No. 14-___

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., N.W.
Suite 300
Washington, DC 20036

MICHAEL A. CARVIN
Counsel of Record
JAMES M. BURNHAM
WILLIAM D. COGLIANESE
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioners

QUESTIONS PRESENTED

Twice in the past three years this Court has recognized that agency-shop provisions—which compel public employees to financially subsidize public-sector unions' efforts to extract union-preferred policies from local officials—impose a "significant impingement" on employees' First Amendment rights. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012); *see also Harris v. Quinn*, 134 S. Ct. 2618 (2014). California law requires every teacher working in most of its public schools to financially contribute to the local teachers' union and that union's state and national affiliates in order to subsidize expenses the union claims are germane to collective bargaining. California law also requires public-school teachers to subsidize expenditures unrelated to collective bargaining unless a teacher affirmatively objects and then renews his or her opposition in writing every year. The questions presented are therefore:

1. Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are: Rebecca Friedrichs, Scott Wilford, Jelena Figueroa, George W. White, Jr., Kevin Roughton, Peggy Searcy, Jose Manso, Harlan Elrich, Karen Cuen, and Irene Zavala; and the Christian Educators Association International ("CEAI"). CEAI is a nonprofit religious organization that is the only professional association specifically serving Christians working in public schools. Founded and incorporated in the state of California, CEAI's membership consists of teachers, administrators, and para-professionals, and many other public- and private-school employees. CEAI has approximately 600 members in the State of California. CEAI is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in CEAI.

Respondents, who were Defendants-Appellees in the court below, are the California Teachers Association; National Education Association; Savanna District Teachers Association, CTA/NEA; Saddleback Valley Educators Association; Orange Unified Education Association, Inc.; Kern High School Teachers Association; National Education Association-Jurupa; Santa Ana Educators Association, Inc.; Teachers Association of Norwalk-La Mirada Area; Sanger Unified Teachers Association; Associated Chino Teachers; San Luis Obispo County Education Association; Sue Johnson (as superintendent of Savanna School District); Clint Harwick (as superintendent of the Saddleback Valley Unified School District); Michael

L. Christensen (as superintendent of the Orange Unified School District); Donald E. Carter (as superintendent of the Kern High School District); Elliott Duchon (as superintendent of the Jurupa Unified School District); Thelma Meléndez de Santa Ana (as superintendent of the Santa Ana Unified School District); Ruth Pérez (as superintendent of the Norwalk-La Mirada Unified School District); Marcus P. Johnson (as superintendent of the Sanger Unified School District); Wayne Joseph (as superintendent of the Chino Valley Unified School District); and Julian D. Crocker (as superintendent of the San Luis Obispo County Office of Education).

In addition to these parties, California Attorney General Kamala D. Harris intervened in the district court proceeding, was a Defendant-Intervenor in the court of appeals, and is thus a party to the proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The Ninth Circuit's order affirming the district court is reproduced in the appendix (Pet.App.1a), as is the district court's order dismissing Petitioners' claims on the pleadings (Pet.App.3a).

JURISDICTION

The Ninth Circuit entered judgment on November 18, 2014. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the Appendix (Pet.App.9a).

STATEMENT OF THE CASE

This is a challenge to the largest regime of state-compelled speech for public employees in the Nation. Each year, the State of California compels its public-school teachers to make hundreds of millions of dollars in payments to Respondent California Teachers Association ("CTA"), Respondent National Education Association ("NEA"), and their local affiliates. California law makes these payments mandatory for every teacher working in an agency-shop school—which is virtually every teacher—regardless of whether that teacher opposes the positions CTA takes in collective bargaining and regardless of whether the positions CTA takes in collective bargaining are directly contrary to that teacher's on-the-job interests. This multi-hundred-million-dollar regime of compelled political speech is irreconcilable with this Court's recent recognition of "the critical First Amendment rights at stake" in such arrangements. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277,

2289 (2012). The logic and reasoning of this Court's recent decisions have shattered the intellectual foundation of its approval of such compulsion in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—a decision that was questionable from the start, as Justice Powell argued persuasively in his separate opinion. *Id.* at 245 (Powell, J., concurring in the judgment) (describing the majority's opinion as "unsupported by either precedent or reason"). The time has therefore come for this Court to reconsider that decision and, at long last, give "a First Amendment issue of this importance" the consideration it deserves. *Harris v. Quinn*, 134 S. Ct. 2618, 2632, 2639 (2014).

A. California's Agency-Shop Laws For Public-School Teachers

1. The "Agency Shop" Arrangement

The State of California empowers school districts to require public-school teachers, as a condition of employment, to either join the union representing teachers in their district or pay the equivalent of dues to that union. This requirement, known as an "agency shop" arrangement, operates as follows.

California law allows a union to become the exclusive bargaining representative for "public school employees" in a bargaining unit (usually a public school district) by submitting proof that a majority of employees in the unit wish to be represented by the union. CAL. GOV'T CODE § 3544(a). A "public school employee" is "a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees

[who facilitate employee relations on behalf of management]." *Id.* § 3540.1(j). Once a union becomes the exclusive representative, it represents all "public school employees" in that district for purposes of bargaining with the district. *Id.* § 3543.1(a). The union is thus authorized to bargain over a wide range of "[t]erms and conditions of employment" that go to the heart of education policy, including wages, hours, health and welfare benefits, leave, transfer and reassignment policies, class size, and procedures to be used for evaluating employees and processing grievances. *Id.* § 3543.2(a).

Once a union becomes the exclusive bargaining representative within a district, it is authorized by California law to establish an agency-shop arrangement (or "organizational security arrangement") with that district. State law defines this arrangement as one in which all employees "shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee." *Id.* § 3546(a). The amount of this "fair share service fee"—commonly known as an "agency fee"—is determined by the union and "shall not exceed the dues that are payable by members" of the union. *Id.* The fee is meant to support union activities that are "germane to [the union's] functions as the exclusive bargaining representative." *Id.* California law includes a range of expenses in this category, including "the cost of lobbying activities designed to foster collective-bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the

employer." *Id.* § 3546(b). In practice, the agency fee typically equals the amount of union dues and includes both the amounts that are chargeable and those that are not chargeable under this Court's prior decisions. *See* Pet.App.79a.

Although nonmembers must pay fees to support union activities that are "germane" to collective bargaining, the First Amendment has long forbade compelling them to support union activities that are "*not* devoted to … negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." *Id.* § 3546(a) (emphasis added); *Abood*, 431 U.S. at 235-36. The latter expenses are "nonchargeable" and it is the union's responsibility to annually determine the portion of its expenses falling into that category. The union makes this determination by calculating the total amount of the agency fee based on its expenditures for the coming year, and then calculating the nonchargeable portion of this fee based on a report of a recent year's expenditures. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(b)(1).

2. The *Hudson* Notice And Objection Process

Each fall, after the union has made the requisite determinations, it must send a "*Hudson* notice" to all nonmembers that sets forth the amount of the agency fee as well as a breakdown of the chargeable and nonchargeable portions of this fee. CAL. GOV'T CODE § 3546(a); REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(a); *see generally Chi. Teachers Union v. Hudson*, 475 U.S. 292, 304-07 (1986) (setting forth

the information unions must provide regarding their expenses). The *Hudson* notice must also include either the union's audited financial report for the year or a certification from the union's independent auditor confirming that the chargeable and nonchargeable expenses have been accurately stated. *Id.* § 32992(b)(1). The independent auditor does not, however, confirm that the union has properly classified expenditures as being chargeable or nonchargeable. *See Knox*, 132 S. Ct. at 2294 (explaining as much).

To avoid paying for nonchargeable expenditures, a nonmember is required to affirmatively "opt out" of such payments each year by notifying the union of his or her objection after receipt of the *Hudson* notice. REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32993. The period to lodge this objection must last at least thirty days, and typically lasts no more than six weeks. *Id.* § 32993(b). Teachers who opt out are then entitled to a rebate or fee-reduction for that year. CAL. GOV'T CODE § 3546(a).

B. The Respondent Unions' Implementation Of These Procedures

1. The Respondent Unions Collect Agency Fees At The National, State, And Local Level.

For each school district in which Petitioners are employed, the local union that is recognized as the exclusive bargaining representative determines the total agency fee, often in collaboration with CTA. Pet.App.60a. After the local union or CTA informs the school district of the year's agency-fee amount, the school district automatically deducts that

amount in pro rata shares from the teacher's regular paychecks unless the teacher informs the district that he or she will pay the union directly. The school district sends the deducted amounts directly to the local union affiliate.

For each district in which Plaintiffs are employed, the local union's agency fee includes "affiliate fees" for both CTA and NEA. Those "affiliate fees" are treated as partially "chargeable" for every teacher, with the allocation between chargeable and nonchargeable fees based on statewide or nationwide expenditures by CTA and NEA. Thus, the portions of CTA and NEA "affiliate fees" deemed "chargeable" to teachers in local school districts are not designed to correspond to actual collective-bargaining expenditures CTA and NEA make within those districts. Pet.App.61a-62a.

Agency fees for nonmembers typically consume roughly two percent of a new teacher's salary. These fees sometimes increase regardless of whether there is an increase in teacher pay. The total amount of annual dues often exceeds $1,000 per teacher, while the amount of the refund received by nonmembers who successfully opt out each year is generally around $350 to $400. Pet.App.62a.

2. Teachers Who Object To Subsidizing "Nonchargeable" Expenses Must Renew Their Objections Every Year.

Respondents require teachers who are not union members to renew their objections to subsidizing nonchargeable expenditures every year, in writing, during a roughly six-week period following the Unions' mailing of their annual *Hudson* notice.

Pet.App.62a. No matter how many years in a row a nonmember has opted out of paying the nonchargeable portion of his or her agency fees, that person must send an annual letter to CTA to successfully opt out. If a teacher misses the deadline, he or she is obligated to pay the full agency fee for the next year. *See, e.g.*, Pet.App.79a; Pet.App.96a-97a.

Neither the school districts in California nor the Respondent Unions educate teachers about their right to opt out of subsidizing nonchargeable union expenses. That leads to ignorance about the mechanics of "opt out"—ignorance that causes teachers to unwittingly contribute to Respondent Unions' nonchargeable expenses. For example, Respondents provide public-school teachers with a membership enrollment form that many teachers wrongly interpret as saying that they can join the union without subsidizing its political activities. Pet.App.80a-81a. The form states that CTA maintains a political action committee ("PAC"), for which it solicits member donations. Pet.App.83a. The form then invites CTA members to check a box "if you choose not to allocate a portion of your dues to the [CTA's PAC] account and want all of your dues to remain in the General Fund." *Id.* As one of the Petitioners has explained, this box-checking option gives many teachers the mistaken impression that checking the box means they have opted out of subsidizing political expenditures altogether. Pet.App.80a-81a.

C. Proceedings Below

On April 30, 2013, Petitioners filed a complaint challenging the agency-shop regimes and opt-out requirements maintained by Respondents. On Sep-

tember 19, 2013, California Attorney General Kamala Harris intervened in the district court proceeding. Petitioners acknowledged in their complaint and explained to the district court that, while this Court's decision in *Knox* had called its prior decision in *Abood* into question, the district court did not have the authority to revisit *Abood* on its own. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Petitioners therefore sought a quick ruling from the district court that would enable them to promptly take their claims to a forum with the power to vindicate them and, in turn, abate the irreparable First Amendment harms that California's agency-shop regime imposes daily on Petitioners. As for Petitioners' second claim concerning "opt-out," Petitioners acknowledged that the Ninth Circuit's decision in *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992), precluded the district court from granting relief. The district court agreed, entering judgment on the pleadings against Petitioners on December 5, 2013.

Petitioners promptly appealed the district court's judgment to the Court of Appeals for the Ninth Circuit, where they again conceded that *Abood* and *Mitchell* foreclosed their claims. Petitioners again asked for a quick ruling without delaying for oral argument on issues the three-judge panel lacked the authority to revisit. Respondents opposed that course, asking the Ninth Circuit to conduct oral argument and issue a published opinion "address[ing] the merits of [the] issue[s] despite acknowledging that the outcome was dictated by controlling precedent." Union Opp. to Mot. for Summary Affirmance at p. 5, *Friedrichs v. Cal. Teachers Ass'n*, No. 13-

57095 (9th Cir. Oct. 14, 2014). The Ninth Circuit declined Respondents' request to issue an advisory opinion and instead summarily affirmed the district court on November 18, 2014. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are simple and compelling. Twice in the past three terms, this Court has recognized that its decisions permitting public-sector agency shops misinterpreted the vital First Amendment rights at stake when governments compel public employees to subsidize political speech with which they disagree. In this era of broken municipal budgets and a national crisis in public education, it is difficult to imagine more politically charged issues than how much money cash-strapped local governments should devote to public employees, or what policies public schools should adopt to best educate children. Yet California compels Petitioners to fund a very specific point of view on these pressing public questions. Nor is California alone. More than twenty other states compel millions of public employees to pay hundreds of millions of dollars to public-employee unions regardless of whether those unions advocate policies the employees support or, indeed, regardless of whether the policies even benefit those employees.

The constitutionality of such regimes is thus of profound importance, and yet is approved only in outmoded decisions that are irreconcilable with this Court's more recent opinions, as well as the general principles underlying bedrock First Amendment protections. This Court has never before sustained a decision that wrongly permitted the ongoing deprivation of a core constitutional right solely out of fidelity to the prudential principle of stare decisis. It should not start now. The Court should instead do as it has twice suggested it should do and give this important First Amendment issue the full and fair considera-

tion it deserves. *See Harris*, 134 S. Ct. at 2632 ("Surely a First Amendment issue of this importance deserved better treatment" than it received in *Abood*.)

The requirement that Petitioners affirmatively object to subsidizing the Respondent Unions' nonchargeable expenditures likewise cannot survive the exacting First scrutiny this Court gives to such arrangements. There is no rational justification—let alone one that satisfies First Amendment scrutiny—for requiring every public-school teacher to annually renew, in writing, his or her objection to subsidizing the unions' political agenda. The only reason to put the onus on individual teachers is to give the unions the "advantage of … inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), and thereby enable them to capitalize on teachers' ignorance, confusion, or forgetfulness. The Court should therefore also directly consider the constitutionality of such presumed consent, particularly given the differences among the circuits in reviewing such regimes.

I. *Abood* Cannot Be Reconciled With The Rest Of This Court's First Amendment Jurisprudence.

It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. That is because "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id.* at 2639; *see also id.* at 2656 (Kagan, J. dissenting) ("[T]he 'difference between compelled speech and

compelled silence' is 'without constitutional significance.'" (quoting *Riley v. National Federal of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). There is thus no constitutionally significant difference between compelling public employees to subsidize public-sector unions' collective-bargaining efforts, compelling employees to speak in favor of such efforts, or prohibiting employees from speaking about such efforts. While compelled subsidization, like all coerced association, must be justified by a "'compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms,'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)), scrutiny is particularly exacting when it involves political speech about public-policy choices. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (citations omitted); *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny' ….") (citation omitted).

This Court's decision in *Abood* faithfully applied these principles to invalidate compelled subsidization of "ideological" or "political" public-sector union speech, but it simultaneously created an exception that permits the compelled subsidization of identical speech uttered in collective bargaining. 431 U.S. at 232. That exception is a constitutional anomaly that conflicts with this Court's decisions in every analo-

gous area and permits compelled speech that cannot survive *any* level of First Amendment review.

Specifically, the *rationale* of *Abood* is consistent with these principles only if there is a constitutionally meaningful difference between a public-sector union's efforts to advance an "ideological" agenda through collective bargaining, and the same union's efforts to advance the same "ideological" agenda through lobbying or campaign spending. But the *context* in which a public-sector union advocates the *same* political and public-policy views plainly does not make a First Amendment difference. *Abood* based its contrary conclusion solely on a flawed analogy to decisions concerning private-sector collective bargaining—an analogy so flawed that no Justice of this Court attempted to defend it last term in *Harris*.

Not only that, but the *result* in *Abood* can be reconciled with the rest of this Court's decisions only if (1) public-sector union speech in collective bargaining is not—contrary to *Abood* itself—"political" or "ideological" speech designed to "influence government decision-making," *Abood*, 431 U.S. at 231; or (2) the governmental interests in promoting "labor peace" and preventing "free-riding" justify compelled subsidization of political speech. The first contention is not only contrary to *Knox*, *Harris*, and *Abood*—it "flies in the face of reality." *Harris*, 134 S. Ct. at 2642. And the second contention had no supporters in *Abood* or *Harris*, directly contradicts this Court's opinions in *Knox* and *Harris*, and conflicts with this Court's decisions holding that similar rationales do not justify compelling subsidization of even "mundane commercial" speech. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Indeed, this Court

held in *Harris* that these justifications cannot satisfy even the deferential balancing test established in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 573 (1968).

For all these reasons, the conflict between *Abood* and the rest of this Court's decisions can only be cured—and basic First Amendment protections can only be restored—if this Court reconsiders and overturns that decision.

A. Public-Sector Collective Bargaining Is Core Political Speech Materially Indistinguishable From Lobbying.

1. *Abood* readily recognized that public-sector unions' collective-bargaining efforts constitute political speech designed to influence governmental decision-making. As the Court put it, "[t]here can be no quarrel with the truism" that, in the collective-bargaining context, "public employee unions attempt to influence governmental policymaking." 431 U.S. at 231. Consequently, "their activities—and the views of members who disagree with them—may be properly termed political." *Id.*

In particular, *Abood* recognized that collective bargaining involves taking positions on a "wide variety" of "ideological" issues, such as the "right to strike," the contents of an employee "medical benefits plan" and the desirability of "unionism itself." *Id.* at 222. And the Court recognized that collective bargaining is intended "to affect the decisions of government representatives who sit on the other side of the bargaining table." *Id.* at 228. Those government representatives are engaged in what is "above all a

political process," as decisions on "[w]hether [to] accede to a union's demands" turn on "political ingredients" that require balancing public interest factors such as the "importance of the service involved and the relation between the [union's] demands and the quality of service." *Id.* at 228-29. (And such "petitioning" of government is specifically and equally protected by the First Amendment. *See*, *e.g.*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) ("We have recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights'" (quoting *Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217, 222 (1967)); *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) ("The considerations that shape the application of the Speech Clause to public employees apply with equal force to claims by those employees under the Petition Clause").)

Abood thus held that public-sector collective bargaining is "political" speech designed to "influence governmental policy-making" about "ideological" issues. It also held that the First Amendment prohibits the Government from "requiring any [objecting nonmember] to contribute to the support of an ideological cause he may oppose." 431 U.S. at 235. It did so on the well-established grounds that the "central purpose of the First Amendment was to protect the free discussion of governmental affairs," and that this "fundamental First Amendment interest" was "no less" infringed simply because the nonmembers were "compelled to make, rather than prohibited from making, [the financial] contributions" that agency-shop arrangements require. *Id.* at 231, 234.

But while *Abood* recognized that this principle prohibited compelled funding of union speech directed at "*other* ideological causes not germane to its duties as a collective bargaining representative," it nonetheless allowed compelled funding of ideological union lobbying in the context of "collective bargaining." *Id.* at 235 (emphasis added). Neither *Abood* nor subsequent cases have articulated any principled basis for distinguishing between collective-bargaining lobbying and non-collective-bargaining lobbying. Rather, *Abood* justified this artificial line solely on the ground that the Court had previously drawn it in the private-sector context in *Railway Employees v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). *Abood*, 431 U.S. at 232.

This Court has, however, since recognized—without apparent disagreement by any Justice—that the "*Abood* Court seriously erred" in concluding that *Street* and *Hanson*'s authorization of compelled subsidization of private-sector collective bargaining somehow supported such compulsion in the "very different" public-sector context. *Harris*, 134 S. Ct. at 2632. As *Harris* explained, approving the Government's "bare authorization" of private employers to compel subsidization of speech that can only affect private decision-makers and private affairs does not support the "very different" proposition that a "state instrumentality" may directly "impose" subsidization of collective-bargaining speech that is "directed at the Government" and designed to "'influence [] the decisionmaking process.'" *Id.* at 2632-33 (citation omitted).

Street and *Hanson* thus support neither *Abood*'s conclusion that compelled subsidization of public-sector collective bargaining is permissible, nor its distinction between collective bargaining and unions' other forms of public advocacy.

2. Nor do this Court's other decisions support those propositions. To the contrary, well-established precedent establishes that public-sector collective bargaining constitutes core political speech about governmental affairs that is not materially different from lobbying. *Abood* recognized precisely that point, and this Court's subsequent decisions have consistently reaffirmed that aspect of *Abood*. In *Knox*, this Court recognized that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. And *Harris* squarely held that collective bargaining over "wages and benefits" is "a matter of great public concern." 134 S. Ct. at 2642-43. Indeed, any contrary "argument flies in the face of reality." *Id*. at 2642.

First, the broad *fiscal* impact of bargaining about wages and benefits makes it political speech about public affairs. As *Harris* explained, "it is impossible to argue that … state spending for employee benefits in general[] is not a matter of great public concern." *Id*. at 2642-43. Such spending necessarily requires either spending less on other public programs or raising additional public revenues—either of which is an important public issue. Indeed, this Court held as much in *Pickering*, ruling that a public-school teacher's criticism of his district's efforts to raise revenues were related to "issues of public importance." 391 U.S. at 574.

That is particularly true for California, where unfunded pension liabilities for retired public workers have ballooned in recent years to $198 billion, $74 billion of which is attributable to the State's retired teachers *alone*. Cal. State Controller's Office, *Defined Benefit Systems—11-Year UAAL Trend*, http://goo.gl/dgwEHL; Cal. State Budget 2014-15 at 57-58, http://goo.gl/BSs17N. And those union-negotiated benefits for retirees are now consuming the increased revenues derived from tax increases and higher school-district contributions that were imposed specifically to address the education-funding shortfalls. *Id.*; *see also* Dale Kasler, *Legislature Delivers Financial Rescue for CalSTRS; State, Schools, Teachers to Contribute More*, The Sacramento Bee, June 16, 2014, http://goo.gl/P20Sa1. This vividly illustrates the degree to which union-secured benefits affect taxes and educational spending for current students and teachers.

Moreover, collective bargaining directly addresses and affects matters of "education policy." *Harris*, 134 S. Ct. at 2655 (Kagan, J., dissenting) (citing *Abood*, 431 U.S. at 263 n.16 (Powell, J., concurring in judgment)). In California, for example, state law authorizes teachers unions to bargain over "class size," CAL. GOV'T CODE § 3543.2(a), an important and hotly debated education policy issue. Unions also collectively bargain for tenure, transfer and reassignment policies, and prohibitive termination procedures. *Id.* Such policies have an important—and, many believe, detrimental—effect on education policy. Indeed, just last year, a California court found that the union's job security and seniority-based assignment policies caused "a significant number of grossly ineffective

teachers [to be] currently active in California classrooms," particularly minority classrooms, to the severe "detriment" of students' education. *Vergara v. California*, No. BC 484642, slip op. at 8, 11, 15 (Cal. Sup. Ct. Aug. 27, 2014), available at http://goo.gl/ThBjNQ. Such consequential speech is, to say the least, as much about a "matter of public concern" as are threats to "blow off their front porches" during a labor dispute, or protest signs declaring that "God Hates Fags"—both of which this Court has found to be "unquestionably a matter of public concern" or "public import." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001); *Snyder*, 131 S. Ct. at 1216-17; *see also Connick v. Myers*, 461 U.S. 138, 146 (1983) (speech is on a matter of public concern if it can be "fairly considered as relating to any matter of political, social or other concern to the community").

It is, moreover, axiomatic that, just like lobbying, public-sector collective bargaining's *raison d'etre* is "to affect the decisions of government representatives"—the only difference being that, in one context, the representatives "sit on the other side of the bargaining table." *Abood*, 431 U.S. at 228. Compelled subsidization of a union's efforts to have public officials enshrine union-preferred policies in a binding contract is thus just as impermissible as the compelled subsidization of a union's efforts to have public officials enshrine those policies in a binding statute. This is particularly obvious in California because the Respondent Unions speak to the government about the *same* topics in both contexts. Numerous statutes that the Respondent Unions lobbied to obtain address topics within the scope of collective bargaining, including teacher tenure, seniority pref-

erences in layoffs, and termination procedures. *See, e.g.*, CAL. EDUC. CODE §§ 44929.21(b); 44934; 44938(b)(1), (2); 44944; 44955. Indeed, California itself recognized that there is no meaningful distinction between speech in the "collective bargaining" or "lobbying" contexts because, at least prior to *Knox*, "California state law explicitly permit[ted] the union to classify some lobbying expenses as chargeable." *Knox*, 132 S. Ct. at 2304 (Breyer, J., dissenting).

In short, there is no material difference between "collective bargaining" and "lobbying" by public-sector unions. *Abood*'s exception for "collective bargaining" is thus irrational on its own terms and is not justifiable on the alternative ground that public-sector collective bargaining does not involve matters of public concern.

B. The Interests In Avoiding Free-Riding And Maintaining Labor Peace Cannot Justify Compelled Subsidization Of Political Speech.

As this Court appears to have unanimously recognized in *Harris*, the interests in "avoiding free-riding" and promoting "labor peace" cannot justify compelled subsidization of union speech on matters of public concern.

1. At the threshold, *Abood* itself held that a public employer cannot require employees to fund unions' ideological speech about public affairs, even though nonmembers "free ride" on the public benefits such speech produces (and thus undermine "labor peace"). Such government interests therefore cannot support subsidizing public-sector collective bargaining, since it also constitutes speech on matters of

public concern. *Supra* at 17-20; *see also Harris*, 134 S. Ct. at 2654 (Kagan, J., dissenting) ("[S]peech in political campaigns relates to matters of public concern …; thus, compelled fees for those activities are forbidden.").

2. This Court's post-*Abood* decisions confirm that the Government cannot compel dissenters to subsidize collective bargaining in order to prevent "free-riding" on that speech.

Foremost, this Court held in *Knox* that "free-rider arguments" are "generally insufficient to overcome First Amendment objections." 132 S. Ct. at 2289. Relying principally on *United Foods*, *Knox* noted that countless other organizations—such as "university professors" seeking "tenure" and "medical associations" lobbying about "fees"—advocate for policies that directly benefit other employees or beneficiaries, but that does not justify mandating contributions from noncontributing "free-riders." *Id.* (citing Summers, *Book Review, Sheldon Leader, Freedom of Association*, 16 COMP. LAB. L.J. 262, 268 (1995)). This Court reiterated that holding in *Harris*. Although accepting that the union "ha[d] been an effective advocate for personal assistants in the State of Illinois"—procuring "substantially improved" wages and benefits as well as nonfinancial gains, such as "orientation and training programs"—the Court struck down Illinois' compelled subsidization regime because "the mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." 134 S. Ct. at 2640-41, 2636.

The *Harris* dissent disagreed, on the ground that there is an "essential distinction between unions and

special-interest organizations" like the entity in *United Foods* and the other examples in *Knox*. 134 S. Ct. at 2656 (Kagan, J., dissenting). Those groups are different because the "law compels unions to represent—and represent fairly—every worker in a bargaining unit, regardless whether they join or contribute to the union." *Id.*

But the unions' nondiscrimination obligation neither distinguishes the unions from other advocacy groups nor materially alters what the unions say and do. To the contrary, all the nondiscrimination mandate means is that the unions cannot bargain for their members to receive better treatment than nonmembers, which is both inherent in the notion of *collective* bargaining and the *norm* for advocacy groups. In *United Foods*, for example, the "Mushroom Council" that was statutorily empowered to collect funds for mushroom promotion used those funds to promote all mushrooms alike. It did not promote particular brands (such as those of Council members) or differentiate among them. "[A]lmost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising." 533 U.S. at 412. That is how virtually every general advocacy organization operates. The American Medical Association, for example, does not lobby to get better Medicare reimbursement rates for dues-paying members than for nonmembers.

Nor does the nondiscrimination mandate alter the union's collective-bargaining speech or make it more palatable to nonmembers. Nondiscrimination does not require unions to give nonmembers' policy preferences equal—or even any—consideration. It just means that the union cannot exempt nonmem-

bers from union-preferred policies obtained through collective bargaining. Thus, as *Harris* noted, the union's nondiscrimination obligation is irrelevant to the free-rider question because there is no "claim" or reason to suppose that "the union's approach to negotiations on wages or benefits would be any different if it were not required to negotiate on behalf of the nonmembers as well as members." 134 S. Ct. at 2637 n.18. And the deprivation imposed on an employee who objects to the union's collectivist policies is hardly ameliorated by *including* him in the policies he dislikes.

Moreover, it is doubtful that such collectivist advocacy by unions actually does benefit, rather than harm, objecting nonmembers. Just like the generic advertisements in *United Foods* harmed the mushroom producer who believed his mushrooms were superior, union-obtained policies that *forbid* merit-based pay and assignments (as discussed in *Vergara*) harm those who believe they are better teachers and would thus thrive in a merit-based regime. This harm is worse than the harm in *United Foods*—or with any other advocacy group—given the unions' unique power, as the exclusive representative, to effectively preclude dissenting employees from advancing contrary views to the relevant decision-maker. Mushroom growers are free to advertise their "superior" mushrooms separately, and doctors are free to ask the government for different Medicaid reimbursement rates than those the AMA prefers. Public employees, by contrast, cannot make different demands of their public employer, since they have no seat at the bargaining table and cannot individually bargain. Compelled subsidization in the union con-

text is thus *more* of a deprivation because only unions can *both* effectively foreclose contrary advocacy *and* demand financial support for their conflicting policies from the silenced dissenters.[1]

Similarly, the unions' choice to bargain for extraordinary retirement benefits often harms current nonmembers because such efforts inevitably—and as California's recent experience demonstrates, often drastically—reduce the funds available for current wages or for improving the educational environment in which current nonmembers work. Nonmembers are also affirmatively harmed because unions can and do use their exclusive bargaining status to withhold certain benefits from being provided by the *employer*, so that the *union* can offer the benefit to nonmembers as an inducement to join the union (and therefore pay chargeable and nonchargeable fees). For example, California teachers cannot obtain disability insurance as part of their collectively bargained employment package, because this valuable benefit is available only as a perk of membership in the CTA. Pet.App.101a-102a.

---

[1] Moreover, just as Illinois covered most of the typical collective bargaining "benefits" in its statutory Service Plans in *Harris*, California has already enshrined many of these "benefits" in state statutes. 134 S. Ct. at 2637; *supra* at 19-20. That enshrinement reduces both the benefits of collective bargaining and the value of unions' commitment to not "sacrifice" nonmembers' interests (which are statutorily guaranteed) to achieve advantages for members. *Id.* at 2636.

3. The interest in labor peace fares no better. *Abood* uses "labor peace" as shorthand for the prevention of "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views … sought to obtain the employer's agreement." 431 U.S. at 224. But the fact that public employers have an interest in dealing with one union rather than many is an argument for having just one union. It does not justify the *additional* and quite different proposition that the state can force all employees to support that one union. As *Harris* recognized, a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." 134 S. Ct. at 2640. Rather, those concepts can become connected only if "free riding" would cause the extinction of the exclusive union (harming "labor peace"). That is why, as *Knox* noted, the "anomaly" of accepting "free-rider arguments" in the union context was purportedly justified previously "by the interest in furthering [the] 'labor peace'" that was advanced by a solvent exclusive representative. 132 S. Ct. at 2290 (quoting *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)). Thus, as *Harris* held, "the agency-fee provision cannot be sustained" on grounds of "labor peace" or "free riding," unless the collective-bargaining "benefits for [nonmembers] could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join [the union]." 134 S. Ct. at 2641.

Respondents have not made that allegation and cannot make that demanding showing, since "[a] host of organizations advocate on behalf of the interests of persons falling within an occupational group, and

many of these groups are quite successful even though they are dependent on voluntary contributions." *Harris*, 134 S. Ct. at 2641. For example, public-employee unions actively represent federal employees, even though "no employee is required to join the union or to pay any union fee." *Id.* at 2640. Similarly, only "20 States have enacted statutes authorizing fair-share provisions," *id.* at 2652 (Kagan, J., dissenting), yet Respondent NEA and its local affiliates ably serve as the exclusive representative for public teachers in all fifty states, including those without agency-fee requirements. *See* NEA, State Affiliates, http://goo.gl/klzR55.

C. Public-Sector Collective Bargaining Would Be Unconstitutional Even If It Were Not Core Political Speech.

Finally, even if collective bargaining were not political speech about public concerns and even if it were not subject to strict scrutiny, this Court's decisions *still* foreclose its compelled subsidization. *Knox* and *Harris* held that such subsidization cannot satisfy even the more "permissive" standard applied to the "mundane commercial" speech in *United Foods*, since the purpose of compelled subsidization of collective bargaining is speech itself. *Knox*, 132 S. Ct. at 2289; *Harris*, 134 S. Ct. at 2639. Moreover, the governmental interests supporting agency fees are not strong enough to satisfy even the balancing test adopted in *Pickering* for workplace speech by public employees on matters of public concern. After all, *Pickering* itself invalidated the termination of a public-school teacher who wrote a letter to the editor "that was critical of the way in which the Board and the district superintendent of schools had handled

past proposals to *raise new revenue* for the schools." 391 U.S. at 564 (emphasis added). That is, no doubt, why this Court held in *Harris* that, "[e]ven if the permissibility of the agency-shop provision in the collective-bargaining agreement now at issue were analyzed under *Pickering,* that provision could not be upheld." 134 S. Ct. at 2643. Specifically, the governmental interests "relating to the promotion of labor peace and the problem of free-riders" do not outweigh the "heavy burden on the First Amendment interests of objecting employees." *Id.* *Abood* is thus unjustifiable under any plausibly applicable level of First Amendment review.

II. Because *Abood* Cannot Be Reconciled With Established Precedent, It Should Be Overturned.

Because *Abood* is irreconcilable with this Court's other First Amendment decisions, the issue is not *whether* to overturn precedent; rather, it is *which* precedents the Court will uphold—*Abood*, or the litany of decisions with which it conflicts. The correct answer is clear: the Court should jettison the *Abood* "anomaly" and thus affirm the integrity of its other decisions. That is true both because *Abood* incorrectly denies a fundamental right and because preserving such an outlier would defeat the purpose of stare decisis, which is to "promot[e] the evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

A. First, if a later decision establishes a First Amendment right that some prior decision denied—such as the right to engage in truthful commercial speech—discarding the prior decision is necessary to

preserve the fundamental right. *Compare, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no [] restraint on government as respects purely commercial advertising."), *with Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) ("The First Amendment … protects commercial speech from unwarranted governmental regulation."). The prudential values of stare decisis obviously cannot "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349 (2009). If "a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any [] 'entitlement' to its persistence." *Id.*; *see also, e.g.*, *Alleyne v. United State*s, 133 S. Ct. 2151, 2163 n.5 (2013) ("The force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."). That is why "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (quoting *F.E.C. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (Scalia, J., dissenting)); *see also, e.g.*, *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (overturning *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

Even if *Abood*'s destruction of a fundamental First Amendment freedom were not sufficient, the Court should reconsider *Abood* because preserving it conflicts with the basic purpose of stare decisis—namely, engendering "the respect accorded to the judgments of the Court and to the stability of the law." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). As demonstrated above, *Abood* is at war with both of

those prudential values, since its rationale and result are contrary to clear principles established in other cases. That is why nobody defends *Abood*'s original rationale, and why its current supporters reject its candid recognition that collective bargaining is "ideological" speech. Where, as here, nobody "defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished." *Citizens United,* 558 U.S. at 363.

Moreover, as noted, seeking to justify *Abood*'s result on the alternative ground that collective bargaining does not involve matters of public concern also directly conflicts with this Court's precedent. This Court's jurisprudence is not served by sustaining a precedent that can only be "preserved" by rejecting its rationale and replacing it with one that also conflicts with this Court's other decisions.

This is particularly true because preserving *Abood* renders this Court's First Amendment jurisprudence not only inconsistent, but topsy-turvy. If *Abood*'s result survives, this Court's decisions will provide greater protection against the compelled subsidization of "mundane commercial speech" than against the compelled subsidization of core political speech. Sustaining *Abood* would also require holding that, even though compelled subsidization of speech on matters of public concern flunks the *Pickering* balancing test, it somehow survives the exacting scrutiny the Court gives political speech. *Abood* thus falls squarely within the "traditional justification for overruling a prior case"—that the challenged "precedent may be a positive detriment to coherence and consistency in the law." *Patterson v. McClean Credit Union*, 491 U.S. 164, 173 (1989).

This Court's decision in *Hudgens v. NLRB*, 424 U.S. 507 (1976), illustrates the point. Previously, the Court had held, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, that the First Amendment protected protesters' right to picket at a private shopping center. 391 U.S. 308, 319 (1968). But four years later in *Lloyd Corp. v. Tanner*, a case involving very similar facts, the Court went to great lengths to distinguish *Logan Valley* in the course of holding that the First Amendment did not apply to the protestors picketing on the private property at issue there. 407 U.S. 551, 563 (1972). The *Lloyd* Court did not overrule *Logan Valley*, but the Court later did so in *Hudgens* because "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*." 424 U.S. at 517-18. Here, neither the reasoning nor result of *Abood* can be squared with (at the very least) *Knox* and *Harris*, and so the Court should do as it did there. That is particularly true given that *Logan Valley* erroneously *expanded* First Amendment rights while *Abood* erroneously *eliminates* them.

B. All of this Court's other established criteria for reconsidering precedent likewise support reconsidering *Abood*. This Court has long recognized that "stare decisis is not an inexorable command," and "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini*, 521 U.S. at 235 (citation omitted). Especially in such constitutional cases, stare decisis must yield when a prior decision proves "unworkable," *Payne*, 501 U.S. at 827; was not "well reasoned," *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009); creates a "critical" anomaly in this Court's

decisions, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); has failed to garner valid reliance interests, *Lawrence*, 539 U.S. at 577; or has been undermined by subsequent factual developments, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992). *Abood* satisfies each of these criteria.

1. First, the line *Abood* drew between collective bargaining and other lobbying is not only constitutionally meaningless, but has proven to be entirely "unworkable."

This Court noted as much in *Harris*, citing a long line of subsequent decisions which demonstrated that the *Abood* Court "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." 134 S. Ct. at 2632. Particularly since *Abood* "does not seem to have anticipated the magnitude of the practical administrative problems" such line-drawing creates, the "Court has struggled repeatedly with this issue" in subsequent cases. *Id.* at 2633.

Justice Marshall's partial dissent in *Lehnert v. Ferris Faculty Ass'n* made a similar point, persuasively showing why supposed "free-riding" on union lobbying for a statute is indistinguishable from collective-bargaining "free-riding." 500 U.S. 507, 537 (1991) (Marshall, J., dissenting in part). As Justice Marshall explained, the *Lehnert* opinion "would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but it would not permit lobbying for the

same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement." *Id.* This makes no sense, given that the interest in preventing "free-riding" applies with equal force to lobbying the legislature to "increase[] funding for education" (nonchargeable) and lobbying the legislature for "ratification of a public sector labor contract" (chargeable). *Id.* at 538 (emphasis omitted). In both instances, dissenting employees might "disagree with the trade-off the legislature has chosen," but are identically situated in their potential obligation to "shar[e] the union's cost of obtaining benefits for them." *Id.* Justice Scalia also noted in *Lehnert* that the plurality's test for drawing the *Abood* line "provides little if any guidance to parties contemplating litigation or to lower courts," and "does not eliminate [the] past confusion" that *Abood* created, because it is a vague set of subjective "judgment call[s]." *Id.* at 551 (Scalia, J., concurring in judgment in part and dissenting in part).

2. As established above, *Abood* is so poorly "reasoned" that no one defends its rationale, and it is an "anomaly" in both reasoning and result. Stare decisis must yield where, as here, it is necessary to "erase [an] anomaly," *Alleyne*, 133 S. Ct. at 2167 (Breyer, J., concurring in part and in judgment), or jettison "an outlier," *id.* at 2165 (Sotomayor, J., concurring).

3. Nor does any individual or entity have a valid reliance interest in *Abood*. "[T]he union has no constitutional right to receive any payment from" nonmembers. *Knox*, 132 S. Ct. at 2295. And, of course, the unions' desire to perpetuate this uncon-

stitutional windfall cannot somehow create a "reliance interest that could outweigh the countervailing" First Amendment right to not pay such tribute. *Gant*, 556 U.S. at 349. Nor would overturning *Abood* somehow interfere with the "thousands of [collective-bargaining] contracts" already entered. *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting). It would, rather, simply enable nonmembers to refuse to fund future collective-bargaining efforts they do not support.

4. Finally, factual developments "have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. As *Harris* explained, *Abood* failed to "foresee the practical problems that would face objecting nonmembers." 134 S. Ct. at 2633. Employees who dispute a public-sector union's chargeability determinations "must bear a heavy burden if they wish to challenge the union's actions." *Id.* Such employees must "mount the legal challenge in a timely fashion," *id.* (quoting *Knox*, 132 S. Ct. at 2294), and "litigating such cases is expensive," *id.* Not only that, but the chargeability decisions being challenged are themselves bedeviled by "administrative problems" caused by the conceptual difficulties in "attempting to classify public-sector union expenditures as either 'chargeable' … or nonchargeable." *Id.* This problem is further compounded by the fact that the auditors who review each union's books "do not themselves review the correctness of a union's categorization." *Id.* For that reason, too, this Court should reconsider *Abood*.

III. At The Least, Respondents' "Opt-Out" Regime Imposes An Unconstitutional Burden On Petitioners' Established First Amendment Rights.

This Court's decisions in *Knox* and *Harris* further establish that—at the very least—Respondents must minimize the First Amendment burden they impose on teachers' right to refrain from subsidizing the Respondent Unions' nonchargeable activities. Minimizing that burden requires Respondents to obtain every public-school teacher's affirmative consent before spending part of that teacher's salary on any nonchargeable expenses. Courts do not, after all, typically "presume acquiescence in the loss of fundamental rights." *Knox*, 132 S. Ct. at 2290 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999)).

This Court's opinion in *Knox* makes clear that California's practice of requiring teachers to register their dissent from subsidizing nonchargeable expenses is unconstitutional. As the Court explained: "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Knox*, 132 S. Ct. at 2290. Defaulting every public-school teacher into subsidizing nonchargeable expenses "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* It also enables public-sector unions to capitalize on confusion about the mechanics of opting out in order to maximize their collection of nonchargeable fees from teachers who do not actual-

ly support the unions' political agenda. Those risks conflict with the longstanding rule that "a 'union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.'" *Id.* (quoting *Hudson*, 475 U.S. at 305).

Review of this issue is also warranted to resolve widespread disagreement and confusion in the circuits about the constitutionality of requiring dissenting employees to annually re-register their dissent. Respondents require Petitioners to register their refusal to subsidize nonchargeable expenditures in writing every year. Pet.App.43a-44a. The circuits disagree about whether it is constitutional to require dissenters to express their dissent anew each year, rather than permitting them to opt out once and have it last forever. *Compare Seidemann v. Bowen*, 499 F.3d 119, 125 (2d Cir. 2007) ("The fact that employees have the responsibility of making an initial objection does not absolve unions of their obligation to ensure that objectors' First Amendment rights are not burdened."), *and Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) ("[T]he annual written objection procedure is an unnecessary and arbitrary interference with the employees' exercise of their First Amendment rights."), *with Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) ("[W]e do not consider unreasonable the plan's provision that each member be required to object each year …."), *and Mitchell*, 963 F.2d at 262-63 ("[T]he burdensome 'opt in' requirement … would unduly impede the union in order to

protect 'the relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes."). Resolving that division provides another reason for the Court to review this issue.

It is true that the Court has previously given implicit approval to opt-out regimes like California's. But as this Court explained in *Knox*, those "prior cases have given surprisingly little attention to this distinction." 132 S. Ct. at 2290. Rather, "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.* This Court has thus never directly decided whether the First Amendment requires that public employees opt into subsidizing nonchargeable speech, and would be free to vindicate the important First Amendment interests at stake in the second Question Presented without reconsidering any prior decisions. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (questions which are "'neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

IV. This Case Is An Excellent Vehicle For Reconsidering *Abood*.

This case is an excellent vehicle for addressing whether *Abood* should be substantially modified or overruled. The district court (properly) dismissed Petitioners' complaint on the pleadings. It recognized that, even accepting all factual allegations in

the Complaint as true, *Abood* forecloses any argument that agency-fee provisions are unconstitutional. *See Agostini*, 521 U.S. at 237. Moreover, the Respondent Unions have provided their comprehensive view of the facts in a detailed Amended Answer. Pet.App.113a-156a. That pleading makes clear that none of the factual disputes between the parties are material under *Abood* and that none of them *should* matter under the First Amendment as properly construed. This case thus provides the Court with a clean platform of undisputed material facts to decide these purely legal questions, and no means of distinguishing *Abood* that could dispose of the case without determining whether and in what form its holding should be maintained. And should the Court's decision make any of the factual disputes between the parties relevant, those issues can be fully litigated on remand under whatever test this Court adopts. (For similar reasons, this case is an excellent vehicle for deciding the legal question whether California's opt-out regime, or any opt-out regime, is constitutional—with any potentially relevant facts to be litigated on remand.)

Moreover, challenges like this one, that directly contest *Abood*'s vitality, are not likely to recur. Should the Court decline to take this case, it is unlikely that future litigants will file suits that are doomed in the lower courts in hopes of obtaining certiorari review. To the contrary, litigants will interpret the Court's denial of certiorari here as dispositive on the issue and will assume that, whatever this Court may have said in *Knox* and *Harris*, the rule announced in *Abood*—and the millions of dollars it permits coercing from public employees every year—

is here to stay. There is thus nothing to be gained, and much to lose, from adopting a wait-and-see approach on this critically important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. ROSMAN
CENTER FOR
INDIVIDUAL RIGHTS
1233 20th St., N.W.
Suite 300
Washington, DC 20036

MICHAEL A. CARVIN
Counsel of Record
JAMES M. BURNHAM
WILLIAM D. COGLIANESE
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Petitioners

JANUARY 26, 2015