in the South Side Schools, which had “a majority of students who were English Language Learners and had low proficiency in reading and math.” Rubinstein & McCarthy, *Creating Union-Management*

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Partnerships, supra, at 9. To make the program work, “the union increased its membership dues to pay for substitute teachers so South Side faculty could be released to take ... professional development training.” *Id.* The union also funded “peer coaching, full-day reading conferences, and community partnerships” through the program. Eckert et al., U.S. Dep’t of Educ., *Local Labor Management Relationships as a Vehicle to Advance Reform 10* (2011). As a result, the South Side Schools “have posted the greatest student achievement growth in the district.” *Id.* This program would not have been possible without an agency fee arrangement, which allowed the union to raise membership dues without a risk of free riding.

Without protection against free riding, these mutually beneficial programs and services are likely to be among the first to be cut as unions reduce membership dues to appeal to the lowest common denominator. If unions stop providing these programs and services, they would either cease to be provided or school districts would be forced to fund them directly, diverting scarce resources from school budgets. *See Kaboolian, supra*, at 57.

* * *

Agency fee arrangements are a critical component of contemporary public education policy-making. School districts and unions have learned that providing optimal education services to students often entails significant commitment from unions and their members, which are made possible by the fidelity, flexibility, and resources that agency fee arrangements allow. States and school districts are best positioned to determine how to structure their employment relations to best serve the interests of their students. The choice

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to adopt an agency fee arrangement is assuredly one that public school districts can reasonably—and lawfully—make.

II. OVERTURNING *ABOOD* WOULD GRAVELY UPSET PUBLIC SCHOOL LABOR RELATIONS AND CAUSE ONGOING DISRUPTION AFFECTING STUDENTS

In the years since *Abood*, amici and other public school districts across the country have entered into multi-year contracts containing agency fee provisions. School districts have a strong interest in avoiding the legal challenges, demands for re-negotiation, and uncertainty that would inevitably result from overturning *Abood*. See *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991) (“[O]verruling the decision would dislodge settled rights and expectations or require an extensive legislative response.”). In school districts with multiple union agreements—for example, separate contracts governing teachers, service employees, and administrators—the problems would be multiplied.

This is not a speculative concern. After Michigan prohibited public sector agency fees, 2012 Mich. Pub. Acts 349, collective bargaining relationships were thrown into disarray. Unions immediately brought legal challenges, and the governor requested an advisory opinion from the Michigan Supreme Court. *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348*, 829 N.W.2d 872, 874 (Mich. 2013). When the court declined that request, lawsuits proliferated and have continued to work their way through the Michigan courts, with inconsistent results. See, e.g., *International Union, United Auto. Aerospace & Agr. Implement Workers of Am. v. Green*, No. 147700, 2015 WL 4562462 (Mich. July 29, 2015)

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(Michigan civil service commission “may not require collection of agency shop fees to fund its administrative operations”); *Steffke v. Taylor Fed’n of Teachers AFT Local 1085*, No. 317616, 2015 WL 1592654, at *4 (Mich. Ct. App. Apr. 7, 2015) (teachers had standing to pursue declaratory-judgment claim on validity of union security agreement requiring payment of union dues or a service fee); *see also Michigan State AFL-CIO v. Callaghan*, 15 F. Supp. 3d 712, 722 (E.D. Mich. 2014) (denying motion to dismiss in case alleging that Public Act 348 was preempted by federal law).

This initial disruption would continue because school districts and unions would not quickly settle into a new status quo. State legislatures may decide to overhaul public sector labor-relations law to adjust to new limitations. Future negotiations would be more complicated and contentious, as unions seek to renegotiate long-settled terms in light of the new economic reality.⁴ The costs of this disruption would be borne most heavily by current students—who need administrators and employees focused on the classroom during their limited years in school. Furthermore, there is a risk that the effort school districts have expended to develop collaborative relationships with their unions would be wasted, as unions deprived of agency fees refocus on continuous organizing and demonstrating quick wins for employees.

⁴ Unions will face immediate revenue losses as current members take advantage of their new-found ability to free ride, and will also find it more difficult to recruit new members. Unions would also face legal uncertainty about their past revenues. *See, e.g., Schlaud v. Snyder*, 785 F.3d 1119 (6th Cir. 2015) (putative class action concerning union liability for back fees under *Harris v. Quinn*, 134 S. Ct. 2618 (2014)).

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This ongoing disruption will also make long-term planning difficult, especially in areas where union cooperation is critical. Some of the more innovative programs adopted by school districts and unions—such as the PAR program discussed above—are especially likely to be derailed. States and school districts have spent decades learning how to work with their unions to advance efficient and effective public administration; the Court should not now upset the progress that has been made.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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NOVEMBER 13, 2015

ActiveUS 149275565v.4