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No. 11-681

IN THE

Supreme Court of the United States

PAMELA HARRIS, *et al.*,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is submitted on behalf of the National Education Association ("NEA"), the California Teachers Association ("CTA") and Change to Win. [1]

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges and universities. CTA is NEA's state affiliate in California, with approximately 300,000 members. NEA affiliates have collective bargaining agreements with more than 10,000 school districts, including more than 900 districts that have agreements with affiliates of CTA. Most of these agreements provide for agency fees.

NEA, CTA and several of their local affiliates are defendants in *Friedrichs v. California Teachers Association*, on appeal to the Ninth Circuit (No. 13-57095), which challenges a California law allowing school districts to enter into agency shop arrangements. Styling themselves the "California Public-School Teachers," the *Friedrichs* Plaintiffs have submitted an *amicus* brief in this case (the "Nonunion Teachers Br.").

Change to Win is a labor federation of three national and international labor unions—the International Brotherhood of Teamsters, the Service Employees International Union and the United Farm Workers of

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[1] Blanket consents from all parties for the filing of *amicus* briefs are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

America—which collectively represent approximately 3.5 million working men and women throughout the United States. Among the workers represented by Change to Win affiliates are hundreds of thousands employed by state and local governments throughout the country. Change to Win affiliates have collective bargaining agreements with several thousand state and local governments, most of which provide for agency fees.

Because petitioners and their *amici* ask this Court to hold that public employee agency shop arrangements are unconstitutional, NEA, CTA and Change to Win have a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

Principles of federalism command respect for a State's decision to manage its personnel relations through a system of collective bargaining with an exclusive representative chosen by a majority of the affected employees and to require all employees to pay a share of the costs of representation. That the First Amendment does not deny a State that right is established by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which has been followed by this Court, both as to its result and its reasoning, in numerous subsequent decisions.

The critiques of *Abood* that are advanced by petitioners and their *amici* lack merit.

Properly understood, collective bargaining is not a "petition for redress of grievances." And if it were, for a State to bargain with an exclusive representative does not deprive employees of any right to petition the government they otherwise could exercise.

Nor does exclusive representation impair freedom of association. Employment necessarily requires association. A government employer's decision to set terms and conditions of employment through collective bargaining with an exclusive representative, in furtherance of its interests as a proprietor, does not coerce association in violation of the First Amendment, where employees are not required to join the union, attend meetings or otherwise act in concert with the union, and their ability to convey their own messages on any subject is not restricted.

In some cases an exclusive bargaining representative may pursue objectives in collective bargaining to which a particular employee is opposed – although petitioners have not alleged that here. But an agency fee requirement does not force such an employee to subsidize speech to which he is opposed. Collective bargaining and contract administration are economic *activities*, as to which employees are charged a fee not to support what a union *says*, but to contribute toward what collective bargaining *produces* – an enforceable agreement from which all employees benefit.

If an agency shop nevertheless were considered to involve compelled subsidization of speech, there still would be no basis for strict scrutiny. In other "compelled subsidization" cases, the Court has required only that the private speech be connected to a legitimate government purpose. And, where the government is acting as *employer*, pursuing its proprietary interests in managing its operations, strict scrutiny is all the more out of place.

ARGUMENT

I. UNDER THE APPROACH THIS COURT CONSISTENTLY HAS TAKEN TO FINANCIAL SUPPORT OF COLLECTIVE ECONOMIC ACTIVITY, THE FIRST AMENDMENT DOES NOT PREVENT A STATE FROM SETTING TERMS AND CONDITIONS OF EMPLOYMENT BY AGREEMENT WITH AN EXCLUSIVE REPRESENTATIVE AND REQUIRING ALL EMPLOYEES TO PAY A SHARE OF THE COSTS OF REPRESENTATION

The decision of a state or local government to authorize a system of collective bargaining with an exclusive representative selected by a majority of the affected workforce is a decision made by the government as a proprietor, managing its internal operations. Principles of federalism counsel against denying state and local governments the right to make that choice. This Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that the First Amendment does not foreclose this choice. *Abood's* holding has consistently been followed, and its reasoning reaffirmed, in the context of exclusive representation for collective bargaining and in numerous other contexts as well. Reconsideration of this settled body of law is not warranted.

A. Principles of Federalism Counsel Against Countermanding a State's Choice to Adopt a Personnel System that Provides for Collective Bargaining With An Exclusive Representative Chosen By a Majority of Affected Employees.

1. A public employer is nonetheless an employer. A public school, hospital or transit system – no less

than a private school, hospital or transit system – must hire, train, manage, discipline and retain a skilled workforce, and must provide compensation that is fair and competitive.

As with many challenges that face state or local governments, "considerable disagreement exists about how best to accomplish th[ose] goal[s]." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Some jurisdictions have opted to make all personnel decisions unilaterally, in part by *ad hoc* decisionmaking and in part by prescriptive lawmaking in the form of statutes and regulations. But other jurisdictions have made the judgment that there are advantages to public employers, as well as to employees, in a system under which terms and conditions of employment are the product of agreement rather than fiat. In these fundamental differences of approach to personnel relations, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.*

A government may reasonably determine that a system of collective bargaining with an exclusive representative chosen by a majority of the employees in an appropriate unit offers the best way to conduct its personnel relations. That "'principle of majority rule' . . . is in fact the central premise" of the National Labor Relations Act. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (quoting *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975)). Congress enacted that statute with the understanding that "it is practically impossible to apply two or more sets

of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, [and therefore] the making of agreements is impracticable in the absence of majority rule." Sen. Rep. No. 573, 2 Leg. Hist. of the NLRA 2313 (1935). And Congress observed that, "by long experience, majority rule has been discovered best for employers as well as employees." *Id.*

Many States have made a similar judgment with respect to the management of their own workforces. For example, in 1996, the Maryland Department of Labor, Licensing and Regulation issued a report "to review policy issues and policy options pertinent to the introduction of comprehensive legislation to authorize collective bargaining for Maryland public employees." Maryland Dept. of Labor, Licensing and Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 1 (Jan. 1996) (copy lodged with the Clerk). The report cited analyses in which "increase[d] worker involvement in decision making" was both "seen as a worthy end in itself" and "viewed as crucial to achieving the [employer's] larger economic goals," such that "many managers, labor leaders, and government officials have come to believe that tapping worker knowledge and energy is the key to overcoming our problems of competitiveness." *Id.* at 27-28 (quoting Adrienne Eaton and Paula Voos, "Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation," in Lawrence Michel and Paula Voos, eds., *Unions and Economic Competitiveness* 173 (1992)). The report extolled the value of "public sector participatory management" aimed at "forging an effective partnership between labor and

management so as to achieve public goals more effectively and efficiently," with collective bargaining serving as "a positive instrument" to that end. *Id.* at 1-2. It cited studies showing positive impacts on productivity, job performance and accountability stemming from public sector bargaining. *Id.* at 28-31.

Similar conclusions were reached by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor Management Corporation, in its report entitled *Working Together for Public Service* (1996) (available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1254&context=key_workplace). Citing dozens of instances where collective bargaining in the public sector resulted in "better service," "more cost-effectiveness," and "better quality of work life," as well as "improved labor-management relations," *id.* at 2, the report concluded that "collective bargaining relationships, applied in cooperative, service-oriented ways, provide the most consistently valuable structure for beginning and sustaining a workplace partnership with effective service results." *Id.* at 70.

More than two-thirds of the States have chosen to authorize a system of exclusive representation for collective bargaining, reasonably believing, among other things, that this will enhance employee morale and commitment, enable the employer better to ascertain employee needs and priorities so that compensation dollars will be best spent, and provide the most effective means of bringing the expertise of the workforce to bear on improving the delivery of services to the public. Exclusive representation also enables public employers to fashion grievance arbitration systems through which employee disputes can be resolved fairly and expeditiously, with decision-

making authority lodged in a union charged to act in the best interests of the unit as a whole, consistent with its duty of fair representation "on which the employer with whom it bargains may rely." *Bowen v. U. S. Postal Serv.*, 459 U.S. 212, 226 (1983).

2. Whether to authorize a system of collective bargaining is a decision made by a government "as proprietor, to manage [its] internal operation," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)), exercising "the extra power" that "comes from the nature of the government's mission as employer," *id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion)). The choice a State makes is based on its own circumstances and what it sees as the best way to conduct its personnel relations, with each state determining which agencies and instrumentalities should be authorized to engage in collective bargaining[2] and which subjects should be included in or excluded from the process.[3]

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[2] Some States have comprehensive statutory collective bargaining regimes that apply broadly to most of the States' own employees as well as to employees of the States' agencies and political subdivisions. *See*, *e.g.*, Alaska Stat. Ann. §§ 23.40.070-23.40.260; Ohio Rev. Code Ann. §§ 4117.01-4117.23. Other States have specific statutory regimes that apply to particular classes of public employees, such as teachers (*e.g.*, Ind. Code §§ 20-29-1-1-20-29-9-5), police (*e.g.*, Ky. Rev. Stat. § 78.470), firefighters (*e.g.*, Wyo. Stat. Ann. §§ 27-10-101-27-10-109), or state employees (*e.g.*, Neb. Rev. Code §§ 81-1369-81-1388).

[3] Public sector bargaining statutes and ordinances that define the scope of bargaining, and the administrative and judicial decisions applying these statutes and ordinances, vary from jurisdiction to jurisdiction. *See generally* Harry T. Edwards,

"Both federalism and separation-of-powers concerns would be implicated," *Minn. State Bd. v. Knight*, 465 U.S.

The Emerging Duty to Bargain in the Public Sector, 71 Mich. L. Rev. 885, 909-10 (1973). In addition, in some jurisdictions, certain subjects that might otherwise fall within the scope of collective bargaining are addressed by specific statutes that leave no room for bargaining. For example, Indiana's statutory regime for teacher collective bargaining provides for mandatory bargaining over salary, wages and related fringe benefits, *see* Ind. Code § 20-29-6-4-(a), but expressly prohibits bargaining over the criteria for selecting teachers to be laid off in the event of a reduction in force, *see id.* 20-28-7.5-1(d). Increasingly, jurisdictions have concluded that certain subjects are best addressed through an approach that provides a role both for collective bargaining and for other processes. For example, in response to the U.S. Department of Education's "Race to the Top" initiative, several States have enacted legislation that establishes criteria and procedures for teacher evaluation and dismissal but provides a role for collective bargaining in their refinement and implementation. *See, e.g.*, Ill. Pub. Act 96-861 (Jan. 15, 2010) (prescribing minimum standards for incorporating "data and indicators on student growth as a significant factor in rating teacher performances", but allowing specific implementation of those standards to be accomplished through collective bargaining); Ill. Pub. Act 97-8, § 5 (June 13, 2011) (prescribing minimum standards for alternative teacher dismissal procedures but allowing for more rapid development and implementation of such procedures through collective bargaining); N.Y. Educ. Law § 3012-c (mandating that teacher evaluations include "locally selected measures of student achievement" that are developed through collective bargaining but must comport with certain minimum requirements set by regulation); 2010 Md. Laws Ch. 189, § 1 (May 4, 2010) (allowing for collective bargaining over performance evaluation criteria that include "data on student growth as a significant component of the evaluation," but requiring implementation of a default "model performance evaluation criteria" in the event that "a local school system and the exclusive employee representative fail to mutually agree" on negotiated criteria).

271, 285 (1984), by any doctrine that would override these decisions made by the several states as employers. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (in challenges to decisions made by a state government in the management of its own affairs, "[r]estraint . . . is also counseled by considerations of state sovereignty").

B. The Constitutionality of the Public Sector Agency Shop is Firmly Established by Precedent That Has Repeatedly Been Reaffirmed By This Court in the Union Context and Elsewhere.

A government that authorizes collective bargaining with an exclusive representative necessarily must consider how the expenses that flow from the representative's "great responsibilities," *Abood*, 431 U.S. at 221, will be met. As the Court recognized in *Abood*, *id.*:

> The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money . . . . The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . . , union and nonunion,' within the relevant unit.

Collective bargaining by an exclusive representative could not successfully serve the "important government interests," *id.* at 225, for which it has been authorized if the exclusive representative were not adequately funded; and, if employees were free to share in the benefits of the representative's efforts at no

charge, adequate funding obviously would be imperiled. It therefore is common for a public employer to require all members of a bargaining unit to contribute to the costs of representation.

Abood held this to be constitutional "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," *id.* at 225-26, so as "to distribute fairly the cost of these activities among those who benefit, and [to] counteract[ ] the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees," *id.* at 222. At the same time, *Abood* held that objecting nonunion employees cannot be required to provide financial support "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.

In its numerous subsequent decisions involving exclusive representation for collective bargaining, this Court has adhered to *Abood's* holding. [4] In *Lehnert*, the

[4] *See Locke v. Karass*, 555 U.S. 207, 210, 213 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 873 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516-21, 524-25 (1991); *id* at 552-53, 556-57; (Scalia, J., concurring in the judgment in part and dissenting in part); *Chi. Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 301-02 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 456-59 (1984); *Minnesota State Bd. v. Knight*, 465 U.S. 271, 278, 290-92 (1984); *id.* at 299-300 (Brennan, J., dissenting); *id.* at 315-16 (Stevens J; dissenting); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50 (1983).

permissibility of the public sector agency shop was reaffirmed both in the opinion of the Court, 500 U.S. at 516-18, and in Justice Scalia's separate opinion, *id.* at 556 (Scalia, J., concurring and dissenting). Justice Scalia explained that the Court's "First Amendment jurisprudence . . . recognizes" that, although the government cannot ordinarily compel support for a private entity, "th[e] constitutional rule" allowing for mandatory support for an exclusive bargaining representative is "justifie[d]" by the union's "distinctive" duty as the statutory representative of all members of a bargaining unit. *Id.* So too in *Locke*, decided four years ago, the Court was unanimous in recognizing that the constitutionality of requiring "both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent" is established as a "general First Amendment principle." 555 U.S. at 209, 213.

Abood also has been the source of the First Amendment analysis this Court has applied in other contexts where individuals are required to support activities undertaken in furtherance of "an otherwise proper goal requiring … cooperative activity." *United States v. United Foods*, 533 U.S. 405, 414 (2001). In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court relied on *Abood* in upholding mandatory bar dues – although the Court found the question to be closer than in *Abood*, because "[t]he members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management." *Id.* at 12. *See also Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S 217, 231 (2000) ("The principles outlined in *Abood* provided the foundation for our later decision in *Keller.*") And, in cases involving generic advertising of agricultural products, the Court has relied on *Abood*

in holding that growers can be required to support such advertising where it is "'germane' to a 'broader regulatory scheme'" involving collectivized production and marketing. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (quoting *United Foods*, 533 U.S. at 413, 415-16). *See also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

In *Knox v. Service Employees International Union*, 132 S. Ct. 2277, 2290 (2012), the Court stated in *dictum* that "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." And so it does, at the highest level of generality, because other organizations that provide benefits to nonmembers generally are not enabled by law to collect fees from those nonmembers. *Id.* But as the Court stated in *Knox*, this "anomaly" has been "found to be justified." *Id.* The *Knox* Court did not take issue with that proposition, or with the explanation offered by Justice Scalia in *Lehnert* as to why this apparent anomaly is "justified" by "[w]hat is distinctive about the 'free riders' who are nonunion members of the union's own bargaining unit," namely, that "*they* are free riders whom the law *requires* the union to carry – indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting) (emphasis in original).

Petitioners and their *amici* nevertheless ask this Court to overrule *Abood*, declaring that *Abood* and its progeny "failed to give adequate recognition to First Amendment rights." Brief for Petitioners ("Pet. Br.") at 18. There is no reason for the Court to reconsider the long-established and oft-reaffirmed holding of *Abood* –

least of all in this case, where the contention that *Abood* should be overruled was not asserted in the courts below or in the petition for certiorari. But, however the issues may be framed, it is important to be clear that *Abood* did *not* fail to give "adequate recognition to First Amendment rights." Rather, as we explain in what follows, the arguments advanced by petitioners and their *amici* regarding what they believe the Court failed to "recogni[ze]" in *Abood* are contrary to this Court's First Amendment jurisprudence both as it stood when *Abood* was decided and as it stands today.

II. ABOOD WAS RIGHTLY DECIDED, AND THE ATTACKS ON THE DECISION BY PETITIONERS AND THEIR *AMICI* LACK MERIT

Attempting to portray *Abood* as out of step with this Court's First Amendment jurisprudence, petitioners and their *amici* refer only in passing to the several cases, noted above, that have addressed mandatory support for collective activities, all of which follow and support *Abood*. *See supra* at 11-13. Instead, petitioners and their *amici* rely on various decisions from further afield. In so doing, at every turn they mischaracterize and exaggerate the purported effect of an agency shop on First Amendment interests, and fail to acknowledge the deference that is owed to a state or local government when, in its proprietary capacity, it makes judgments as to how best to manage its workforce.

A. An Agency Shop Does Not Deprive Employees of Any Right to Petition the Government They Otherwise Could Exercise.

Petitioners and their *amici* assert that exclusive representation deprives employees of rights to "peti-

tion the government" they otherwise could exercise. *See* Pet. Br. at 30-31; Nonunion Teachers Br. at 17-18. That is not the case.

1. Even if a demand "addressed to the government in its capacity as the petitioners' employer," *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2506 (2011) (Scalia, J., concurring and dissenting), could in some instances constitute a First Amendment "petition for redress of grievances," *but see id.*, petitioners do not explain why collective bargaining – a process to forge, by give and take, a contract setting economic terms and imposing commitments on both the employer and the union – should constitute a First Amendment "petition," unless every proposal by a prospective government contractor is to be so considered.

But, even assuming *arguendo* that collective bargaining is "petitioning" for First Amendment purposes, there still is no substance to the suggestion that an agency shop deprives nonmember employees of rights to petition the government that otherwise would exist. Public employees "have no constitutional right to force the government to listen to their views," *Knight*, 465 U.S. at 283, any more than a *union* has a constitutional right to force the government to listen to *its* views. *See Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979). Rather, in conducting its business as an employer, "[a]bsent statutory restrictions, the state must be free to consult or not to consult whenever it pleases." *Knight*, 465 U.S. at 285. *See also Borough of Duryea*, 131 S. Ct. at 2495-2500 (assuming collective bargaining processes are "petitioning" activities, an employee's "petitioning" interests are subordinate to the government's interests in the efficiency of its personnel operations). And in exercising that discretion, it has not been the

practice of Illinois, or of the states generally, to engage in bargaining with individual employees. Indeed, petitioners do not allege that, prior to the advent of the exclusive representation system, Illinois bargained with them individually over their wages or anything else.

2. At the same time, notwithstanding the absence of any right to *bargain* with their employer, "[i]ndividual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace." *Lehnert*, 500 U.S. at 521. Both where collective bargaining is in force and where it is not, governments often provide that final decisions regarding terms and conditions of public employment will be made through procedures in which the public, including individual employees, may participate. "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities." *Abood*, 431 U.S. at 236. To the extent that legislative or administrative action is required to give effect to a collective bargaining agreement, an employee who opposes a union's contract demands may "communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract . . . demands." *City of Madison v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 n.10 (1976).

Thus "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about government decisions concerning labor relations." *Abood*, 431 U.S. at 230. Notwithstanding the rhetoric in their brief, petitioners do not allege that

they have been muzzled in any respect. *See* Pet. App. 30a ("[T]he Complaint is bereft of any allegation that the Plaintiffs are prevented from independently lobbying the State for any purpose.")

B. A Public Employer's Authorization of Exclusive Representation For Purposes of Collective Bargaining Is Not Subject to Strict Scrutiny.

Arguing that exclusive representation violates the First Amendment right of association, petitioners rely on the line of cases that includes *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). But those cases dealt with mandatory *membership*, which obviously amounts to forced association. That is not the case with exclusive *representation*, where an employee is not forced to become a member of the union, to attend union meetings, or otherwise to act in concert with the union.

This Court said as much in *Knight*, explaining that nonmember employees' "associational rights . . . have not been infringed" by the state's "restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative," because "[t]he state has in no way restrained [employees'] freedom to associate *or not to associate* with whom they please, including the exclusive representative." *Knight*, 465 U.S. at 288 (emphasis added). In 1983, this Court considered the matter so free of doubt that it summarily affirmed a decision that "rejected . . . [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood*." *Knight*, 465 U.S. at 278 (describing *Knight v. Minn.*

Cmty. Colls. Faculty Ass'n, 460 U.S. 1048 (1983)). And in *Knight*, where exclusive representation was upheld not only with respect to collective bargaining but also with respect to "meet and confer" sessions concerning questions of policy, even the Justices who dissented on the latter point agreed that "there is no dispute that Minnesota may limit the process of negotiation on the terms and conditions of public employment to the union that represents the employees in a given collective bargaining unit." *Id.* at 301 (Stevens, J., dissenting). *See also id.* at 300 (Brennan, J., dissenting) ("As we have often recognized, the use of an exclusive union representative is permissible in the collective-bargaining context because of the state's compelling interest in reaching an enforceable agreement.").

The Court's affirmation of the constitutionality of exclusive representation in *Abood* and *Knight* is not in tension with *Roberts* and its progeny. The *Roberts* line of cases is concerned with regulations which, by requiring a group to accept members it does not want, "may impair the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623. Those decisions reason that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association *if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.*" *Dale*, 530 U.S. at 648 (emphasis added).[5] But an agency shop,

[5] As Justice Alito has explained, because "a group's First Amendment right of expressive association is burdened by the 'forced inclusion' of members whose presence *would 'affec[t] in a significant way the group's ability to advocate public or private viewpoints'* [, the] Court has *therefore* held that the

which does *not* compel membership, does not impair employees' ability to communicate their own messages. "A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint . . . in public or private orally or in writing." *Abood*, 431 U.S. at 230. Employees remain free "to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public . . . ." *City of Madison*, 429 U.S. at 175-76 & n.10.

Equally to the point, *Roberts* and its progeny do not speak to association that is required incident to the government's business as an *proprietor*. All employment involves association, and government employment necessarily requires association under terms set by the government. Standards that apply where, as in *Roberts* and *Dale*, the government imposes mandatory membership requirements that have nothing to do with the government's own operations, are not on point in assessing choices that are made by the government pursuant to its interests and powers as a proprietor to ensure the efficient operations of and among its employees and/or contractors. *See supra* at 8-10; *infra* at 28-31.[6]

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government may not compel a group that engages in 'expressive association' to admit such a member unless the government has a compelling interest, 'unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.'" *Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 3014 (2010) (Alito, J., dissenting) (emphasis added) (quoting *Dale*, 530 U.S. at 648, in turn quoting *Roberts*, 468 U.S. at 623).

[6] In *Christian Legal Society*, which presented a related context where the government's proprietary interests (in control

This case likewise bears no resemblance to *Elrod v. Burns*, 427 U.S. 347 (1976), cited in the Brief for Petitioners at 46. In *Elrod*, as in the *Roberts* line of cases, the challenged practices impeded self-expression and association: an individual could "maintain[] affiliation with his own party [only] at the risk of losing his job," 427 U.S. at 355, and "[h]e works for the election of his party's candidates and espouses its policies at the same risk," *id.* Furthermore, as the Court later explained in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n. 4 (1990), the patronage practices at issue in *Elrod*, although concerned with employment, were not based on "interests that the government has in its capacity as an employer." *See also Elrod*, 427 U.S. at 366 (patronage discharges could not be justified "as a means of furthering government effectiveness and efficiency").[7]

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over its property) were implicated, this Court held that only a requirement of reasonableness and viewpoint neutrality – *not* Roberts' requirement of strict scrutiny – applies to a compelled-membership rule that is adopted by the government in furtherance of "a State's right 'to reserve the property under its control for the use to which it is lawfully dedicated.'" 130 S. Ct. at 2984. That is the case even where the compelled membership "makes it difficult for certain groups to express their views in a manner essential to their message." *Id.* at 2999 (Kennedy, J., concurring). This Court followed a quite similar approach in assessing and affirming a government's right, in service of its interest in efficient collective bargaining to reserve its property for the communications of the designated exclusive representative, as that representative was viewed by this Court as fulfilling "official responsibilities" within the government's personnel system. *See Perry*, 460 U.S. at 51.

[7] In *Kusper v. Pontikes*, 414 U.S. 51 (1973), also cited in Pet. Br. at 46, an individual who wished to affiliate with a

Consequently, although the governmental interests served by exclusive representation for collective bargaining may properly be characterized as "compelling," *see Knight*, 465 U.S. at 299 (Brennan, J., dissenting on other issues), or "vital," *Keller*, 496 U.S. at 13 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455-456 (1984)), the compelling-interest standard discussed in *Roberts* is simply not applicable here. This Court's determination in *Abood* that the governmental interests served by exclusive representation are "important," 431 U.S. at 225, therefore is sufficient to justify exclusive representation – even if, contrary to *Knight*, this were considered to involve some limitation on freedom of association. *See Lathrop v. Donohoe*, 367 U.S. 820, 843 (1961) (requiring attorneys to be members of an integrated bar and to pay bar dues did not work "any impingement upon protected rights of association" because the State "might reasonably believe" that this served "a legitimate end of state policy"); *United Foods*, 553 U.S. at 414 (the question is whether there is "an otherwise proper goal requiring the cooperative activity").

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political party was impeded by a law that "substantially restrict[ed] an Illinois voter's freedom to change his political party affiliation." 414 U.S. at 57. The case therefore involved "[e]lection regulations that impose a *severe* burden on associational rights," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (emphasis added), which are subject to strict scrutiny, unlike election regulations that impose lesser burdens on associational interests, which will be sustained as long as they are "reasonable [and] nondiscriminatory," *id.* at 452 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

C. An Agency Shop Does Not Involve Impermissible Subsidization of Speech.

1. Although petitioners' *amici* compare an agency shop to cases of "compelled speech" such as *Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977),[8] petitioners themselves make no such contention, and do not mention *Barnette* or *Wooley*. For good reason: a "compelled-speech violation" can be found only where "the complaining speaker's own message was affected by the speech it was forced to accommodate," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), and that is not the case with an agency shop.[9]

So too, although some of petitioners' *amici* maintain that an agency shop "coerc[es] citizens to financially support speech they oppose," Nonunion Teachers Br. at 6, petitioners have not alleged, in their complaint or in their briefs, that they disagree with any position the union has taken in bargaining (not to mention in grievance handling and other activities) apart from the

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[8] *See* Nonunion Teachers Br. at 16; Brief *Amicus Curiae* of Center for Constitutional Jurisprudence, *et al.* ("CCJ Br.") at 4, 8.

[9] Although the compelled speech doctrine may extend to some situations in which speech is *attributed to* an individual who is not himself forced to speak, *see Johanns*, 544 U.S. at 565-66, there is no risk that the positions taken by a union will be attributed to an employee who has declined to join the union, merely because he has been required by his employer to pay an agency fee. An agency shop therefore presents none of the features of a compelled-speech claim. *See id.* at 565 n.8; *Rumsfeld*, 547 U.S. 64-65; *PruneYard Shopping Ctr. v. Robins*, 447 US. 74, 88 (1980).

agency fee requirement itself. After all, the union's bargaining has been directed at improving wages and benefits, and although it is conceivable that some employees might oppose improvements in their wages and benefits, as far as we are aware there are no cases in which nonunion employees have testified that that is the basis of their objection to paying agency fees.

Moreover, "[t]here are no allegations that the fair share fees here are used to support any political or ideological activities." Pet. App. 35a.[10] In some cases, of course, a union may negotiate contract provisions to

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[10] *Abood* established that nonmembers cannot be required to contribute to such activities. The assertions of petitioners' *amici* regarding union political expenditures therefore are beside the point. For example, none of the political expenditures of CTA that are described at pp. 16, 19-20 of the CCJ Brief were treated as chargeable. Indeed, for 2012-13, only 65.4% of CTA's agency fee, and only 40.0% of NEA's agency fee, was charged to objectors. The Nonunion Teachers nevertheless assert that the fees paid to state and national organizations must be to further "non-bargaining-related political objectives," because those organizations have "no connection to local collective bargaining." Nonunion Teachers Br. at 29. That is incorrect. National unions like NEA often provide substantial grants to state and/or local affiliates to enable those affiliates to employ qualified negotiators, and state and national unions like CTA and NEA spend large sums on research and other services that local affiliates draw upon in bargaining.

Some of the *amici* suggest that the line between chargeable and nonchargeable activities can be difficult to draw. But this Court has made a similar observation regarding the line between matters of public concern and matters of private concern. *Garcetti v. Ceballos*, 475 U.S. 410, 418 (2006). That "conducting these inquiries sometimes has proved difficult," *id.*, does not distinguish this from other areas of First Amendment law.

which some individuals object on religious or ideological grounds, as with *Abood*'s example of an employee whose "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." 431 U.S. at 222. But even there, it generally will be the case that the union has devoted far more resources to negotiating items of which the employee *approves*, such as higher wages or the medical plan as a whole. Such an employee will have recognized the "benefits of union representation," *Abood*, 431 U.S. at 222, and cannot fairly be considered to have been injured by the requirement that he pay a *pro rata* share of the costs of the Union's beneficial efforts on his behalf merely because he would have preferred that one provision of the collective bargaining agreement had been different. And of course, absent collective bargaining, the employer would design its medical plan unilaterally and might make any number of choices that an individual employee would find objectionable.

If, on the other hand, an employee does not believe that union representation is worth the money he is required to pay for it, that is not in itself a disagreement of constitutional dimension, because the First Amendment gives a public employee grounds for objecting to an employment requirement only where speech involves a matter of *public concern*. *Borough of Duryea*, 131 S. Ct. at 2493; *Connick v. Myers*, 461 U.S. 138, 147 (1983).

2. It would be wrong in any event to maintain that where an employee *does* oppose positions a union has pursued in collective bargaining, an agency fee requirement compels him to *subsidize speech* to which he is opposed.

"[C]ollective bargaining, and related activities such as grievance arbitration and contract administration, are *part and parcel of the very economic transactions* between employees and employers that [the government] can regulate." *Glickman*, 521 U.S. at 484 (Souter, J., dissenting) (emphasis added). This case therefore is easier that *Glickman*, *United Foods* and *Johanns*, where the public advertising at issue was pure speech. To treat collective bargaining and contract administration as speech merely because they "often include[ ] elements of speech," *Rumsfeld*, 547 U.S. at 61, would be no more correct than to "[deem it] an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed,'" *id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The Nonunion Teachers therefore get things right when they characterize "grievance representation" as a "non-speech [function]." Nonunion Teachers Br. at 20. But that is true of collective bargaining as well, which often involves more in the way of research, analysis and strategizing than in the assertion of positions and messages. For, whatever may be the amount of speech that takes place in the course of a particular round of bargaining, employees are required to contribute to the costs of their union's collective bargaining not because of what the union *says* in that process but because of what it *produces* – a collective bargaining agreement.

Thus, agency fees are charged because a union "deliver[s] services." *Lehnhert*, 500 U.S. at 556 (Scalia, J., concurring and dissenting). The representation for which a nonmember pays an agency fee has "the na-

ture of a prepaid . . . consulting or legal services plan," *id.* at 563 (Kennedy, J., concurring and dissenting), whereby services are provided "pursuant to an arrangement that is akin to an insurance policy," *Locke*, 555 U.S. at 222 (Alito, J., concurring).[11] It mischaracterizes the situation to maintain that a nonmember is paying a fee to subsidize positions the union takes in grievances for other employees; it would be more accurate to say that the nonmember is securing the right to representation in his own behalf in the event that he should become the victim of a contract violation. By the same token, an employee may be required to pay a *pro rata* share of the union's bargaining costs, not to subsidize whatever messages the union may communicate in the course of bargaining, but to secure the benefits of the agreement that is bargained, in which the employee will share.[12]

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[11] Those cases were referring to the affiliation fee a local union pays to its national parent organization, a *pro rata* share of which is included in the agency fee. But the characterization holds true with respect to a local union's own charges as well.

[12] Challenges to agency fees, to the extent that they spring from anything more than a desire for a free ride, often are predicated on objections to the terms of an employee's collective bargaining agreement rather than on objections to speech by the union as such. For example, the Nonunion Teachers "object to collective-bargaining contracts [which they regard as] geared toward protecting middling employees at their expense." Nonunion Teachers Br. at 21. But such an objection to terms of a collective bargaining agreement has no more traction as a First Amendment claim than would an objection to the agricultural marketing orders in *Glickman.* Comparing themselves to the mushroom growers in *United Foods* who believed that they produced superior mushrooms, the Nonunion Teachers, who "believe they have superior skills," *id.*, get *United Foods*

Furthermore, in the agricultural marketing cases, the government required growers to subsidize generic advertising because it agreed with the ads' message "that [the products] are worth consuming whether or not they are branded." *United Foods*, 533 U.S. at 411. Thus the government sought to impose "special subsidies for speech on the side [of a disputed issue] that it favors." *Id.* But a government does not provide for exclusive representation and agency fees because it agrees with the positions that are espoused in bargaining by a particular union or by unions generally. On the contrary, "the basic assumption underlying collective bargaining in both the public and private sector," *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983), is that "[t]he parties – even granting the modification of views that may come from a realization of economic interdependence – still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960). As with the access to the school mail system that was reserved to the exclusive bargaining representative in *Perry*, a government authorizes payment of agency

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backwards. A First Amendment violation was found in that case not because the government had subjected mushroom growers to a collectivized regime of production and marketing, but because, unlike in *Glickman*, the government had *not* done so, but nevertheless had required the growers to pay for collective public advertising. *See United Foods*, 533 U.S. at 412-15. *See also Johanns*, 544 U.S. at 558 (*United Foods* recognized that "*Abood* and *Keller* would permit the mandatory fee if it were 'germane' to a 'broader regulatory scheme'") (citation omitted); *id.* at 558 n.3 (*Glickman* "agreed . . . that compelled support for generic advertising was legitimately part of the Government's 'collectivist' centralization of the market for tree fruit.").

fees to an exclusive representative "based on the *status* of the . . . union[ ] rather than [its] views." 460 U.S. at 49 (emphasis in original).

3. If an agency shop nevertheless were considered to involve compulsory subsidization of speech, *Abood* was correct in concluding that any impact on First Amendment interests that may be presented is justified by "[t]he governmental interests advanced by the agency-shop provision." *Abood*, 431 U.S. at 224.

a. In the first place, compelled *subsidization* is not equivalent to compelled *speech*. Where the government itself dictates speech, compelled subsidization is *permitted*, whereas compelled speech is generally *prohibited*. *See Johanns*, 544 U.S. at 562-63, 564-65 n.8. And where the government facilitates *private* speech as part of a governmental program, such compelled subsidization is impermissible only if the speech is "unconnected to *any legitimate government purpose*." *Id.* at 565 n.8 (emphasis added). *Cf. Southworth*, 529 U.S. at 232 (assessment of student activity fees, where it was "all but inevitable that the fees [would] result in subsidies to speech which some students find objectionable and offensive to their personal beliefs," was permissible in light of the public university's "significant interests").

This Court's decisions thus lend no support to the notion that claims of compelled subsidization are subject to strict scrutiny as a general matter – much less where any speech that is being subsidized is "part and parcel of" lawful economic transactions.

b. Petitioners' argument for strict scrutiny fails for another equally fundamental reason. "[G]overnment has significantly greater leeway in its dealings

with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Borough of Duryea*, 131 S. Ct. at 2497 (quoting *Engquist*, 553 U.S. at 599). The government's decisionmaking as employer is suffused with "substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees." *Id.* at 2495. *See Waters*, 511 U.S. at 674-75 (plurality opinion) (the government must be afforded "extra power … in this area" so that it may carry out its operations "as effectively and efficiently as possible"). *See also Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) ("if the [g]overnment is to perform its responsibilities effectively and economically …, [it] must have wide discretion and control over the management of its . . . internal affairs").

This principle extends to "many contexts, with respect to many different constitutional guarantees." *Rutan*, 497 U.S. at 94 (1990) (Scalia, J., dissenting). The First Amendment is no exception. Although private citizens cannot be punished for "speech of merely private concern," government employees certainly can. *Id.* at 95 (citing *Connick*, 461 U.S. at 147). Similarly, speaking about politics and other issues of public concern are at the heart of the First Amendment's protections, and it goes without saying that private citizens cannot be punished for those activities. *See Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Yet, public employees can be dismissed for engaging in purely political speech or association. *See Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (upholding the Hatch

Act's prohibition on taking "any active part in . . . political campaigns"). And, they can be punished for engaging in speech on a matter of public concern that impairs the "efficiency of the public services [the government] performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).[13]

Because public employees thus must accept certain restrictions on First Amendment rights due to "the consensual nature of the employment relationship and . . . the unique nature of the government's interest," *Borough of Duryea*, 131 S.Ct. at 2494, petitioners' call for strict scrutiny is utterly without foundation. *See Rutan*, 497 U.S. at 98 (Scalia, J., dissenting) ("Th[e] strict-scrutiny standard finds no support in our cases.").[14] Far from requiring the

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[13] Petitioners' perverse attempt to use the *Pickering/Connick* line of cases to confine collective bargaining to matters that are not of public concern, *see* Pet. Br. at 28-31, misses the mark entirely. It is *not* the case, as petitioners would have it, that the interests of the government as employer cannot support restrictions on speech or association that involve matters of public concern. On the contrary, activity that surpasses the "public concern" threshold may be restricted to the extent that it interferes with the "countervailing interest of the government in the effective and efficient management of its internal affairs." *Borough of Duryea*, 131 S.Ct. at 2500; *see also Garcetti*, 547 U.S. at 420. In numerous cases, the Court has upheld restrictions on public-employee speech and association touching on matters of the utmost public concern, requiring only that the government's efficiency-based justifications for the restrictions were reasonable. *See Connick*, 461 U.S. at 149-54; *Mitchell*, 330 U.S. at 101.

[14] In *Rutan*, the opinion of the Court, while stating no view as to whether Justice Scalia was "correct that less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal operations," found

government to show that its interest in the efficient operation of its affairs is "compelling," this Court consistently has held that governments are "granted the widest latitude" in ordering their affairs, *Sampson v. Murray*, 415 U.S. 61, 83 (1974), and that restrictions on public-employee speech imposed in that capacity need only be reasonable. *See Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980) ("[A] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government."); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) ("[T]his Court's cases make clear that . . . [a government employer] could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."); *Mitchell*, 330 U.S. at 101 ("[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service").[15]

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this to be of "no relevance" to the patronage practices challenged in *Rutan*, because the Court concluded that the interests offered in justification of those practices "are not interests that the government has in its capacity as an employer." *Id.* at 70 n.4 (opinion of the Court). Thus, *Rutan* and the Court's other patronage decisions are not inconsistent with the proposition that strict scrutiny has no place where, as here, the government *is* acting in furtherance of "interests that the government has in its capacity as an employer."

[15] In assessing the reasonableness of the government's employment decisions, a court may not demand empirical proof that the government's assessments were correct. This Court has "given substantial weight to government employers'

Abood therefore was correct to sustain the public sector agency shop on the ground that it serves "important government purposes," *see supra* at 10, rather than imposing a level of scrutiny that has no place where a state or local government is acting as a proprietor, managing its internal operations.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Waters*, 511 U.S. at 673 (plurality opinion) (emphasis added) (citing *Connick*, 461 U.S. at 151-152; *U.S. Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 566-67 (1973)). *See also Mitchell*, 330 U.S. at 101 ("[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service"); *United States v. Kokinda*, 497 U.S. 720, 735-36 (1990) (plurality opinion) (rejecting contention that a Postal Service regulation of speech on its own property was impermissible "because of the existence of less restrictive alternatives" and concluding that "[e]ven if more narrowly tailored regulations could be promulgated . . ., the Postal Service is only required to adopt *reasonable* regulations, not 'the most reasonable or the only reasonable' regulation possible") (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985)) (emphasis in original). *See also Perry, supra; Christian Legal Society, supra* note 6.

Respectfully submitted,

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