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IN THE SUPREME COURT OF THE UNITED STATES

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REBECCA FRIEDRICHS, ET AL. :

Petitioners : No. 14-915

v. :

CALIFORNIA TEACHERS :

ASSOCIATION, ET AL. :

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Washington, D.C.

Monday, January 11, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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EDWARD C. DUMONT, ESQ., Solicitor of California, San Francisco, Cal.; on behalf of Respondent Attorney General of California.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of Union Respondents.

GEN. DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 14-915, Friedrichs v. The California Teachers Association, et al.

Mr. Carvin.

ORAL ARGUMENT OF MICHAEL A. CARVIN

ON BEHALF OF THE PETITIONERS

MR. CARVIN: Mr. Chief Justice, and may it please the Court:

Every year, Petitioners are required to provide significant support to a group that advocates an ideological viewpoint which they oppose and do not wish to subsidize. Abood's authorization of this clear First Amendment violation should be overturned, both to end this ongoing deprivation of basic speech and association rights, and to restore consistency and predictability to the Court's First Amendment jurisprudence.

JUSTICE GINSBURG: Mr. Carvin, is it permissible, in your view, to allow the union to be the exclusive representative so that nobody else is at the bargaining table?

MR. CARVIN: Yes, that's fine with us. Our objection, of course, is being forced to subsidize that exclusive representative.

1           The fact that they are exclusive  
2 representative impinges on my clients because it  
3 disables them from individually negotiating with the  
4 school board, but that is justified by the need for an  
5 exclusive representative.

6           And that is why, indeed, requiring agency  
7 fees in the collective bargaining context is less  
8 justified than, for example, requiring agency fees to  
9 support union lobby.

10           In the -- in collective bargaining context,  
11 we are required to free ride on the union because they  
12 are the exclusive representative and we don't have our  
13 own vehicle. So the free-rider justification is far  
14 weaker in the collective bargaining context than it is  
15 in the union lobbying context.

16           JUSTICE SCALIA: Mr. Carvin, is -- is it  
17 okay to force somebody to contribute to a cause that he  
18 does believe in?

19           MR. CARVIN: I wouldn't think, Your Honor,  
20 that you could force Republicans to give contributions.

21           JUSTICE SCALIA: Yes. That's -- that's what  
22 I'm thinking. Could you enact a law? Let's say the  
23 national political parties are in trouble so they enact  
24 a law that says all -- all members of the Republican  
25 party, if you want to be a member you have to contribute

1 so much money.

2 MR. CARVIN: No.

3 JUSTICE SCALIA: Is that okay?

4 MR. CARVIN: No, it's not, and that's  
5 because the bedrock principle, as Harris made clear, is  
6 not whether or not you vividly oppose what they're  
7 saying --

8 JUSTICE SCALIA: Right.

9 MR. CARVIN: -- it's because you don't wish  
10 to subsidize it.

11 JUSTICE SCALIA: Exactly. So I don't know  
12 why you're putting so much emphasis on the fact that  
13 your -- your clients oppose. It really wouldn't matter,  
14 would it?

15 MR. CARVIN: No. And I don't -- I did want  
16 to point out that that's the reason that they've brought  
17 this lawsuit. But -- but no, you're a thousand percent  
18 right, Your Honor. You don't --

19 JUSTICE KENNEDY: If -- if you were to  
20 prevail, what would happen with private employers in a  
21 State which said that there should be an -- a union  
22 shop?

23 MR. CARVIN: Nothing, Your Honor.

24 JUSTICE KENNEDY: What --

25 MR. CARVIN: For two --

1 JUSTICE KENNEDY: And -- and because?

2 MR. CARVIN: Because the First Amendment  
3 doesn't apply to private employers, and because in Beck  
4 the Court established the rules for agency shops based  
5 on the statute without any First Amendment --

6 JUSTICE KENNEDY: I think that's correct as  
7 a basic distinction. It is true, though, assuming that  
8 you have a State statute which allows an agency shop or  
9 a -- a closed shop, that that is State participation in  
10 the very kind of coerced membership and coerced speech  
11 that you're objecting to.

12 MR. CARVIN: Well, I don't, in candor, think  
13 that that would create State action under the Court's  
14 modern jurisprudence, such as Moose Lodge, where it  
15 turns on who is making the decision that is being  
16 objected to. In your hypothetical it would be the  
17 private employer.

18 But that aside, as the Court made clear in  
19 Harris, even if it did reach First Amendment, there's  
20 a -- there's a serious difference between a grudging  
21 authorization or the government permitting private  
22 employers to engage in agency shops and the government  
23 itself affirmatively imposing them on its own public  
24 employees.

25 JUSTICE GINSBURG: What about the Railway

1 Labor --

2 JUSTICE KAGAN: What is the --

3 JUSTICE GINSBURG: What about the Railway  
4 Labor Act?

5 MR. CARVIN: I apologize.

6 JUSTICE GINSBURG: The Railway Labor Act.

7 MR. CARVIN: Yes.

8 JUSTICE GINSBURG: You -- you answered  
9 Justice Kennedy that, in the private sector, this --  
10 this is all right, you can have an agency shop. How  
11 about under the Railway Labor Act?

12 MR. CARVIN: Well, as you know from Street,  
13 you can have agency shops but the agency fees can only  
14 go to things that are germane to collective bargaining.  
15 In other words, they impose the Abood rule in the  
16 private sector as a matter of statutory interpretation,  
17 and nothing the Court says about --

18 JUSTICE GINSBURG: But you don't have any  
19 First Amendment argument about that, about the -- either  
20 the private sector or railroads.

21 MR. CARVIN: Not at all, Your Honor. We --  
22 we are strictly limiting ourselves to public employees  
23 because public employers obviously are subject to far  
24 greater constraints under the First Amendment that  
25 the --

1 JUSTICE KAGAN: Well, one of the points of  
2 your public employee cases generally, Mr. Carvin, is  
3 essentially to ensure that when the government acts as  
4 an employer, that the government be put in the same  
5 position as a private employer; in other words, that the  
6 various constraints that would constrain the government  
7 when it's acting as sovereign fall away and a different  
8 and lesser set of constraints apply that are meant  
9 essentially to ensure that the government doesn't use  
10 its position as leverage over things it oughtn't to be  
11 able to control, but that the government can do the same  
12 things that a private employer can.

13 And so why doesn't this fall within that  
14 category of things? In other words, you've just said  
15 private employer can decide to do this. That's not a  
16 constitutional problem. So too with the government  
17 employer.

18 MR. CARVIN: For two reasons, Justice Kagan.  
19 First, I must respectfully disagree with the premise.  
20 None of the Court's First Amendment jurisprudence quite  
21 says public employers have the same rights as private  
22 employers.

23 Private employers under the Constitution can  
24 discriminate on the basis of political affiliation.  
25 They can even discriminate on the basis of sexual



1 orientation. But nobody thinks that public employers  
2 can do that.

3 Plus which, even under Pickering, for  
4 example, the deferential review you're referring to  
5 imposes greater constraints on public employers than  
6 private employers. Bargaining --

7 JUSTICE KAGAN: As I said, Mr. Carvin --

8 MR. CARVIN: Sorry.

9 JUSTICE KAGAN: But there's a lesser set of  
10 constraints. And -- and the lesser set is basically to  
11 draw a line and to ensure that the government doesn't  
12 use its position as employer to do things it oughtn't  
13 properly to do.

14 But the -- the government, when it's acting  
15 as an employer with respect to its employee workforce,  
16 really ought to be able to do the same things that a  
17 private employer can.

18 MR. CARVIN: The Court's  
19 government-as-employer speech and First Amendment draw a  
20 clear distinction between restricting employee speech,  
21 like under the Pickering line of cases where there is  
22 deferential review, and circumstances such as this where  
23 they do leverage the employment relationship to coerce  
24 the employee to subsidize or associate with an outside  
25 group.

1                   That's obviously --

2                   JUSTICE SOTOMAYOR: How is that different --

3                   MR. CARVIN: -- for example, Rutan is  
4 subject to strict scrutiny because they are leveraging  
5 the employment relationship to force you to associate  
6 with a political party.

7                   JUSTICE KAGAN: Well, that sounds --

8                   MR. CARVIN: Similarly --

9                   JUSTICE KAGAN: -- like you're drawing a  
10 distinction between restricting speech and subsidizing  
11 speech. And I had always thought that these were two  
12 sides of the same coin, that compelled speech is -- is  
13 no less and no greater an offense than compelled  
14 silence.

15                   MR. CARVIN: Yes. Certainly in terms of  
16 Petitioners' rights. But Your Honor, the scrutiny given  
17 to the speech being subsidized doesn't dictate the level  
18 of -- of speech scrutiny given to the compulsion speech.

19                   For example, the -- you can stop unions from  
20 making political contributions under the case law, but  
21 that hardly suggests you can compel a nonmember to  
22 subsidize the union's contributions.

23                   You can stop public employees under the  
24 Hatch Act from engaging in basic political  
25 participation, but that hardly suggests that you could

1 require a nonmember to subsidize political activity.

2           So there's always been a clear distinction  
3 in the case law between those two things precisely  
4 because subsidization is an entirely different  
5 infringement than restricting employee speech.

6           Restricting employee speech is an inherent  
7 part of the employment relationship. The employer has  
8 to be able to restrict the employees' speech, as this  
9 Court has frequently noted, or you couldn't have a  
10 workplace. Plus which we give deferential review  
11 because we don't want the Federal judiciary  
12 micromanaging the literally hundreds of thousands of  
13 personnel decisions that public employers make every  
14 day.

15           Neither of those concerns is present when  
16 you have a categorical rule that requires one set of  
17 employees to subsidize an outside advocacy group like a  
18 political party or like a union, and that's because  
19 you're not involving the Federal judiciary in personnel  
20 decisions. And it's certainly not an inherent part of  
21 the employment relationship. It is, to use your phrase,  
22 leveraging the employment relationship to require  
23 something that the State couldn't require directly.

24           JUSTICE SOTOMAYOR: Well, why are we  
25 treating the government differently than a private

1 employer?

2                   You just earlier said, and I think our --  
3 our cases are replete with the point that as employer,  
4 the government can already restrict speech which is, I  
5 think, a higher problem than subsidization.

6                   We've already permitted subsidization of bar  
7 associations, of government programs. We've permitted  
8 assessments on a lot of different levels, so why can't  
9 the government, as employer, create a State entity?  
10 Because this union under California law is a State  
11 entity.

12                   MR. CARVIN: No.

13                   JUSTICE SOTOMAYOR: Oh --

14                   MR. CARVIN: I'm sorry.

15                   JUSTICE SOTOMAYOR: -- I -- I beg to differ.  
16 Hold on, Mr. Carvin. I'll get you the section.

17                   MR. CARVIN: Sure.

18                   JUSTICE SOTOMAYOR: It says, "When  
19 recognized as the exclusive bargaining representative, a  
20 union assumes an official position in the operational  
21 structure of a school."

22                   So it seems to me that -- and California  
23 tells the union what topics it can negotiate on, it  
24 requires them to do training, and in the end it accepts  
25 their recommendations with respect to -- to the issues

1 of employment at its own will, meaning the State is  
2 creating the union as part of the employment training  
3 and other responsibilities.

4 MR. CARVIN: Justice Sotomayor, I think it's  
5 important to draw a distinction between having an  
6 official position -- they certainly do. They are the  
7 exclusive representative of the employees -- and  
8 suggesting that they are somehow State actors.

9 If they were State actors, the State  
10 legislature could tell the unions not to advocate pay  
11 raises. It could tell them not to --

12 JUSTICE SOTOMAYOR: Oh, in fact, it might be  
13 able to do that.

14 MR. CARVIN: I don't --

15 JUSTICE SOTOMAYOR: If it -- it tells them  
16 what they can -- they give -- the State legislature has  
17 given them the right to do that.

18 MR. CARVIN: Right.

19 JUSTICE SOTOMAYOR: But what would take away  
20 from their right to say, no, you can't bargain on these  
21 particular topics?

22 MR. CARVIN: The First Amendment. In other  
23 words, the -- the scope of collective bargaining is  
24 obviously something the State can dictate. It could  
25 never dictate the union's position on collective --

1 JUSTICE SOTOMAYOR: Absolutely.

2 MR. CARVIN: Well -- well, then, that's my  
3 point. But of course if the -- if they were State  
4 officials subordinate to the State legislature, the  
5 State legislature could tell them, don't advocate pay  
6 raises, don't advocate this for health and benefit.

7 JUSTICE SOTOMAYOR: Well, they wouldn't say,  
8 don't advocate this with respect to the State  
9 legislature, but they could say that's not going to be  
10 the subject of discussion at the bargaining table.  
11 Those are two different things altogether.

12 MR. CARVIN: Well, again, we need to  
13 distinguish between collective bargaining and lobbying.

14 JUSTICE SOTOMAYOR: Exactly.

15 MR. CARVIN: Exactly. And -- and here's the  
16 point: They couldn't -- collective bargaining is  
17 unique, because it requires public officials to meet and  
18 negotiate in good faith and mediate any impasses with  
19 unions. None of that exists in lobbying, for example.  
20 State legislators could close their door whenever they  
21 want.

22 JUSTICE KENNEDY: Well, even -- even with --

23 MR. CARVIN: What --

24 JUSTICE KENNEDY: -- even -- aren't  
25 charges -- suppose the union has an article or a public

1 relations campaign to protest merit pay. I take it  
2 that's a chargeable expense.

3 MR. CARVIN: Yes, under Lehnert. And on  
4 my --

5 JUSTICE KENNEDY: So -- so collective  
6 bargaining in -- in this instance subsumes -- includes  
7 this wide-ranging effort on the part of the union to  
8 have a public relations campaign in favor of principles  
9 that some of its members -- that some teachers strongly  
10 object to.

11 MR. CARVIN: Exactly, Your Honor. And my  
12 point in response to Justice Sotomayor would be if they  
13 were really State officials subject to subordination by  
14 the State legislature, the State legislature could say,  
15 just like they could say to their own employees, don't  
16 run public relations campaigns adverse to the  
17 government. And the key point is, I think they say you  
18 can abandon -- you can ban collective bargaining, but  
19 you can't ban lobbying.

20 But it's important to focus on why that is  
21 so. The reason that is so is because we are imposing an  
22 obligation on public officials in collective bargaining,  
23 that exists nowhere else, to negotiate in good faith  
24 with the union. But they couldn't tell the union don't  
25 advocate to the school board, pay raises, and things

1 like that. They can simply revoke collective bargaining  
2 by saying, just like the State legislature, the school  
3 board doesn't have to listen.

4 JUSTICE SOTOMAYOR: If we --

5 MR. CARVIN: So the distinction is between  
6 what public officials have to meet and negotiate on, but  
7 that doesn't translate into any ability to tell the  
8 union what to say or do. And I'm assuming --

9 JUSTICE SOTOMAYOR: In terms of --

10 MR. CARVIN: -- the Respondents will agreed  
11 with that.

12 JUSTICE SOTOMAYOR: But the teachers can  
13 lobby. There's nothing wrong with the teachers  
14 speaking.

15 MR. CARVIN: And that's the whole point.  
16 The teachers can lobby. They can go to the State  
17 legislature.

18 JUSTICE SOTOMAYOR: Uh-huh. Just like the  
19 union can.

20 MR. CARVIN: Just like the union can.

21 And yet, they can't be forced to subsidize  
22 the union's lobbying --

23 JUSTICE SOTOMAYOR: But what does your  
24 lobbying do --

25 MR. CARVIN: However -- so with respect to



1 collective bargaining, they can't negotiate. So the  
2 free-rider rationale is much weaker in the collective  
3 bargaining context, because the teachers' right to  
4 negotiate with the public officials that the union is  
5 talking to is -- is extinguished in those circumstances,  
6 even though in lobbying, they can engage in their own  
7 lobbying, but we don't allow agency fees for lobbying.

8 JUSTICE KAGAN: Mr. Carvin, you come here,  
9 of course, with a heavy burden. That's always true in  
10 cases where somebody asks us to overrule a decision. It  
11 seems to be particularly true here.

12 This is a case in which there are tens of  
13 thousands of contracts with these provisions. Those  
14 contracts affect millions of employees, maybe as high as  
15 10 million employees.

16 So what special justification are you  
17 offering here?

18 MR. CARVIN: There are two special  
19 justifications, Justice Kagan. The first one is that  
20 this -- Aboud erroneously denies a fundamental right.  
21 It doesn't expand a fundamental right. And as the Court  
22 made clear in Gant, the right of the citizen not to be  
23 subject to unconstitutional treatment outweighs any  
24 reliance or predictability interests of stare decisis.

25 JUSTICE KAGAN: You say this a lot in

1 your --

2 MR. CARVIN: The second --

3 JUSTICE KAGAN: Excuse me.

4 MR. CARVIN: Sure.

5 JUSTICE KAGAN: You say this a lot in your  
6 briefs. But I -- I -- I guess I found it hard to  
7 understand that the idea that every time we deny a claim  
8 of right, whether it's the First Amendment or the Fourth  
9 Amendment or the Fourteenth Amendment, that that denial  
10 of the claim would not have any stare decisis effect. I  
11 mean, we do that constantly. We do that tens of times  
12 every year.

13 MR. CARVIN: But -- but you are asking  
14 what -- if the Court concludes that Abood was erroneous,  
15 what special justification is there?

16 JUSTICE KAGAN: Yes. And your answer is  
17 essentially you don't need a special justification if  
18 the initial decision improperly denied a claim of right.

19 MR. CARVIN: Right.

20 JUSTICE KAGAN: I guess I'm saying that I  
21 find that an extremely difficult concept to understand.  
22 It would take away stare decisis effect from numerous --  
23 I mean, just hundreds, thousands of our decisions.

24 MR. CARVIN: But Justice Kagan, with  
25 respect, I think the proof is in the pudding. The Court

1 has never upheld an erroneous denial of a right on stare  
2 decisis.

3 JUSTICE BREYER: And you think all the  
4 Fourth Amendment cases, in your opinion, are correct. I  
5 mean, you know, the police can go search a car, the good  
6 faith rule in respect to admission of evidence that was  
7 seized unlawfully under the Fourth Amendment. I read a  
8 lot of criticism of those things in the paper. And it  
9 seems to me you could get people who are judges, who are  
10 up here, who thought that the Fourth Amendment should be  
11 really extended and, in fact, there should be no rule  
12 that gives police any special authority to search a car.

13 MR. CARVIN: That --

14 JUSTICE BREYER: There should be no rule  
15 that stops any incidents from coming in. I mean, there  
16 are dozens of cases where this Court has denied  
17 individual rights. And you're saying all those cases  
18 are now free of any stare decisis inhibition.

19 Is that the point, or is it just labor  
20 unions?

21 MR. CARVIN: No, no. Your Honor, in fact,  
22 the Fourth Amendment is not a hypothetical. That was  
23 what Gant involved. And Gant is the one that I was  
24 quoting when it says the right to constitutional  
25 treatment outweighs the reliance interests of stare

1       decisis.

2                       But if I could move to my second --

3                       JUSTICE BREYER: Well, wait. Well, what  
4       about the Eighth Amendment? That's a good one. There's  
5       an individual right, some think, perhaps, against  
6       capital punishment. The Court has consistently ruled  
7       against it. So I guess if that's ever considered again,  
8       under your view, the Court would give no weight to stare  
9       decisis.

10                      MR. CARVIN: If the Court was convinced that  
11       capital punishment was clearly outlawed by the  
12       Constitution, I think it would be very strange to tell  
13       people who were being executed in the future that even  
14       though this is an unconstitutional execution, we are  
15       bound by our erroneous prior decisions.

16                      JUSTICE KENNEDY: Well, Mr. Carvin, let's --  
17       let's -- let's assume that stare decisis is an important  
18       consideration for the Court. Let's assume that.

19                      MR. CARVIN: Sure.

20                      JUSTICE KENNEDY: What about the answer to  
21       Justice Kagan's questions about the many contracts,  
22       perhaps thousands of contracts? Would they suddenly be  
23       endangered? Would they all be void? Could you address  
24       that?

25                      MR. CARVIN: There is no reliance interest.

1 These contracts will operate precisely the same, the day  
2 after Abood is overruled, as they would before.

3 JUSTICE GINSBURG: But what would happen  
4 then?

5 MR. CARVIN: Sorry.

6 JUSTICE GINSBURG: What would happen to the  
7 employee who said now Abood is off the books?

8 MR. CARVIN: Right.

9 JUSTICE GINSBURG: I want back the agency  
10 fee that I was compelled to pay. That was an  
11 unconstitutional exaction. So all of the people who  
12 paid these fees against their will --

13 MR. CARVIN: When you --

14 JUSTICE GINSBURG: -- have a right to get it  
15 back?

16 MR. CARVIN: No. No more than anybody had  
17 the right to get recompensed under Citizens United or  
18 the commercial speech cases, once you relied those First  
19 Amendment speeches doctrine there. As I understand it,  
20 the Court's analysis prescribes prospectively. That's  
21 all we're asking is for prospective relief. It doesn't  
22 apply retroactively.

23 And to get to the point, all of the benefits  
24 remain precisely the same. They -- simply, the union's  
25 future bargaining efforts would no longer be subject to

1 unwilling agency fee.

2 JUSTICE KAGAN: Well, Mr. Carvin --

3 MR. CARVIN: Do you --

4 JUSTICE KAGAN: -- remember, one, you're  
5 assuming that these provisions are completely severable,  
6 which I imagine depends on the contract.

7 But number two, even suppose that they are  
8 severable, these provisions are bargained for benefits.  
9 The contracts would read differently. The unions would  
10 have gotten different things if that provision had not  
11 been there.

12 So you're essentially saying that the exact  
13 same contract should go forward, notwithstanding that  
14 the union has given up things, or has not gotten things,  
15 because the agency fee provision is in the contract.

16 MR. CARVIN: No. Again, I must respectfully  
17 disagree with the factual matter. The union did not go  
18 in and say we would have asked for a 10 percent  
19 increase, but now we're going to sell out our members'  
20 rights to a 9 percent increase so we can line our own  
21 pockets with agency fees --

22 JUSTICE KAGAN: The unions have --

23 MR. CARVIN: -- but they're not -- sorry.

24 JUSTICE KAGAN: -- for -- for -- for -- many  
25 ways of dealing with their need for adequate funding in

1 order to perform their collective responsibilities --  
2 collective bargaining responsibilities. They asked for  
3 this way and not for other possible ways of achieving  
4 adequate funding. And you would be essentially  
5 stripping them of this way, and not giving them anything  
6 to replace that with.

7 MR. CARVIN: Well again, they didn't  
8 negotiate with the employer for funding because they  
9 don't get any funding from the employer; they get it  
10 from their members. So no position they took in  
11 collective bargaining is at all affected by the  
12 completely separate issue of how they --

13 JUSTICE SOTOMAYOR: Ah, but that's the  
14 question, isn't it? Would it be illegal for the  
15 government, as employer or government, to fund the  
16 union?

17 MR. CARVIN: That's a -- I thought about  
18 that, Justice Sotomayor. It's a very tricky question.

19 Under *Johanns*, for example, the government  
20 can engage in a lot of speech that it can't compel  
21 citizens to engage in. The government, for example, can  
22 subsidize Planned Parenthood, but it couldn't require  
23 citizens to subsidize Planned Parenthood. So in that  
24 sense, yes, the government would have far greater  
25 leeway.

1                   That said --

2                   JUSTICE SOTOMAYOR: So if the union had a  
3 way, or something to negotiate, which was right now, the  
4 union participates in the grievance procedure and it  
5 pays certain expenses for that, it could have said to  
6 the employer, we're no longer getting enough money to be  
7 the exclusive representative of every employee --

8                   MR. CARVIN: Right.

9                   JUSTICE SOTOMAYOR: -- so now we want you to  
10 fund certain things.

11                  MR. CARVIN: Well --

12                  JUSTICE SOTOMAYOR: That could very well  
13 have been part of the negotiation.

14                  MR. CARVIN: Not in California, for two  
15 reasons. One is the State statute requires agency fees.  
16 The employer couldn't have done anything with respect to  
17 agency fees. That's all decided by statute.

18                  JUSTICE SOTOMAYOR: No. You're -- you're  
19 assuming --

20                  MR. CARVIN: Prior --

21                  JUSTICE SOTOMAYOR: I'm not assuming the  
22 state of the law as it exists now. I'm assuming that we  
23 were to -- to undo and say they can't charge an agency  
24 fee.

25                  MR. CARVIN: Right.



1 JUSTICE SOTOMAYOR: All right? California's  
2 going to have to respond somehow. It's now breaching  
3 the agreement it had with the union.

4 MR. CARVIN: It's --

5 JUSTICE SOTOMAYOR: They're going to have to  
6 come to some sort of accommodation.

7 MR. CARVIN: Right. And they would excise  
8 the agency fees part of the contract.

9 JUSTICE SOTOMAYOR: Even if they did, could  
10 they then decide to fund the union?

11 MR. CARVIN: Oh. But that's a separate  
12 question.

13 JUSTICE SOTOMAYOR: Well --

14 MR. CARVIN: If -- if they wanted to go  
15 ahead and fund the union, as I said, they've got some  
16 discretion to do it. I think the one area the  
17 government doesn't have the power to subsidize speech is  
18 when it's engaged -- subsidizing political speech in a  
19 viewpoint-discriminatory way.

20 JUSTICE SOTOMAYOR: Let's -- let's take that  
21 aside. I'm talking about the -- the collective  
22 bargaining part of the union.

23 MR. CARVIN: Oh, okay. Then I'm maybe not  
24 understanding it. If -- if the union is -- could they  
25 subsidize the union's collective bargaining efforts?

1 JUSTICE SOTOMAYOR: Mm-hmm.

2 MR. CARVIN: I think they might be able to,  
3 but of course no State --

4 JUSTICE SOTOMAYOR: All right. So why can't  
5 they assess -- why can't they assess all of their  
6 employees a tax for that contribution?

7 MR. CARVIN: Right. And that was the point  
8 I was trying to get to, which is agency fees don't go  
9 just to collective bargaining. As we know, they also go  
10 to political activity. And I don't think the government  
11 could fund political activity in a  
12 viewpoint-discriminatory way.

13 JUSTICE SOTOMAYOR: I'm a little --

14 JUSTICE ALITO: Is there any history in  
15 American labor management relations, at least going  
16 back, I don't know what, 75, 80 years of employers  
17 paying for unions? I thought the union movement was  
18 against this long ago.

19 MR. CARVIN: Your -- your recollection of  
20 history is correct. And of course, currently no  
21 government ever funds unions. Indeed, under the NLRA,  
22 it's --

23 JUSTICE BREYER: There -- there were company  
24 unions, but regardless --

25 MR. CARVIN: But --

1 JUSTICE BREYER: -- I'd like two minutes  
2 to --

3 MR. CARVIN: But if I --

4 JUSTICE BREYER: Sir, go ahead. Finish.  
5 Finish, finish.

6 MR. CARVIN: Before you --

7 JUSTICE BREYER: Finish. Finish, please.

8 MR. CARVIN: Just one more sentence.

9 Under the NLRA, it's a felony for the  
10 employer to give the unions money because it would  
11 influence the unions, and contrary to the entire  
12 structure of collective bargaining.

13 JUSTICE SCALIA: Is it a bargainable  
14 subject?

15 MR. CARVIN: Excuse me --

16 JUSTICE SCALIA: Is it a bargainable  
17 subject? I mean, it's a political subject. I suppose  
18 you can enact a statute that says the government will  
19 fund you, but is -- is it bargainable? Is it one of  
20 those items that the union can bargain for?

21 MR. CARVIN: It doesn't exist, it's never  
22 existed in American society, and there's no way the  
23 public employer, particularly because agency fees as a  
24 matter of statute, could all of a sudden say, sure,  
25 we're going to take our taxpayer dollars and start

1 giving money to unions, because they've always been  
2 funded through voluntary contributions.

3           If they did become recipients of Federal or  
4 State funds, that would impose all kinds of restrictions  
5 on their speech and other activities that the unions  
6 presumably would never have asked for wholly apart from  
7 any funding shortfall.

8           JUSTICE BREYER: I have a different --  
9 somewhat different subject, but it -- and I don't know  
10 how to get you to focus on this exactly. Because I -- I  
11 think there are good arguments on your side, and there  
12 are good arguments on the other side.

13           When you go into this, it was, in my view, a  
14 kind of compromise 40 years ago. But it was 40 years  
15 ago. It was 40 years ago. I mean, maybe Marbury v.  
16 Madison was wrong. There are people who argue certain  
17 aspects were.

18           And the concerns I -- I have in terms of  
19 workability are not so much the details. I guess  
20 something would work out in the labor area. It would  
21 certainly affect the bar. It would certainly affect the  
22 integrated bar. It would certainly affect at least  
23 student fees at universities. It would require  
24 overruling a host of other cases, I think, at least two  
25 or three that I can find, and that's quite a big deal.

1 MR. CARVIN: It certainly is.

2 JUSTICE BREYER: And so -- so what is it, in  
3 your mind, that you can say from the point of view of  
4 this Court's role in this society in that if, of course,  
5 we can overrule a compromise that was worked out over 40  
6 years and has lasted reasonably well -- not perfectly.  
7 I guess people could overrule our decisions just as  
8 easily. I've had a few dissents. In those dissents I  
9 think I'm right and the others are wrong, and then think  
10 I'm wrong and they're right. All right? There are a  
11 lot of people who think that. Do you see where I'm  
12 going?

13 I'd like you to talk for a minute, because  
14 it is a matter of considerable concern to me, even when  
15 I'm on the other side of something.

16 MR. CARVIN: Justice Breyer --

17 JUSTICE BREYER: And you -- you start  
18 overruling things, what happens to the country thinking  
19 of us as a kind of stability in -- in a world that is  
20 tough because it changes a lot.

21 MR. CARVIN: And I think you put your finger  
22 on precisely the same question. I think the principal  
23 reason to overrule Abood is that all of the rationales  
24 offered in support of Abood's result directly conflict  
25 with other precedent of this Court. So by overruling

1 Abood, you -- you don't do what you're saying, you do  
2 just the opposite.

3           If I could walk through the list for you:  
4 The standard of review, the -- the new rationale for  
5 Abood is it's subject to deferential government as  
6 employer review. It's contrary to Harris, it's contrary  
7 to Knox, it's contrary to Abood itself, which is huge  
8 Pickering analysis.

9           The notion that the union's duty somehow  
10 justifies agency fees because they've got a duty to  
11 represent nonmembers, which we've chatted about, that  
12 comes from the dissenting opinion in Lehnert. So you'd  
13 have to overturn Lehnert, which characterizes this  
14 argument as turning the Court's principles on its head  
15 and is wholly unworkable in the name of preserving  
16 another precedent.

17           The notion that collective bargaining  
18 doesn't involve matters of public concern, which has  
19 been offered up, that's contrary to Harris, Abood  
20 itself, which said it was, Pickering, which involved  
21 basic issues of school finances, so you would have to  
22 strike all of those down.

23           Respondents' radical arguments that it's not  
24 entitled to any First Amendment protection under the  
25 employee speech doctrine and under the Glickman

1 commercial speech doctrine is contrary, not only to  
2 Abood, every Abood case, and the Harris dissenting  
3 opinion because --

4 JUSTICE KAGAN: Mr. Carvin --

5 MR. CARVIN: -- because everyone recognizes  
6 there's some First Amendment protection.

7 JUSTICE KAGAN: I mean, it seems to me -- I  
8 guess we have one disagreement, which is how well Abood  
9 fits with all of our other employee speech cases,  
10 because I think Abood fits pretty well. It didn't cite  
11 Pickering, but it essentially had the exact same  
12 concerns as Pickering, which was the employer's  
13 interest, the -- the government's interest as an  
14 employer, and how that related to an employee's speech  
15 right and -- and basically arguing for a -- a balancing  
16 test.

17 So -- so really what your argument comes  
18 down to is two very recent cases, which is Harris and  
19 Knox. And there you might say that Harris and Knox gave  
20 indications that the Court was not friendly to Abood.  
21 But those were two extremely recent cases, and they were  
22 both cases that actually were decided within the Abood  
23 framework.

24 In the Harris case, the parties came here  
25 and explicitly asked us to overrule that case. Almost

1 all the briefing was about overruling that case, and the  
2 Court decided not to overrule that case and instead to  
3 say that -- that the employees there were -- were simply  
4 not public employees at all.

5 So taking two extremely recent cases, which  
6 admittedly expressed some frustration with Abood, but  
7 also specifically decided not to overrule Abood, I mean,  
8 just seems like it's -- it's nothing of the kind that we  
9 usually say when we usually say that a precedent has to  
10 be overturned because it's come into conflict with an  
11 entire body of case law.

12 MR. CARVIN: Again, I must respectfully  
13 disagree. I think the classic justification for stare  
14 decisis overturning the case is that subsequent cases  
15 have undermined the reasoning and principles there.

16 I think we can certainly agree that Harris  
17 and Knox certainly undermined the doctrinal  
18 underpinnings of Abood. The fact that they're really  
19 recent as opposed to not so recent doesn't change the  
20 fact that Abood has been overwritten.

21 Citizens United pointed to two differing  
22 lines of cases in the First Amendment area as its  
23 principal rationale for overturning Austin. The Hudgens  
24 v. NLRB case. In Logan Valley, it upheld something. In  
25 Lloyd Corporation, it distinguished it but not overruled



1 it. Hudgens --

2 JUSTICE BREYER: Well, I -- I --

3 MR. CARVIN: This doesn't -- this --

4 JUSTICE BREYER: I'll accept that. Let me  
5 accept that what you can do is you can go through -- and  
6 you're good at it, and so is the other side. You know,  
7 you go through the cases and you draw the line here,  
8 there, and the other place. And I'm trying to abstract  
9 from that in a very basic way for this reason.

10 I think Plessy v. Ferguson was a case that  
11 certainly should have been overruled. It certainly  
12 should have been overruled because it was basic, because  
13 it was a right to treat people equally, and there were  
14 millions of people who were not. Now, you see the level  
15 of abstraction I'm working at?

16 Now, if I put that same level of abstraction  
17 here, I see the following: You will go out this door,  
18 and you will buy hundreds of things, if not thousands,  
19 where money will go from your pocket into the hands of  
20 people, including many government people, who will spend  
21 it on things you disagree with. I don't see anything  
22 too basic in the lines you're drawing there.

23 The second thing is, what you said was --  
24 and it's true -- employees can say what they want.  
25 We're talking about six people in a room bargaining

1 about wages, hours, and working conditions. That's  
2 pretty far removed from the heart of the First  
3 Amendment, and pretty close to ordinary physical  
4 activity carried on through words. Regulation, if you  
5 like.

6 So I can't find a basic principle that's  
7 there that's erroneous as in these major cases that we  
8 have overruled. And if you have a response to that, I'd  
9 like to hear it.

10 MR. CARVIN: Sure. As to requiring people  
11 to give money to -- which they don't wish to give,  
12 Thomas Jefferson said that was sinful and tyrannical.  
13 James Madison famously said, requiring three pence is  
14 the thing. So -- so it's not at all something that  
15 we've invented.

16 For example, you couldn't require, as Rutan  
17 makes crystal clear, people to give money to a political  
18 organization. Because money is not money when it's  
19 supporting speech; it is -- it is association with an  
20 advocacy organization. And the compelled association is  
21 something that this Court has consistently condemned as  
22 basic to the -- Abood itself said it's contrary to the  
23 most basic principles of -- of the founding, which is to  
24 force people to --

25 JUSTICE GINSBURG: Mr. Carvin, do I take

1 it -- it was something that Justice Breyer said; you  
2 didn't respond directly to it. He said if Abood falls,  
3 then so do our decisions in Keller on mandatory bar  
4 association, on student activities fee.

5 Do you -- you agree that that would be a  
6 consequence of your theory?

7 MR. CARVIN: Well, no. In fact, that  
8 hypothetical was completely eliminated by Harris, which  
9 made it quite clear that neither Keller nor Southworth  
10 was in any jeopardy, because the rationale of those  
11 cases was significantly different than the rationale of  
12 Abood.

13 JUSTICE KAGAN: Those cases --

14 MR. CARVIN: Keller --

15 JUSTICE KAGAN: -- start with Abood, Mr.  
16 Carvin. Those cases say Abood is the framework, and  
17 those cases decide the questions that they decided  
18 specifically within that framework.

19 MR. CARVIN: A lot of cases cite cases, but  
20 the question is --

21 JUSTICE KAGAN: It's not a cite. It's a --  
22 this is the way we look at mandatory fee cases.

23 MR. CARVIN: Again, I must respectfully  
24 disagree. They do have that in common at that level of  
25 generality, but there's a key distinction, as -- as

1 Harris, itself, pointed out, between giving money to a  
2 bar association, and giving money to a union.

3 The key thing is that the bar association is  
4 a nonspeech restriction. It's like what the Court said  
5 in the Glickman commercial speech context. The initial  
6 association has nothing to do with speech. There, it  
7 was regulating lawyers, not advocating on behalf of  
8 lawyers.

9 And if those --

10 JUSTICE KAGAN: Bar associations do things  
11 all the time that lawyers disagree with. They engage in  
12 certain kinds of litigation and not other kinds of  
13 litigation. They take public policy positions on  
14 certain issues and not other issues.

15 I mean, I -- I think it would be impossible  
16 to make a distinction along that score.

17 MR. CARVIN: Keller struck down those kinds  
18 of activities by bar associations, taking positions on  
19 Federal jurisdiction, taking position on gun control.  
20 It said they could only spend money --

21 JUSTICE KAGAN: Do you think bar  
22 associations do, now, nothing that -- that -- that  
23 members of the bar could disagree with and find hostile  
24 to their own views?

25 MR. CARVIN: If they do it, and if it's not

1     germane to lawyer ethics or service, then, by  
2     definition, it's a violation of Keller. So I sure hope  
3     the bars are not violating the clear pronouncements of  
4     this Court.

5             The -- Keller only upheld expenditures that  
6     are a necessary incident to their principle role of  
7     regulating lawyer ethics and legal behavior. All of the  
8     other things that were law-related were struck down in  
9     Keller. So that is not --

10            JUSTICE KENNEDY: Any jeopardy, if not --

11            JUSTICE SCALIA: I think that we're talking  
12     about two kinds of bar associations. I mean, voluntary  
13     bar --

14            MR. CARVIN: Oh --

15            JUSTICE SCALIA: -- associations get into a  
16     lot of those other things.

17            You're -- you're just saying that those bar  
18     associations that you're compelled to join as a  
19     condition of your practice do not get into those things.

20            MR. CARVIN: Oh, absolutely. If -- if they  
21     required me to join the ABA, I would have an absolute  
22     First Amendment right not to do that, because virtually  
23     every word out of their mouth I disagree with.

24            JUSTICE KENNEDY: Mr. Carvin -- Mr. --  
25     Mr. Carvin, I see -- I see your -- I -- I -- I see

1 your -- your time is running.

2           Could you address briefly the opt-in/opt-out  
3 requirement, an issue which, I take it, is in the case,  
4 regardless of -- of -- of the -- the way we rule on the  
5 issue we've been discussing?

6           MR. CARVIN: It -- it certainly is, Your  
7 Honor. And that's because the only -- it will only  
8 affect the amount that you need to opt in or opt out on.

9           And my short answer -- and I am running  
10 out of time -- is, if this regime is upheld, that means  
11 tomorrow the State of California could say every public  
12 employee contributes 1 percent to the governor's  
13 reelection campaign unless they affirmatively opt out of  
14 doing so.

15           No one thinks, realistically, that's a  
16 voluntary decision to give money. There's only one  
17 purpose behind that kind of requirement, which is to  
18 inflate the governor's political war chest, just like  
19 the only purpose behind this is to, through inadvertence  
20 and neglect, inflate the union's war chest by people who  
21 really have not made a voluntary decision to do so.

22           Unless there are further questions, I'd like  
23 to reserve the remainder of my time.

24           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
25 Carvin.

1 General DuMont.

2 ORAL ARGUMENT OF EDWARD C. DUMONT

3 ON BEHALF OF THE RESPONDENT ATTORNEY GENERAL OF

4 CALIFORNIA

5 MR. DUMONT: Mr. Chief Justice, and may it  
6 please the Court:

7 California understands the First Amendment  
8 interests that are involved in this case.

9 But the State also has critical interests in  
10 being free to manage the public workplace, much like a  
11 private employer, unless we are improperly leveraging  
12 the employment role to coerce or suppress citizens'  
13 speech.

14 So let me try to briefly address why I  
15 think, if we are going to have collective bargaining in  
16 the public sector, mandatory agency fees can serve  
17 important State interests without unduly burdening  
18 citizens' speech.

19 JUSTICE ALITO: Before you get --

20 MR. DUMONT: If --

21 JUSTICE ALITO: Before you get into that,  
22 could I just ask you a preliminary question that came up  
23 earlier in the argument?

24 Do you think that the California Teachers  
25 Association is an agency of the State of California?

1                   MR. DUMONT: No. I think a -- a -- a union  
2 that becomes an exclusive representative, under the  
3 Perry case, has an official place in the functioning of  
4 the school district. But it is not -- it does not  
5 become an organ of the State.

6                   And that's actually a very important point.  
7 Precisely because of the company union concern, what's  
8 delicate about this, from the State's point of view, is  
9 that we want -- if we're going to have collective  
10 bargaining, we need to have a system where there's one  
11 representative that we can deal with, and that  
12 representative has to be both a good partner for us,  
13 from our point of view, but also perceived by the  
14 employees as representing their interests, which is  
15 why --

16                   CHIEF JUSTICE ROBERTS: But it's not --

17                   MR. DUMONT: -- we can't take it over.

18                   Excuse me.

19                   CHIEF JUSTICE ROBERTS: No. Go ahead.  
20 Finish.

21                   MR. DUMONT: Well, which is why it's very  
22 important that we not fund it directly, and that we  
23 not be perceived as controlling the speech of that  
24 representative.

25                   CHIEF JUSTICE ROBERTS: It's -- it's hard to



1 visualize this in a pure employer-employee relationship,  
2 when the collective bargaining agreement, itself, has to  
3 be submitted for public review and public comment.

4 That -- that suggests that you're doing more than simply  
5 regulating the employment relationship.

6 MR. DUMONT: Well, the public employment  
7 context is certainly different from the private context,  
8 and that's one of the important ways. We don't contest  
9 that.

10 But I think the question is, before you get  
11 to the final legislative approval or -- or board  
12 approval stage, what kind of system can we have,  
13 legitimately, that will be a workable system, both for  
14 our employees who overwhelmingly have shown they want  
15 collective bargaining, and for the local managers,  
16 the -- the actual managers of local governments, of  
17 school districts, or of State agencies who need to have  
18 the practical problem of -- of reaching an agreement  
19 that will govern --

20 CHIEF JUSTICE ROBERTS: If your --

21 MR. DUMONT: -- their workplace for a period  
22 of time.

23 CHIEF JUSTICE ROBERTS: If your employees  
24 have shown overwhelmingly that they want collective  
25 bargaining, then it seems to me the free-rider concern

1 that's been raised is -- is really insignificant.

2 MR. DUMONT: With respect, I disagree with  
3 that. Because many people can want something in the  
4 sense they view it as very advantageous to themselves,  
5 but if they are given a choice, they would prefer to  
6 have it for free, rather than to pay for it.

7 This is a classic collective action problem.

8 So when we -- so from the employer's point  
9 of view, when we're going to have collective bargaining,  
10 we want one union to deal with. We want that union to  
11 deal with all employees. And so we require it to  
12 represent all employees fairly, whether they supported  
13 the union or not. They might have supported the rival  
14 unions. They might be in favor of unionism, but they  
15 supported a different one. But once the majority has  
16 said this is our representative, then that is going to  
17 represent all employees.

18 And it's important then, from the employer's  
19 point of view, that that representative be adequately  
20 funded and stably funded, so that they can work with us  
21 or work with the employer to reach actual progress.

22 JUSTICE KENNEDY: But it's -- it's almost  
23 axiomatic. When you are dealing with a governmental  
24 agency, many critical points are matters of public  
25 concern. And is it not true that many teachers are --

1 strongly, strongly disagree with the union position on  
2 teacher tenure, on merit pay, on merit promotion, on  
3 classroom size?

4 And you -- the term is free rider. The  
5 union basically is making these teachers compelled  
6 riders for issues on which they strongly disagree.

7 Many teachers think that they are devoted to  
8 the future of America, to the future of our young  
9 people, and that the union is equally devoted to that  
10 but that the union is absolutely wrong in some of its  
11 positions. And agency fees require, as I understand  
12 it -- correct me if I'm wrong -- agency fees require  
13 that employees and teachers who disagree with those  
14 positions must nevertheless subsidize the union on those  
15 very points.

16 MR. DUMONT: And let me -- what I'd like to  
17 do is to separate out the important public policy  
18 issues, which we do not deny cross-cut between the  
19 public's fear and the -- the realm of citizens' speech  
20 and the -- the isolated collective bargaining realm.  
21 They -- they do cross-cut, but that -- that does not  
22 mean that the two spheres are the same.

23 So in the collective bargaining context,  
24 what the employer needs is to get one agreement with one  
25 group of employees, which we do by having one union.

1 It's a democratic process. The employees get to pick  
2 that union. And because it's a democratic process,  
3 almost -- it's almost guaranteed that not everyone will  
4 agree with all the positions that are taken by the union  
5 that represents the majority of employees.

6 From the employer's point of view, we need  
7 to get a contract, is to have one representative that  
8 can speak with one voice for all those disparate people.

9 Now, I understand that you'll be speaking  
10 on -- on delicate issues. And the important point here  
11 is that outside the context of getting a contract, we do  
12 not try to suppress at all the wide or enriched variety  
13 of viewpoints that employees may have as citizens. And  
14 they can express them in the legislative realm. They  
15 can express them at the workplace, just not in the  
16 bargaining room.

17 JUSTICE KENNEDY: Do union -- do unions have  
18 public relations programs of -- or newspaper articles,  
19 media programs to talk about things like merit pay,  
20 protecting underperforming teachers and so forth? Do  
21 the unions actually make those arguments, and aren't  
22 those chargeable expenses?

23 MR. DUMONT: The union is engaged in a  
24 variety of speech. Some of it is chargeable and some of  
25 it is not.

1 JUSTICE KENNEDY: Some of the ones I've  
2 mentioned are chargeable?

3 MR. DUMONT: I believe under current law  
4 they are. And if there's a need to adjust the current  
5 law because the Court feels that some of those things  
6 are more in the political or legislative sphere than  
7 they are in the -- the collective bargaining sphere per  
8 se, that is a -- a more of a Lehnert question than an  
9 Abood question.

10 It does not --

11 JUSTICE SCALIA: Well, if it --

12 MR. DUMONT: -- require -- it would not --

13 JUSTICE SCALIA: The problem is that  
14 everything that is collectively bargained with the  
15 government is within the political sphere, almost by  
16 definition. Should the government pay higher wages or  
17 lesser wages? Should it promote teachers on the basis  
18 of seniority or on the basis of -- all of those  
19 questions are necessarily political questions.  
20 That's -- that's the major argument made by the other  
21 side.

22 MR. DUMONT: And Your Honor, I don't  
23 disagree with that. But it does not change the fact  
24 that as a government, we have two things that we're  
25 doing; one is trying to run a workplace, another is

1 trying to run a government in which the debate must be  
2 wide open, and we would not dream of being able to  
3 impose --

4 CHIEF JUSTICE ROBERTS: What is -- you said  
5 you agree with that. You agree with that everything  
6 they're negotiating over is a public policy question?

7 MR. DUMONT: No. I don't agree that --

8 CHIEF JUSTICE ROBERTS: Why?

9 MR. DUMONT: -- every issue is a public  
10 policy question, but I don't want to dispute the fact  
11 that many -- that there are deep public policy  
12 implications to many of the topics and to the general  
13 tenor of public employee bargaining.

14 Many of the public --

15 CHIEF JUSTICE ROBERTS: If you disagree with  
16 that, what is -- what is your best example of something  
17 that is negotiated over in a collective bargaining  
18 agreement with a public employer that does not present a  
19 public policy question?

20 MR. DUMONT: Mileage reimbursement rates or  
21 how you're going to have public safety.

22 CHIEF JUSTICE ROBERTS: It's all money.  
23 That's money. That's how much money is going to have to  
24 be paid to the teachers. If you give more mileage  
25 expenses, that costs more money. And the amount of

1 money that's going to be allocated to public education  
2 as opposed to public housing, welfare benefits, that's  
3 always a public policy issue.

4 MR. DUMONT: Which is why I would say I  
5 would not try to draw the line by saying that some part  
6 of this speech is not a matter of public concern or  
7 whatever term you want to use.

8 What I would say is that they -- when we're  
9 trying to run the public workplace, we need to have some  
10 flexibility because for -- as employers, we're trying to  
11 reach workable agreements to govern particular  
12 workplaces for particular periods of time. And that  
13 involves compromise, and it involves reaching some  
14 decisions on some of these issues. And many of them are  
15 controversial, but we need to have concrete decisions  
16 with one group of employees represented by one union to  
17 do that.

18 JUSTICE ALITO: Where does the -- where does  
19 the State of California think the line should be drawn?  
20 A provision of California law -- this is Section 3546(b)  
21 of the -- of the California Government Code -- says that  
22 agency fees may be used for, quote, "the cost of  
23 lobbying activities designed to secure advantages in  
24 wages, hours, and other conditions of employment, in  
25 addition to those secured through meeting and

1 negotiating with the employer."

2 Is that constitutional?

3 MR. DUMONT: I don't know the answer to that  
4 question. I don't think it's the question presented  
5 here. It's not what the union's here -- it's not the  
6 position that they have taken in this litigation. And  
7 if there is a need to adjust that line, which there  
8 might be, that would be a question about where to draw  
9 the fundamental line that Abood draws. But the question  
10 here is whether that line --

11 JUSTICE ALITO: Well, one of the questions  
12 is whether the -- whether Abood is workable. So I do  
13 think it's relevant to know whether you think that is on  
14 one side of the line or the other.

15 MR. DUMONT: I think there are arguments  
16 about why that kind of thing could be considered germane  
17 to bargaining. But what is most important to the State  
18 here would not be preserving that line. I don't want to  
19 concede it, but that is not the fundamental point here.  
20 What is fundamental is that we need to be able to run  
21 our workplaces, and that involves prescinding somewhat  
22 from the -- from the broad debates about public policy,  
23 which will continue to go on, but getting particular  
24 contracts.

25 CHIEF JUSTICE ROBERTS: Is there --



1 MR. DUMONT: And the -- the particular  
2 speech restrictions, if I might, just in -- excuse me.  
3 I'm sorry.

4 CHIEF JUSTICE ROBERTS: Is -- is there  
5 any -- is there any legal argument or factual basis on  
6 which the State of California disagrees with the  
7 position of the union?

8 MR. DUMONT: I'm sorry. Any -- any  
9 aspect of --

10 CHIEF JUSTICE ROBERTS: Well, we have -- I'm  
11 trying to sort out. We have, as you know, three  
12 Respondents here, and I'm trying to sort out the  
13 different position.

14 Is there anything -- in -- any way in which  
15 your presentation disagrees with the union's  
16 presentation in its -- in its brief?

17 MR. DUMONT: I don't think there's  
18 necessarily any fundamental disagreement. I think we  
19 would emphasize that our interests here are not -- are  
20 primarily interests of employees in coming to practical  
21 accommodations here.

22 There was a long history in California in  
23 the '50s and 1960s of labor unrest. It led to a  
24 commission that -- that issued a -- a report that was  
25 very comprehensive and addressed this issue, among

1 others. This issue of agency fees was part of the  
2 debate that went into the legislative decision in the  
3 early '70s to adopt this -- this system, and we think  
4 that was a legitimate legislative decision.

5 JUSTICE SCALIA: General DuMont, you -- you  
6 are arguing that -- and I sympathize with -- with the  
7 need of the State to have an efficient system for  
8 dealing with its employees, and I can agree that dealing  
9 with just one union makes everybody's life easier.

10 Why do you think that the union would not  
11 survive without these -- these fees charged to  
12 nonmembers of the union? Federal employee unions do --  
13 do not charge agency fees to nonmembers, and they seem  
14 to survive; indeed, they prosper. Why -- why is  
15 California different?

16 MR. DUMONT: The Federal situation is  
17 different. They have very different scope of  
18 bargaining. I wouldn't say that it's been established  
19 that they prosper. They have about a 30 percent  
20 membership rate.

21 And from --

22 JUSTICE GINSBURG: As opposed to -- what is  
23 the membership rate in -- in the California teachers  
24 unions? How -- how many are members of the union?

25 MR. DUMONT: Actual membership? I'm afraid

1 I don't know that. Mr. Frederick may -- may know that.

2 JUSTICE GINSBURG: Because you -- you've  
3 pointed out the membership is low in the Federal sector.  
4 But there is no bargaining about pay, right?

5 MR. DUMONT: There is no bargaining about  
6 pay; that's correct.

7 JUSTICE SOTOMAYOR: General, there was no  
8 fact-finding below on this assumption, factual  
9 assumption of whether --

10 MR. DUMONT: There has been no fact-finding  
11 at all.

12 JUSTICE SOTOMAYOR: No factual development.  
13 So there's a presumption in the question posed which is  
14 that it can survive, but we don't know that factually.

15 MR. DUMONT: We don't know that factually.  
16 The State would prefer not to take that risk, and I  
17 don't think the Constitution requires us --

18 JUSTICE SCALIA: You're the one making the  
19 argument. It isn't -- it isn't the job of the opponents  
20 to show that it -- you know, that it will survive.  
21 You're the one that's saying we need to do this because  
22 otherwise it won't survive. It seems to me the burden  
23 on -- is on you to suggest why that's so.

24 MR. DUMONT: With respect, Your Honor, I  
25 don't think --

1 JUSTICE KENNEDY: You have a compelling  
2 interest.

3 MR. DUMONT: With respect, Your Honor, I  
4 don't believe that what we need to show is that the  
5 union would not survive without this. From our point of  
6 view, the question is are we using a technique that the  
7 private sector uses widely that is reasonable from the  
8 point of view of the employer and that doesn't impose an  
9 undue burden.

10 And let just me say for just a moment about  
11 the burden that's involved here, because I don't want to  
12 minimize it, but let's remember that there is no  
13 personal attribution of this speech here to any  
14 individual employee. There is no restriction on any  
15 individual employee's speech as a citizen, either in the  
16 workplace or out of the workplace. All this speech is  
17 workplace-related, and if it's not, then that's a matter  
18 of --

19 JUSTICE KENNEDY: It's odd to say that if X  
20 is required to pay \$500 for someone to espouse a belief  
21 that he doesn't share, that he is now free to go out  
22 and -- and argue against it. That means he has to spend  
23 another \$500 so that it balances out? That makes no  
24 sense.

25 MR. DUMONT: See, what I would say here

1 is -- to me, Your Honor, this case is very much like  
2 Southworth, because what we have here is something where  
3 it is important to the State to have a system in which  
4 we are not the speaker, because that would defeat the  
5 purpose of the system. The same way the point in  
6 Southworth was to have students speak --

7 JUSTICE KENNEDY: The whole idea of  
8 Southworth was a public forum.

9 Are you saying that the whole purpose of  
10 agency fees is to have an open public forum?

11 MR. DUMONT: No. I'm saying it's to have a  
12 bargaining forum, but that it is legitimate when we have  
13 compelled -- compelled association to have that  
14 bargaining forum. It is also legitimate to have user  
15 fees that fund it.

16 CHIEF JUSTICE ROBERTS: Thank you, General.  
17 Mr. Frederick.

18 ORAL ARGUMENT OF DAVID C. FREDERICK  
19 ON BEHALF OF THE UNION RESPONDENTS

20 MR. FREDERICK: Thank you, Mr. Chief  
21 Justice, and may it please the Court:

22 Aboud correctly held that States may  
23 reasonably insist that nonmembers pay their share of  
24 costs for the services provided by a union to the  
25 government and to all employees as their exclusive

1 representative. Overruling Abood now would  
2 substantially disrupt established First Amendment  
3 doctrine and labor management systems in nearly half the  
4 country.

5           Let me talk about what a collective  
6 bargaining is, and how the agreement is struck, and how  
7 it evolves over time. Because it's not simply one  
8 contract where there might be a severability provision,  
9 but it is really system of agreements that are  
10 established over time, and a body of relationships that  
11 build up.

12           And if you look at the Joint Appendix, there  
13 are several examples of collective bargaining  
14 agreements. They are very long, detailed agreements  
15 that include a wide range of services that are  
16 negotiated between the union and the government. And  
17 some of these are monetary. Many of these are  
18 hot-button issues, to be sure, Justice Kennedy, but many  
19 of them are also mundane issues about health and welfare  
20 benefits, what times teachers need to show up, how long  
21 their lunch break can be without having to perform a  
22 duty, what the policies are for transferring teachers  
23 between and among school districts, and these are all  
24 basic services that require research, legal  
25 representation, conferring and consulting, communicating

1 with members, trying to ascertain what the positions of  
2 all members of the workforce are before the union  
3 presents a -- a policy --

4 JUSTICE KENNEDY: Well, I suppose, if that's  
5 so convincing, the union can convince teachers to join  
6 the union.

7 MR. FREDERICK: Well -- and, in fact, in  
8 California, the overwhelming majority of the teachers  
9 are in the union, and it's only a small percentage that  
10 have opted not to.

11 But I would go further, Justice Kennedy, in  
12 saying that what we are talking about here are a range  
13 of services that they're providing. We're talking about  
14 a service fee for the State law that provides for the  
15 exclusive representative to be the union when that is  
16 voted for by a majority of the workers.

17 And here, this Court's cases have  
18 distinguished between citizens' speech, where the very  
19 teacher who might disagree with the union's position is  
20 free to go and speak publicly about that position, and  
21 employment speech, where this Court's cases have been  
22 extraordinarily deferential to the government in  
23 upholding restrictions on what speech employees may  
24 make.

25 JUSTICE KENNEDY: But -- but -- but

1 philosophically, if you use Pickering in this case,  
2 you're committing error of composition. You're  
3 comparing a whole group of persons who have their views  
4 coerced or compelled against one person that -- that --  
5 Pickering is just inapplicable on that -- on that  
6 ground.

7 MR. FREDERICK: Well, Justice Kennedy, I  
8 think that it is fair to suppose that the government, in  
9 deciding whether it's going to establish a relationship  
10 with its workers and were to get input, is necessarily  
11 going to be dealt with a cacophony of views unless it  
12 comes up with a reasonable system of management to get  
13 those views collected and have them represented by an  
14 exclusive representative. And that is the basic  
15 trade-off that Abood recognized.

16 And I would note that because different  
17 States have chosen, based on their history, their  
18 culture, their experiences with the labor management  
19 system in the private sector, to come up with different  
20 results.

21 And here, I would say that Wisconsin and  
22 Michigan, which recently adopted alterations to their  
23 public management sector, established this point.  
24 Because on the one hand, the legislature in Wisconsin  
25 decided we're going to do away with public sector agency



1 fees for school teachers and for government workers, but  
2 we're going to keep it for public safety officers,  
3 police officers, firefighters, because we determined  
4 there is a legislative interest in having agency fees.

5 Why? The firefighters brief in this case  
6 explains that many States don't have safety regulations  
7 for firefighters. And so a lot of these regulations end  
8 up coming through the collective bargaining process,  
9 where firefighters work out negotiated rules to  
10 establish what is a safe way to fight a fire.

11 CHIEF JUSTICE ROBERTS: And all of that  
12 would still survive if the Petitioners prevail, unless  
13 your basic argument that if you do away with agency's --  
14 agency fees, the unions are going to collapse and not be  
15 in a position to negotiate those safety requirements.

16 MR. FREDERICK: Chief Justice, the necessity  
17 standard has never been the standard when the government  
18 is operating as employer or proprietor. It has always  
19 been a case that you would judge the agency -- the  
20 government's decision on the basis of what is  
21 appropriate or reasonable.

22 And if you look at it from that standard,  
23 what the firefighters are saying here is that it's  
24 actually essential to have agency fees, because they are  
25 using those fees to benefit all of the workers in the --

1 in the unit through getting additional equipment that  
2 the county may not be able to afford, additional  
3 training so what when they're called upon to fight a  
4 fire --

5 CHIEF JUSTICE ROBERTS: I'm sorry. They're  
6 getting additional equipment that the county may not be  
7 able to afford?

8 MR. FREDERICK: That's right. The union  
9 members and the nonmembers of the union in the -- in the  
10 unit are putting their money together through the agency  
11 fee process so that the union is supplying --

12 JUSTICE BREYER: There's something other  
13 than that. That would be the same as Justice Scalia's  
14 question which raised an issue, and we heard it before.  
15 Your -- your -- your last colleague mentioned this.

16 California needs this rule that it has,  
17 because it wants, on the other side of the bargaining  
18 table, a coherent group of people to negotiate for the  
19 workers on wages, hours, working conditions, et cetera.

20 Now, the Chief Justice said, I can  
21 understand that argument if the alternative is the union  
22 is destroyed, because then there's nobody. And you say  
23 that that argument's a good argument because they're  
24 going to buy fire trucks and some other things.

25 Is there anything else that backs up that

1 argument?

2 MR. FREDERICK: Sure.

3 JUSTICE BREYER: I think it's important, and  
4 I'd like you to explain it.

5 MR. FREDERICK: Yes. The flip side is that  
6 the State briefs and the City briefs that have been  
7 submitted in this Court note what happened when the  
8 agency fee process didn't occur.

9 In New York City, for example, there were  
10 strikes that were occurring all of the time until an  
11 agency fee -- fee system was put into place, and that  
12 enabled the City to better deliver transit services,  
13 school services, and the like.

14 So you have both the positive story by --

15 JUSTICE SCALIA: I -- I don't understand  
16 that. I just absolutely don't understand it. Why --  
17 why would agency fees enable the city to do things that  
18 it couldn't do before?

19 MR. FREDERICK: Because it enables all of  
20 the workers to know they are making a shared sacrifice  
21 for the purpose of working together to establish a  
22 coherent position with their employer. That's --

23 JUSTICE SCALIA: You say that, but I -- it  
24 doesn't mean anything to me.

25 MR. FREDERICK: I understand --

1 JUSTICE SCALIA: You have a union  
2 bargaining, and the city says no. And you're saying  
3 that if there are enforced fees to the union, the city  
4 will say yes?

5 MR. FREDERICK: No. What I'm --

6 JUSTICE SCALIA: I -- I see no connection  
7 whatever between --

8 MR. FREDERICK: Well --

9 JUSTICE SCALIA: -- what the city is willing  
10 to -- to give in collective bargaining and whether you  
11 have agency fees.

12 MR. FREDERICK: Justice Scalia, all I can  
13 report on in the absence of a factual record -- because  
14 this was basically brought as a facial challenge -- is  
15 what is in the amicus briefs. In cities, States, school  
16 districts, hospitals that are management-side have  
17 supported agency fees because they find it to be a more  
18 workable system by having --

19 CHIEF JUSTICE ROBERTS: Well, I --

20 MR. FREDERICK: -- employees buy into the  
21 policies that are being established --

22 CHIEF JUSTICE ROBERTS: I --

23 MR. FREDERICK: -- through the collective  
24 bargaining process.

25 CHIEF JUSTICE ROBERTS: It sounds to me like

1 your argument cuts exactly the opposite way.

2 The -- the problem that's before us is  
3 whether or not individuals can be compelled to support  
4 political views that they disagree with. And you're  
5 saying, well, the reason they should be able to, because  
6 if they do, then those political views are going to  
7 prevail. They are opposed to particular funding.  
8 That's why they don't want to join the -- that's why  
9 they don't want to join the union, because the union is  
10 pushing that. But you say you should force them because  
11 then the union will prevail, contrary to the objecting  
12 employee's views.

13 MR. FREDERICK: No. What I'm saying, Mr.  
14 Chief Justice, is the States can make rational and  
15 reasonable judgments that for their workability of a  
16 system, they can have an agency-fee process.

17 Abood recognized the very Federalism  
18 interests that are at stake here, where different States  
19 have different experiences, and this is an opportunity  
20 for the States to draw upon those distinctive  
21 experiences in coming up with a system that's fair for  
22 everyone.

23 JUSTICE GINSBURG: Mr. Frederick, you didn't  
24 ask for this judgment. It was thrust on you, this  
25 judgment on the pleadings. You did say you wanted to

1 make a record in the district court. If you had had  
2 that opportunity to develop a record, what would you  
3 have put in it?

4 MR. FREDERICK: Well, the first thing I  
5 would have put in, it would have been a response to  
6 Justice Kennedy's question, which is that Ms. Friedrichs  
7 has said publicly she's happy with the positions the  
8 union is taking on pay. It would be anomalous to  
9 suppose that we're going to decide a case of this kind  
10 of constitutional import with a lead plaintiff who has  
11 said publicly she agrees with the union's positions on  
12 pay.

13 CHIEF JUSTICE ROBERTS: Can you -- can  
14 you -- do you think you can find one employee who  
15 doesn't?

16 MR. FREDERICK: No. I think that that's the  
17 point, Mr. --

18 CHIEF JUSTICE ROBERTS: You don't think.

19 MR. FREDERICK: No. I think that there are  
20 undoubtedly -- there are undoubtedly issues in a  
21 hundred-page collective bargaining agreement in which  
22 reasonable people can say, we don't like where the  
23 bargain got struck.

24 But the point here is government workability  
25 and assessing the reasonableness of the government's

1 position.

2 JUSTICE BREYER: Do you think you can -- I  
3 mean, obviously one thing that's come up is -- I know  
4 that you're right on this -- the Thaler law was a mess.  
5 It was strike after strike. But what you would like to  
6 show is that that approach, compared to the assessment  
7 of wage-, hour-, and working-condition-related fees,  
8 that the latter makes an improvement in the coherence of  
9 the union's position, and therefore there will be of  
10 your strikes.

11 That's something like that is what you're  
12 arguing, and I would guess that people would have  
13 written articles about that now, and -- and -- if that's  
14 so.

15 MR. FREDERICK: Well, Justice Breyer, I  
16 guess the question is, are you going to decide a case of  
17 this constitutional significance on the basis of a  
18 hypothesis based on --

19 JUSTICE BREYER: All right. My argument to  
20 you was, do you want to put information in the record on  
21 that point?

22 MR. FREDERICK: I think that is a one of  
23 many points that a record would be helpful, but let me  
24 just say that we're talking here --

25 JUSTICE SOTOMAYOR: Mr. Fredericks, this is

1 the --

2 JUSTICE KENNEDY: I -- I suppose --

3 JUSTICE SOTOMAYOR: -- this is the --

4 JUSTICE KENNEDY: Mr. Fredericks, we -- I  
5 suppose, Mr. Fredericks, we could assume that a State is  
6 always benefitted and -- and is more efficient if it can  
7 suppress speech.

8 MR. FREDERICK: And your decision in  
9 Garcetti, Justice Kennedy, allowed for the suppression  
10 of the speech by the prosecutor who objected --

11 JUSTICE KENNEDY: That was in the workplace.  
12 It doesn't apply to merit pay. It didn't apply to the  
13 protection of underperforming teachers. It -- it  
14 didn't -- it didn't apply to classroom size. It didn't  
15 apply to educational objectives.

16 MR. FREDERICK: Those are all classic  
17 workplace situations.

18 JUSTICE SOTOMAYOR: Can you -- can you --

19 MR. FREDERICK: You are talking about  
20 workplace --

21 CHIEF JUSTICE ROBERTS: Justice --

22 MR. FREDERICK: -- speech --

23 CHIEF JUSTICE ROBERTS: Justice Sotomayor.

24 JUSTICE SOTOMAYOR: Can we go back to this  
25 issue of burden?



1                   There are a lot of assumptions underlying  
2 your adversary's position, whole set of questions: Can  
3 the union survive?

4                   Hold on. I have about ten of them.

5                   Is it necessary? And your adversary says  
6 you -- or one of my colleagues has said you bear the  
7 burden.

8                   But this is an overturning of a decision on  
9 stare decisis, isn't it?

10                  MR. FREDERICK: That's correct. And the  
11 point --

12                  JUSTICE SOTOMAYOR: And what burden do you  
13 have, or is it your adversary who has to show no  
14 reliance interests that the foundation is wrong,  
15 et cetera?

16                  MR. FREDERICK: We submit that, given the  
17 four-decade history, they have the burden to demonstrate  
18 that the way the system has worked would be unworkable  
19 if it were to be -- if it were to be sustained.

20                  And -- and Justice Kennedy, back to your  
21 point. I appreciate that a prosecutor's memo might be  
22 viewed in your eyes as workplace speech whereas the  
23 teachers' position about what size the classroom might  
24 be may not seem the same way as workplace speech. But  
25 from of government's perspective, I think you have to

1 assess that on the basis of the reasonableness of the  
2 system that the government --

3 JUSTICE ALITO: Well, no, Mr. Frederick --

4 JUSTICE KENNEDY: You're again talking about  
5 a whole class of persons whose speech has been silenced,  
6 not just one person.

7 MR. FREDERICK: Well --

8 JUSTICE KENNEDY: Big difference.

9 MR. FREDERICK: -- their speech isn't  
10 silenced. They are paying a service fee so that a --  
11 the exclusive representative can negotiate their health  
12 and welfare benefits, their mileage reimbursement, a  
13 whole set of things that -- voluntary teacher transfer  
14 policy, the questions about when teachers have to show  
15 up, how long their duty breaks -- duty-free breaks are  
16 during the course of the day.

17 These are all relatively mundane points.  
18 I -- I think you would agree with me. And there's  
19 nothing in the agency fee process that suppresses the  
20 ability of teachers to speak out publicly, and even  
21 within the process because the law itself allows for  
22 merit pay to be a subject of bargaining if a minority of  
23 the teachers can convince the majority that this is a  
24 position that the teachers ought to take.

25 CHIEF JUSTICE ROBERTS: Mr. Frederick, your

1 -- your -- I think you would at least agree we're  
2 dealing with some sensitive and important constitutional  
3 issues. What is the -- the burden on the union that  
4 counter -- weighs against those of simply requiring  
5 opt-in as opposed to opt-out? At least then you --  
6 you ensure that people are making a conscious decision  
7 about supporting the union before they're compelled to  
8 do that.

9 MR. FREDERICK: On the second question  
10 presented, we think that the decision ought to be  
11 affirmed because Abood correctly recognized that here,  
12 where there was basically no burden on the person who  
13 wanted to opt out, that that was in itself a core  
14 question.

15 CHIEF JUSTICE ROBERTS: And what you're  
16 saying, it's easy for the person to check a box saying I  
17 opt out. It's also easy to check a box saying opt in.

18 MR. FREDERICK: It's administratively --  
19 actually, in a system where the overwhelming majority --  
20 and we're talking about more than 90 percent of the  
21 people are paying the fees, even those that are  
22 nonchargeable fees under the Lehnert line to support  
23 political activities, it's administratively much easier  
24 to count a smaller number.

25 And the question is whether the suppression

1 of their constitutional rights is such as to rise to the  
2 level of compulsion. Here we would submit that where  
3 there's a one-page checkbox, they can send it in, they  
4 are able -- and every Petitioner on the other side has  
5 successfully opted out of paying those -- that the  
6 burden is on them to show that the government has made  
7 an unreasonable choice as to the kind of administrative  
8 scheme that's been established.

9 JUSTICE ALITO: Well, opt-in is -- opt-out  
10 is not always as easy as you -- as you say. In one of  
11 our prior cases, I think that anybody who wanted to opt  
12 out had to send a certified letter within a certain  
13 period of time.

14 Now, suppose somebody says I don't want to  
15 pay this year. I don't want to -- I -- I never want to  
16 pay. What is the justification for saying that person  
17 has to opt out every single year?

18 MR. FREDERICK: Well, let me just say that  
19 the perpetual opt out is not an issue in this case. And  
20 it -- had it been raised, it very well might be an  
21 acceptable way to do, to say I want to opt out until  
22 further notice. That's not been presented or argued  
23 here.

24 If it were to be argued, there are reasons  
25 why that might be appropriate. But here, having an

1 annual process follows this Court's Hudson decision  
2 where the union is required on an annual basis to  
3 provide notice of the activities that are chargeable and  
4 not chargeable. So from the perspective of getting  
5 notice to the potential objecting member, it allows more  
6 flexibility.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. FREDERICK: Thank you.

9 CHIEF JUSTICE ROBERTS: General Verrilli.

10 ORAL ARGUMENT OF GEN. DONALD B. VERRILLI, JR.

11 FOR THE UNITED STATES, AS AMICUS CURIAE,

12 SUPPORTING THE RESPONDENTS

13 GENERAL VERRILLI: Mr. Chief Justice, and  
14 may it please the Court:

15 Let me begin by summarizing the three  
16 fundamental reasons why Abood should be reaffirmed.

17 First, in the four decades that Abood has  
18 been the law, this Court's jurisprudence in the area  
19 of -- of employment relations, First Amendment  
20 jurisprudence in the area of employment relations has  
21 converged with Abood in a way that fortifies its  
22 foundations and does not erode them, because what those  
23 cases have recognized is when the government is acting  
24 as employer managing the workforce, it should receive  
25 reasonableness review in order to give it the latitude

1 comparable to that of a private employer to manage its  
2 workforce, and not exacting scrutiny that applies when  
3 government is a sovereign regulating the citizens.

4           Second, in those four decades, more than 20  
5 States have enacted and enforced laws that allow the  
6 public employers in those States to have the same  
7 latitude that Congress gave private employers to decide,  
8 based on workplace needs and local conditions, whether  
9 agency fee requirements will help them achieve the  
10 purposes for which they -- for which they adopt  
11 collective bargaining.

12           And the reliance goes far deeper than those  
13 20 State laws and the thousands of contracts affecting  
14 millions of people that are based on those laws. In  
15 those States, the agency fee requirement has worked its  
16 way, woven its way into the fabric of the relation  
17 between workers and management and the public's fear.

18           In those States, the unions have taken on  
19 such obligations as training and the like, funded by  
20 agency fees that make the workplace more effective for  
21 management, as well as more effective for employees.

22           And if you were to take those away, you're  
23 going to disrupt those long-term relationships that have  
24 developed over time, and the expectations that have  
25 developed over time, and you're going to replace them

1 with a different kind of a situation in which the union  
2 is going to have a different set of incentives, trying  
3 to -- trying to ensure that the maximum number of people  
4 are willing to pay union fees.

5           And the way that the unions are likely to  
6 try to do that is through trying to convince employees  
7 that you -- that they need the union because otherwise  
8 management is going to do them harm. And I do think  
9 that that's a significant problem here for public  
10 employer perspective now, in a time of budgetary  
11 constraints, when difficult decisions have to be made  
12 and cuts have to be made.

13           It's of great benefit to the employer, to  
14 the government as employer, to have the union  
15 participate in those judgments so that they are  
16 perceived as fair as the -- by the workforce, and so  
17 that the union then, in effect, vouches for management  
18 with the workforce and prevents disruption. So I do  
19 think the reliance interests go very deep here.

20           And then the third point I would make is  
21 that we're talking about overruling a precedent of 40  
22 years' standing. There need to be -- needs to be a  
23 showing of changed circumstances, it seems to me.

24           Now, with respect to the question of -- of  
25 the role that agency fee -- the role that agency fees

1 play in the process, I think it is quite important, and  
2 this goes to a point you raised, Justice Scalia. Abood  
3 never said, and no case since Abood has ever said, that  
4 agency fees are necessary to union survival. Abood  
5 couldn't have said that, because when Abood ruled as it  
6 did, Taft-Hartley had been on the books for decades.  
7 And so with respect to the private sector, what Congress  
8 had said with respect to the private sector is that  
9 employers get to choose. Employees get to decide  
10 whether the agency fee will help them achieve their  
11 workplace goals. And what the Court said in Abood was  
12 that public employers ought to have the same kind of  
13 choice to respond to workplace needs and local  
14 conditions that prior employee --

15 CHIEF JUSTICE ROBERTS: The -- the fact that  
16 Abood has been around for 40 years, does it affect your  
17 point at all that the main justification for Abood  
18 that's being advanced today is one that Abood did not  
19 adopt?

20 GENERAL VERRILLI: I --

21 CHIEF JUSTICE ROBERTS: Pickering  
22 justification, that's what I hear most prominently in  
23 the presentations, and yet Abood did not even cite  
24 Pickering.

25 GENERAL VERRILLI: I -- I respectfully



1 disagree with that as a technical matter. I think Abood  
2 did cite Pickering. And if one looks at the briefs in  
3 Abood, the parties on both sides were arguing Pickering.

4 But beyond that, I think --

5 CHIEF JUSTICE ROBERTS: In -- in -- in terms  
6 of that, but in terms of the substantive analysis, it  
7 can't really seriously be called a Pickering case.

8 GENERAL VERRILLI: No. But I think it  
9 shares -- what I said at the outset, Mr. Chief Justice,  
10 is I think the key point: That this Court's First  
11 Amendment law in the public employment context has, over  
12 time, converged with Abood, in that the cases generally  
13 have recognized that when government is acting as  
14 employer, it has interests that, if government were  
15 acting as sovereign regulating the citizenry, wouldn't  
16 suffice to justify conditions on speech.

17 JUSTICE ALITO: Well, Pickering is --  
18 Pickering is the heart of your argument, so I -- I do  
19 want to ask you a couple of questions about it.

20 Is it different from the situation here in  
21 several respects? One was brought out. Pickering --  
22 the Pickering cases involve the termination or the  
23 discipline of a public employee after -- a single  
24 employee after the employee has made a statement that --  
25 to which the employer objects. This is a prospective

1 rule that applies to a huge category of employees.

2 The second is whether restrictions on what  
3 employees can say are the same as compelling an employee  
4 to make a statement or subsidizing a statement.

5 GENERAL VERRILLI: Let me take --

6 JUSTICE ALITO: So as to the -- as to the  
7 latter --

8 GENERAL VERRILLI: Yeah.

9 JUSTICE ALITO: -- there are circumstances,  
10 are there not, in which the Department of Justice could  
11 terminate or take an adverse employment action against a  
12 DOJ employee for something that that employee says as a  
13 citizen on a question of public concern. That could be  
14 done, could it not?

15 GENERAL VERRILLI: Yes.

16 JUSTICE ALITO: Are there any circumstances  
17 in which the Department of Justice could compel an  
18 employee to make a statement --

19 GENERAL VERRILLI: I can't --

20 JUSTICE ALITO: -- as a --

21 GENERAL VERRILLI: I -- I can't think of  
22 one, specifically.

23 JUSTICE ALITO: -- as a -- as a private  
24 citizen?

25 GENERAL VERRILLI: I can't think of one, but

1 that goes right to the difference, right to the  
2 difference between government acting as employer,  
3 managing the workplace, and government acting as  
4 sovereign, regulating the citizenry.

5 In the latter situation, what this Court's  
6 cases would say is that that is not government acting to  
7 manage the workplace; that is government leveraging  
8 its -- its control over the employee, acting as  
9 sovereign, affecting that person in his role as citizen,  
10 and that would get exacting scrutiny.

11 And that -- so that -- I think that's the  
12 key. We're not arguing that Abood applies of its own  
13 terms. We're arguing that there's an insight that  
14 underlays Abood, and it underlays Garcetti, and frankly,  
15 it underlays the political affiliation cases as well.

16 Because if you look at those, what those  
17 cases all say, contrary to what my friends say, is that  
18 when government can show the political affiliation is a  
19 reasonable requirement for the effective performance of  
20 the job in question, that that affiliation requirement  
21 can be upheld. That, again, is not exacting scrutiny;  
22 it's reasonableness. Every case lines up along that  
23 axis. And so -- and I -- I think that's the key point  
24 about Pickering.

25 And if I could, I just want to address a

1 couple other points.

2 JUSTICE ALITO: Well, I -- when -- when --  
3 when a union is bargaining about a matter of -- of  
4 public concern, you're saying that that's -- that is not  
5 the same as commenting on a matter of public concern?

6 GENERAL VERRILLI: No. What I'm saying is  
7 that it occurs in the context of the -- the collective  
8 bargaining relationship, which is a -- which is -- it  
9 has to be subject to a different set of constitutional  
10 standards. It has to be; because, think about it.

11 With respect to collective bargaining,  
12 there's a specialized channel of communication that the  
13 government sets up. The government controls who can  
14 speak, when the discussion's going to occur, and what  
15 topics can be discussed.

16 JUSTICE SCALIA: All of that is true.  
17 Nobody -- nobody denies that. But the problem is that  
18 it is not the same as a private employer, that what is  
19 bargained for is, in all cases, a matter of public  
20 interest. And that changes the -- that changes the  
21 situation in a way that -- that may require a change of  
22 the rule. It's one thing to provide it for private  
23 employers. It's another thing to provide it for the  
24 government, where every matter bargained for is a matter  
25 of public interest.

1           GENERAL VERRILLI: But I guess what I would  
2 say about that, Justice Scalia, what I read this Court's  
3 cases as saying in the employee speech context, in the  
4 employee petitioning context, in the political  
5 affiliation context, is that you -- yes, it's not wholly  
6 free of First Amendment scrutiny. But recognizing the  
7 government's interests as employer and prerogatives as  
8 employer, you apply reasonableness review and not the  
9 exacting scrutiny that applies when government is  
10 regulating as a sovereign regulator.

11           JUSTICE BREYER: I guess -- isn't it -- is  
12 -- you may know -- the case in which government as  
13 employer is most likely to want to control what the  
14 employee says and where he has the right to do that is  
15 likely to be a case that involves the institution's job,  
16 i.e., the public interest.

17           GENERAL VERRILLI: Yes. Certainly,  
18 certainly. That's why -- that's why I think there was  
19 no doubt in Garcetti that the speech was not a matter of  
20 public concern. And I could have said the same thing in  
21 Borough of Duryea and any number of these courts' other  
22 cases.

23           That's not the -- that's not the distinction  
24 the Court has drawn. The distinction the Court has  
25 drawn is between government acting as employer managing

1 the workforce, and the government as sovereign  
2 regulating the citizenry.

3 And I respectfully submit that that -- that  
4 that distinction applies with equal force here, and  
5 especially given the stare decisis considerations  
6 that -- that ought to govern this Court's decision in  
7 this context that that is more than sufficient to  
8 uphold, to reaffirm Abood. Because as I said, what this  
9 Court's cases have recognized through all the public  
10 employer context is the same principle for which Abood  
11 stands.

12 JUSTICE SOTOMAYOR: General, you seem -- and  
13 everybody seems to equate government subsidy with  
14 government speech. Do you think our cases give  
15 government subsidy the same analysis as they give  
16 compelled speech or compelled silence?

17 GENERAL VERRILLI: May I answer, Mr. Chief  
18 Justice?

19 CHIEF JUSTICE ROBERTS: Sure.

20 GENERAL VERRILLI: What I would say about  
21 that, Justice Sotomayor, is that in this context, the  
22 subsidy goes to the process of contract formation and  
23 contract administration within that collective  
24 bargaining context that I described earlier, that of  
25 necessity, a different First Amendment standard has to

1 apply to.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, General.

4 Three minutes, Mr. Carvin.

5 REBUTTAL ARGUMENT OF MICHAEL CARVIN

6 ON BEHALF OF THE PETITIONERS

7 MR. CARVIN: Thank -- thank you.

8 As to the absence of a factual record here,  
9 it's important to point out that we gave them an amended  
10 answer where they could make any allegation they wanted.  
11 And at page 4 of their so-called opposition, it said, to  
12 quote, "The unions do not oppose the entry of a judgment  
13 on the pleadings."

14 Why is that? Because they certainly -- it's  
15 their burden to argue, for example, that agency fees  
16 will lead to the demise of the union. But they didn't  
17 make any such allegation in their answer. They didn't  
18 make any such allegation in response to  
19 Justice Ginsburg's question, and they've got all the  
20 facts and terms of the union's fiscal well-being.  
21 That's because they can't make such an allegation in the  
22 real world.

23 How do we know that? Twenty-five states  
24 prohibit agency fees. Not one union. Read the amici.  
25 See if you can see one example of the union capitulating

1 because of that. The federal government doesn't allow  
2 agency fees. And only a third of the members are union  
3 members, and yet, that -- that union survives. Whereas  
4 here, we have 90 percent union membership, and  
5 Mr. Frederick said 90 percent of the nonmembers continue  
6 to contribute. So the notion that anything could happen  
7 adversely here simply doesn't square with things.

8           The notion that Abood put forth that there's  
9 some Federal policy in favor of agency fees is  
10 completely contrary to the fact. 29 U.S.C. 6 -- 164(b)  
11 allows -- excuse me -- prohibits agency fees if the  
12 State prohibits. So it allows states to prohibit agency  
13 fees. Conversely, it preempts states that seek to  
14 require agency fees.

15           So the Federal policy, not only with respect  
16 to their own workforce, but to the respect of the  
17 private workforce, is contrary to agency fees.

18           In response to Justice Kennedy's question,  
19 yes. There's a stark difference between single  
20 personnel decisions and group decisions. NTEU, which is  
21 a Pickering case, makes that quite clear. Even in the  
22 Pickering context when there was a general rule with  
23 respect to outside honorarium, the Court made it clear  
24 that the burden of justification is much higher. They  
25 haven't come close to this burden of justification,



1 because they can't possibly show that agency fees will  
2 lead to the end of the union.

3           And contrary to my brethren, that's the only  
4 thing that matters. We're talking about the -- the  
5 government's interest as an employer. All they care  
6 about, according to Abood, is having one union instead  
7 of two so they only have to speak to one person. They  
8 don't care about how robust or effective this union is.  
9 Indeed, if anything, they don't want them to be  
10 effective, because nobody wants a strong bargaining  
11 partner that's going to drive up public expenditures  
12 and -- and have a --

13           JUSTICE SOTOMAYOR: So what do you do with  
14 the law enforcement people who submitted their brief who  
15 said the unions actually do training. They provide  
16 equipment the county can't afford with fees. So  
17 they're -- what the -- the General has been saying is,  
18 we have to leave it to each State to decide, because  
19 with this kind of agency fee, there are things that  
20 unions can do that we would choose not to do.

21           MR. CARVIN: I am --

22           JUSTICE SOTOMAYOR: The unions in California  
23 do teacher training.

24           MR. CARVIN: Exactly, and they do fire  
25 training. They do safety training. Can you think of

1 something that's more a matter of public concern, that's  
2 more of an ideological point, that's more important?  
3 And yet they dismiss these as somehow prosaic issues.  
4 They're basic to our democracy, and that's why we have  
5 an absolute right not to subsidize it. No one's arguing  
6 that these --

7 JUSTICE SOTOMAYOR: Why? Why? If you're  
8 receiving the benefits of it, why? It's -- it's your  
9 benefit. You may disagree with that judgment --

10 MR. CARVIN: Right.

11 JUSTICE SOTOMAYOR: -- but -- and you -- and  
12 you can speak about it --

13 MR. CARVIN: Because there's --

14 JUSTICE SOTOMAYOR: -- but why is it hurting  
15 your First Amendment right if you can speak?

16 MR. CARVIN: There's a great ongoing debate  
17 about teacher training class size in education reform  
18 today. The unions have their right to take their side  
19 of that view. What they don't have a view -- is a right  
20 to demand that the other side subsidize their views on  
21 these essential questions of -- of basic public  
22 importance.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 The case is submitted.

25 (Whereupon, at 11:26 a.m., the case in the

1 above-titled matter was submitted.)  
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