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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. :

- - - - - x

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:

MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf of Petitioners.

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.

| | C O N T E N T S | |
|----|--|------|
| | | PAGE |
| 1 | | |
| 2 | ORAL ARGUMENT OF | |
| 3 | MICHAEL A. CARVIN, ESQ. | |
| 4 | On behalf of the Petitioners | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | EDWARD C. DUMONT, ESQ. | |
| 7 | On behalf of Respondent Attorney General | |
| 8 | of California | 39 |
| 9 | ORAL ARGUMENT OF | |
| 10 | DAVID C. FREDERICK, ESQ. | |
| 11 | On behalf of the Union Respondents | 53 |
| 12 | ORAL ARGUMENT OF | |
| 13 | GEN. DONALD B. VERRILLI, JR., ESQ. | |
| 14 | For United States, as amicus curiae, | |
| 15 | supporting Respondents | 69 |
| 16 | REBUTTAL ARGUMENT OF | |
| 17 | MICHAEL A. CARVIN, ESQ. | |
| 18 | On behalf of the Petitioners | 79 |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1
2
3
4
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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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19
20
21
22
23
24
25

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|--------------------------------|-------------------------------------|------------------------------------|------------------------------------|-----------------------------------|
| A | | | | |
| a.m 1:14 3:2 82:25 | accept 33:4,5 | admission 19:6 | 59:8,11,17 | 58:21 |
| ABA 37:21 | acceptable 68:21 | admittedly 32:6 | 60:11,17 66:19 | altogether 14:11 |
| abandon 15:18 | accepts 12:24 | adopt 50:3 | 70:9,15,20 | amended 79:9 |
| ability 16:7 66:20 | accommodation 25:6 | 70:10 72:19 | 71:25,25 72:4 | Amendment 3:15,18 6:2,5 |
| able 8:11 9:16 | accommodati... 49:21 | adopted 56:22 | 72:10 79:15,24 | 6:19 7:19,24 |
| 11:8 13:13 | achieve 70:9 | advanced 72:18 | 80:2,9,11,12 | 8:20 9:19 |
| 26:2 46:2 | 72:10 | advantageous 42:4 | 80:14,17 81:1 | 13:22 18:8,9,9 |
| 48:20 58:2,7 | achieving 23:3 | advantages 47:23 | 81:19 | 19:4,7,10,22 |
| 61:5 68:4 | Act 7:4,6,11 10:24 | adversary 65:5 | agency's 57:13 | 20:4 21:19 |
| Abood 7:15 | acting 8:7 9:14 | 65:13 | agency-fee 61:16 | 30:24 31:6 |
| 17:20 18:14 | 69:23 73:13,15 | adversary's 65:2 | ago 26:18 28:14 | 32:22 34:3 |
| 21:2,7 29:23 | 75:2,3,6,8 | adverse 15:16 | 28:15,15 | 37:22 39:7 |
| 30:1,5,7,19 | 77:25 | 74:11 | agree 32:16 35:5 | 54:2 69:19 |
| 31:2,2,8,10,20 | action 6:13 42:7 | adversely 80:7 | 44:4 46:5,5,7 | 73:11 77:6 |
| 31:22 32:6,7 | 74:11 | advocacy 11:17 | 50:8 66:18 | 78:25 82:15 |
| 32:18,20 34:22 | activities 28:5 | 34:20 | 67:1 | America 43:8 |
| 35:2,12,15,16 | 35:4 36:18 | advocate 13:10 | agreed 16:10 | American 26:15 |
| 45:9 48:9,12 | 47:23 67:23 | 14:5,6,8 15:25 | agreement 25:3 | 27:22 |
| 53:22 54:1 | 69:3 | advocates 3:12 | 41:2,18 43:24 | amici 79:24 |
| 56:15 61:17 | activity 11:1 | advocating 36:7 | 46:18 54:6 | amicus 1:25 |
| 67:11 69:16,17 | 26:10,11 34:4 | affect 17:14 | 62:21 | 2:14 60:15 |
| 69:21 72:2,3,4 | actors 13:8,9 | 28:21,21,22 | agreements 47:11 54:9,14 | 69:11 |
| 72:5,11,16,17 | acts 8:3 | 38:8 72:16 | 54:14 | amount 38:8 |
| 72:18,23 73:1 | actual 41:16 | affiliation 8:24 | agrees 62:11 | 46:25 |
| 73:3,12 75:12 | 42:21 50:25 | 75:15,18,20 | Ah 23:13 | analysis 21:20 |
| 75:14 78:8,10 | addition 47:25 | 77:5 | ahead 25:15 | 30:8 73:6 |
| 80:8 81:6 | additional 58:1 | affirmatively 6:23 38:13 | 27:4 40:19 | 78:15 |
| Abood's 3:14 | 58:2,6 | affirmed 67:11 | al 1:3,7 3:5 | annual 69:1,2 |
| 29:24 | address 20:23 | afford 58:2,7 | ALITO 26:14 | anomalous 62:8 |
| above-entitled 1:12 | 38:2 39:14 | 81:16 | 39:19,21 47:18 | answer 18:16 |
| above-titled 83:1 | 75:25 | afraid 50:25 | 48:11 66:3 | 20:20 38:9 |
| absence 60:13 | addressed 49:25 | agencies 41:17 | 68:9 73:17 | 48:3 78:17 |
| 79:8 | adequate 22:25 | agency 4:6,8 6:4 | 74:6,9,16,20 | 79:10,17 |
| absolute 37:21 | 23:4 | 6:8,22 7:10,13 | 74:23 76:2 | answered 7:8 |
| 82:5 | adequately 42:19 | 7:13 17:7 21:9 | allegation 79:10 | anybody 21:16 |
| absolutely 14:1 | adjust 45:4 48:7 | 22:1,15,21 | 79:17,18,21 | 68:11 |
| 37:20 43:10 | administration 78:23 | 24:15,17,23 | allocated 47:1 | apart 28:6 |
| 59:16 | administrative 68:7 | 25:8 26:8 | allow 3:20 17:7 | apologize 7:5 |
| abstract 33:8 | administrativ... 67:18,23 | 27:23 30:10 | 70:5 80:1 | APPEARAN... 1:15 |
| abstraction 33:15,16 | | 39:16,25 42:24 | allowed 64:9 | Appendix 54:12 |
| | | 43:11,12 47:22 | allows 6:8 66:21 | applies 70:2 |
| | | 50:1,13 53:10 | 69:5 80:11,12 | 74:1 75:12 |
| | | 56:25 57:4,14 | alterations 56:22 | 77:9 78:4 |
| | | 57:19,24 58:10 | alternative | apply 6:3 8:8 |
| | | | | 21:22 64:12,12 |

| | | | | |
|---|--|---|--|---|
| 64:14,15 77:8 79:1 appreciate 65:21 approach 63:6 appropriate 57:21 68:25 approval 41:11 41:12 area 25:16 28:20 32:22 69:18,20 argue 28:16 52:22 79:15 argued 68:22,24 arguing 31:15 50:6 63:12 73:3 75:12,13 82:5 argument 1:13 2:2,5,9,12,16 3:3,7 7:19 30:14 31:17 39:2,23 45:20 49:5 51:19 53:18 57:13 58:21,23 59:1 61:1 63:19 69:10 73:18 79:5 argument's 58:23 arguments 28:11,12 30:23 44:21 48:15 article 14:25 articles 44:18 63:13 ascertain 55:1 aside 6:18 25:21 asked 22:18 23:2 28:6 31:25 asking 18:13 21:21 asks 17:10 aspect 49:9 aspects 28:17 | assess 26:5,5 66:1 assessing 62:25 assessment 63:6 assessments 12:8 associate 9:24 10:5 association 1:7 3:5,16 34:19 34:20 35:4 36:2,3,6 39:25 53:13 associations 12:7 36:10,18 36:22 37:12,15 37:18 assume 20:17,18 64:5 assumes 12:20 assuming 6:7 16:8 22:5 24:19,21,22 assumption 51:8 51:9 assumptions 65:1 Attorney 1:19 2:7 39:3 attribution 52:13 Austin 32:23 authority 19:12 authorization 3:14 6:21 axiomatic 42:23 axis 75:23 | ban 15:18,19 bar 12:6 28:21 28:22 35:3 36:2,3,10,18 36:21,23 37:12 37:13,17 bargain 13:20 27:20 62:23 bargainable 27:13,16,19 bargained 22:8 45:14 76:19,24 bargaining 3:22 4:7,10,14 7:14 9:6 12:19 13:23 14:10,13 14:16 15:6,18 15:22 16:1 17:1,3 21:25 23:2,11 25:22 25:25 26:9 27:12 30:17 33:25 39:15 40:10 41:2,15 41:25 42:9 43:20,23 44:16 45:7 46:13,17 48:17 50:18 51:4,5 53:12 53:14 54:6,13 57:8 58:17 60:2,10,24 62:21 66:22 70:11 76:3,8 76:11 78:24 81:10 bars 37:3 based 6:4 56:17 63:18 70:8,14 basic 3:16 6:7 10:24 30:21 33:9,12,22 34:6,22,23 54:24 56:14 57:13 82:4,21 basically 9:10 31:15 43:5 | 60:14 67:12 basis 8:24,25 45:17,18 49:5 57:20 63:17 66:1 69:2 bear 65:6 Beck 6:3 bedrock 5:5 beg 12:15 behalf 1:16,19 1:21 2:4,7,11 2:18 3:8 36:7 39:3 53:19 79:6 behavior 37:7 belief 52:20 believe 4:18 45:3 52:4 benefit 14:6 57:25 71:13 82:9 benefits 21:23 22:8 47:2 54:20 66:12 82:8 benefitted 64:6 best 46:16 better 59:12 beyond 73:4 big 28:25 66:8 board 4:4 15:25 16:3 41:11 body 32:11 54:10 books 21:7 72:6 Borough 77:21 bound 20:15 box 67:16,17 breaching 25:2 break 54:21 breaks 66:15,15 brethren 81:3 Breyer 19:3,14 20:3 26:23 27:1,4,7 28:8 29:2,16,17 33:2,4 35:1 | 58:12 59:3 63:2,15,19 77:11 brief 49:16 57:5 81:14 briefing 32:1 briefly 38:2 39:14 briefs 18:6 59:6 59:6 60:15 73:2 broad 48:22 brought 5:16 60:14 73:21 budgetary 71:10 build 54:11 burden 17:9 51:22 52:9,11 64:25 65:7,12 65:17 67:3,12 68:6 79:15 80:24,25 burdening 39:17 buy 33:18 58:24 60:20 |
| C | | | | |
| C 1:18,21 2:1,6 2:10 3:1 39:2 53:18 cacophony 56:11 Cal 1:19 California 1:6 1:18,20 2:8 3:5 12:10,22 24:14 38:11 39:4,7 39:24,25 47:19 47:20,21 49:6 49:22 50:15,23 55:8 58:16 81:22 California's 25:1 called 58:3 73:7 campaign 15:1,8 | | | | |

| | | | | |
|--|---|---|--|--|
| <p>38:13 campaigns 15:16 candor 6:12 capital 20:6,11 capitulating 79:25 car 19:5,12 care 81:5,8 carried 34:4 Carvin 1:16 2:3 2:17 3:6,7,9,19 3:23 4:16,19 5:2,4,9,15,23 5:25 6:2,12 7:5 7:7,12,21 8:2 8:18 9:7,8,18 10:3,8,15 12:12,14,16,17 13:4,14,18,22 14:2,12,15,23 15:3,11 16:5 16:10,15,20,25 17:8,18 18:2,4 18:13,19,24 19:13,21 20:10 20:16,19,25 21:5,8,13,16 22:2,3,16,23 23:7,17 24:8 24:11,14,20,25 25:4,7,11,14 25:23 26:2,7 26:19,25 27:3 27:6,8,15,21 29:1,16,21 31:4,5 32:12 33:3 34:10,25 35:7,14,16,19 35:23 36:17,25 37:14,20,24,25 38:6,25 79:4,5 79:7 81:21,24 82:10,13,16 case 3:4 10:20 11:3 17:12 31:2,24,25</p> | <p>32:1,2,11,14 32:24 33:10 38:3 39:8 40:3 53:1 56:1 57:5 57:19 62:9 63:16 68:19 72:3 73:7 75:22 77:12,15 80:21 82:24,25 cases 8:2 9:21 12:3 17:10 19:4,16,17 21:18 28:24 31:9,18,21,22 32:5,14,22 33:7 34:7 35:11,13,16,17 35:19,19,22 55:17,21 68:11 69:23 73:12,22 75:6,15,17 76:19 77:3,22 78:9,14 categorical 11:16 category 8:14 74:1 cause 4:17 certain 24:5,10 28:16 36:12,14 68:12 certainly 10:15 11:20 13:6 28:21,21,22 29:1 32:16,17 33:11,11 38:6 41:7 77:17,18 79:14 certified 68:12 cetera 58:19 65:15 challenge 60:14 change 32:19 45:23 76:21 changed 71:23 changes 29:20 76:20,20</p> | <p>channel 76:12 characterizes 30:13 charge 24:23 50:13 chargeable 15:2 44:22,24 45:2 69:3,4 charged 50:11 charges 14:25 chatted 30:11 check 67:16,17 checkbox 68:3 chest 38:18,20 Chief 3:3,9 38:24 39:5 40:16,19,25 41:20,23 46:4 46:8,15,22 48:25 49:4,10 53:16,20 57:11 57:16 58:5,20 60:19,22,25 61:14 62:13,18 64:21,23 66:25 67:15 69:7,9 69:13 72:15,21 73:5,9 78:17 78:19 79:3 82:23 choice 42:5 68:7 72:13 choose 72:9 81:20 chosen 56:17 circumstances 9:22 17:5 71:23 74:9,16 cite 31:10 35:19 35:21 72:23 73:2 cities 60:15 citizen 17:22 52:15 74:13,24 75:9 citizenry 73:15 75:4 78:2</p> | <p>citizens 21:17 23:21,23 32:21 44:13 70:3 citizens' 39:12 39:18 43:19 55:18 city 59:6,9,12,17 60:2,3,9 claim 18:7,10,18 class 66:5 82:17 classic 32:13 42:7 64:16 classroom 43:3 64:14 65:23 clear 3:14 5:5 6:18 9:20 11:2 17:22 34:17 35:9 37:3 80:21,23 clearly 20:11 clients 4:2 5:13 close 14:20 34:3 80:25 closed 6:9 Code 47:21 coerce 9:23 39:12 coerced 6:10,10 56:4 coherence 63:8 coherent 58:18 59:22 coin 10:12 collapse 57:14 colleague 58:15 colleagues 65:6 collected 56:13 collective 4:7,10 4:14 7:14 13:23,25 14:13 14:16 15:5,18 15:22 16:1 17:1,2 23:1,2 23:11 25:21,25 26:9 27:12 30:17 39:15 40:9 41:2,15</p> | <p>41:24 42:7,9 43:20,23 45:7 46:17 54:5,13 57:8 60:10,23 62:21 70:11 76:7,11 78:23 collectively 45:14 come 17:8 25:6 32:10 56:19 63:3 80:25 comes 30:12 31:17 56:12 coming 19:15 49:20 57:8 61:21 comment 41:3 commenting 76:5 commercial 21:18 31:1 36:5 commission 49:24 committing 56:2 common 35:24 communicating 54:25 communication 76:12 company 26:23 40:7 comparable 70:1 compared 63:6 comparing 56:3 compel 10:21 23:20 74:17 compelled 10:12 10:13 21:10 34:20 37:18 43:5 53:13,13 56:4 61:3 67:7 78:16,16 compelling 52:1 74:3 completely 22:5</p> |
|--|---|---|--|--|

| | | | | |
|---|---|---|--|---|
| 23:12 35:8 80:10 composition 56:2 comprehensive 49:25 compromise 28:14 29:5 47:13 compulsion 10:18 68:2 concede 48:19 concept 18:21 concern 29:14 30:18 40:7 41:25 42:25 47:6 74:13 76:4,5 77:20 82:1 concerns 11:15 28:18 31:12 concludes 18:14 concrete 47:15 condemned 34:21 condition 37:19 conditions 34:1 47:24 58:19 70:8 72:14 73:16 conferring 54:25 conflict 29:24 32:10 Congress 70:7 72:7 connection 60:6 conscious 67:6 consequence 35:6 considerable 29:14 consideration 20:18 considerations 78:5 considered 20:7 | 48:16 consistency 3:17 consistently 20:6 34:21 constantly 18:11 Constitution 8:23 20:12 51:17 constitutional 8:16 19:24 48:2 62:10 63:17 67:2 68:1 76:9 constrain 8:6 constraints 7:24 8:6,8 9:5,10 71:11 consulting 54:25 contest 41:8 context 4:7,10 4:14,15 17:3 36:5 41:7,7 43:23 44:11 73:11 76:7 77:3,4,5 78:7 78:10,21,24 80:22 continue 48:23 80:5 contract 22:6,13 22:15 25:8 44:7,11 54:8 78:22,23 contracts 17:13 17:14 20:21,22 21:1 22:9 48:24 70:13 contrary 27:11 30:6,6,7,19 31:1 34:22 61:11 75:17 80:10,17 81:3 contribute 4:17 4:25 80:6 contributes 38:12 contribution | 26:6 contributions 4:20 10:20,22 28:2 control 8:11 36:19 75:8 77:13 controlling 40:23 controls 76:13 controversial 47:15 converged 69:21 73:12 Conversely 80:13 convince 55:5 66:23 71:6 convinced 20:10 convincing 55:5 core 67:13 Corporation 32:25 correct 6:6 19:4 26:20 43:12 51:6 65:10 correctly 53:22 67:11 cost 47:22 costs 46:25 53:24 counsel 69:7 82:23 count 67:24 counter 67:4 country 29:18 54:4 county 58:2,6 81:16 couple 73:19 76:1 course 3:24 14:3 17:9 26:3,20 29:4 66:16 court 1:1,13 3:10 6:4,18 7:17 11:9 | 17:21 18:14,25 19:16 20:6,8 20:10,18 29:25 31:20 32:2 34:21 36:4 37:4 39:6 45:5 53:21 59:7 62:1 69:14 72:11 77:24,24 80:23 Court's 3:18 6:13 8:20 9:18 21:20 29:4 30:14 55:17,21 69:1,18 73:10 75:5 77:2 78:6 78:9 courts' 77:21 create 6:13 12:9 creating 13:2 critical 39:9 42:24 criticism 19:8 cross-cut 43:18 43:21 crystal 34:17 culture 56:18 curiae 1:25 2:14 69:11 current 45:3,4 currently 26:20 cuts 61:1 71:12 | 82:16 debates 48:22 decades 69:17 70:4 72:6 decide 8:15 25:10 35:17 62:9 63:16 70:7 72:9 81:18 decided 24:17 31:22 32:2,7 35:17 56:25 deciding 56:9 decision 6:15 17:10 18:18 38:16,21 50:2 50:4 57:20 64:8 65:8 67:6 67:10 69:1 78:6 decisions 11:13 11:20 18:23 20:15 29:7 35:3 47:14,15 71:11 80:20,20 decisis 17:24 18:10,22 19:2 19:18 20:1,9 20:17 32:14 65:9 78:5 deep 46:11 71:19 deeper 70:12 defeat 53:4 deferential 9:4 9:22 11:10 30:5 55:22 definition 37:2 45:16 delicate 40:8 44:10 deliver 59:12 demand 82:20 demise 79:16 democracy 82:4 democratic 44:1 44:2 |
|---|---|---|--|---|

D

D 3:1
D.C 1:9,16,21,24
DAVID 1:21
2:10 53:18
day 11:14 21:1
66:16
deal 28:25 40:11
42:10,11
dealing 22:25
42:23 50:8,8
67:2
dealt 56:11
debate 46:1 50:2

| | | | | |
|-----------------------------|--------------------------|-------------------------|------------------------|------------------------|
| demonstrate 65:17 | 40:22 | doctrinal 32:17 | 67:23 | 42:12,17 43:13 |
| denial 18:9 19:1 | disables 4:3 | doctrine 21:19 | easily 29:8 | 43:25 44:1,5 |
| denied 18:18 | disagree 8:19 | 30:25 31:1 | easy 67:16,17 | 44:13 47:16 |
| 19:16 | 22:17 32:13 | 54:3 | 68:10 | 49:20 50:8 |
| denies 17:20 | 33:21 35:24 | doing 38:14 41:4 | education 47:1 | 53:25 55:23 |
| 76:17 | 36:11,23 37:23 | 45:25 | 82:17 | 60:20 70:21 |
| deny 18:7 43:18 | 42:2 43:1,6,13 | DOJ 74:12 | educational | 71:6 72:9 74:1 |
| Department | 45:23 46:15 | dollars 27:25 | 64:15 | 74:3 |
| 1:24 74:10,17 | 55:19 61:4 | DONALD 1:23 | EDWARD 1:18 | employees' 11:8 |
| depends 22:6 | 73:1 82:9 | 2:13 69:10 | 2:6 39:2 | employer 6:17 |
| deprivation 3:16 | disagreement | door 14:20 | effect 18:10,22 | 8:4,5,12,15,17 |
| described 78:24 | 31:8 49:18 | 33:17 | 71:17 | 9:12,15,17 |
| designed 47:23 | disagrees 49:6 | doubt 77:19 | effective 70:20 | 11:7 12:1,3,9 |
| destroyed 58:22 | 49:15 | dozens 19:16 | 70:21 75:19 | 23:8,9,15 24:6 |
| detailed 54:14 | discipline 73:23 | draw 9:11,19 | 81:8,10 | 24:16 27:10,23 |
| details 28:19 | discretion 25:16 | 13:5 33:7 47:5 | efficient 50:7 | 30:6 31:14 |
| determined 57:3 | discriminate | 48:8 61:20 | 64:6 | 39:11 42:21 |
| develop 62:2 | 8:24,25 | drawing 10:9 | effort 15:7 | 43:24 46:18 |
| developed 70:24 | discussed 76:15 | 33:22 | efforts 21:25 | 48:1 52:8 |
| 70:25 | discussing 38:5 | drawn 47:19 | 25:25 | 57:18 59:22 |
| development | discussion 14:10 | 77:24,25 | Eighth 20:4 | 69:24 70:1 |
| 51:12 | discussion's | draws 48:9 | either 7:19 | 71:10,13,14 |
| devoted 43:7,9 | 76:14 | dream 46:2 | 52:15 | 73:14,25 75:2 |
| dictate 10:17 | dismiss 82:3 | drive 81:11 | eliminated 35:8 | 76:18 77:7,8 |
| 13:24,25 | disparate 44:8 | DuMont 1:18 | emphasis 5:12 | 77:13,25 78:10 |
| differ 12:15 | dispute 46:10 | 2:6 39:1,2,5,20 | emphasize 49:19 | 81:5 |
| difference 6:20 | disrupt 54:2 | 40:1,17,21 | employee 8:2 | employer's |
| 66:8 75:1,2 | 70:23 | 41:6,21 42:2 | 9:15,20,24 | 31:12 42:8,18 |
| 80:19 | disruption | 43:16 44:23 | 11:5,6 21:7 | 44:6 |
| different 8:7 | 71:18 | 45:3,12,22 | 24:7 30:25 | employer-emp... |
| 10:2 11:4 12:8 | dissenting 30:12 | 46:7,9,20 47:4 | 31:9 38:12 | 41:1 |
| 14:11 22:10 | 31:2 | 48:3,15 49:1,8 | 46:13 50:12 | employers 5:20 |
| 28:8,9 35:11 | dissents 29:8,8 | 49:17 50:5,16 | 52:14 62:14 | 6:3,22 7:23 |
| 41:7 42:15 | distinction 6:7 | 50:25 51:5,10 | 72:14 73:23,24 | 8:21,22,23 9:1 |
| 49:13 50:15,17 | 9:20 10:10 | 51:15,24 52:3 | 73:24 74:3,12 | 9:5,6 11:13 |
| 50:17 56:16,19 | 11:2 13:5 16:5 | 52:25 53:11 | 74:12,18 75:8 | 26:16 47:10 |
| 61:18,19 71:1 | 35:25 36:16 | Duryea 77:21 | 77:3,4,14 | 70:6,7 72:9,12 |
| 71:2 73:20 | 77:23,24 78:4 | duty 30:9,10 | employee's | 76:23 |
| 76:9 78:25 | distinctive 61:20 | 54:22 66:15 | 31:14 52:15 | employment |
| differently | distinguish | duty-free 66:15 | 61:12 | 9:23 10:5 11:7 |
| 11:25 22:9 | 14:13 | | employees 6:24 | 11:21,22 13:1 |
| differing 32:21 | distinguished | E | 7:22 10:23 | 13:2 39:12 |
| difficult 18:21 | 32:25 55:18 | E 2:1 3:1,1 | 11:17 13:7 | 41:5,6 47:24 |
| 71:11 | district 40:4 | 39:23 78:24 | 15:15 17:14,15 | 55:21 69:19,20 |
| directly 11:23 | 62:1 | early 50:3 | 26:6 32:3,4 | 73:11 74:11 |
| 29:24 35:2 | districts 41:17 | easier 50:9 | 33:24 40:14 | enable 59:17 |
| | 54:23 60:16 | | 41:14,23 42:11 | enabled 59:12 |

| | | | | |
|--------------------------|------------------------|-------------------------|-------------------------|--------------------------|
| enables 59:19 | 23:4 31:11 | expectations | famously 34:13 | finger 29:21 |
| enact 4:22,23 | establish 56:9 | 70:24 | far 4:13 7:23 | finish 27:4,5,5,7 |
| 27:18 | 57:10 59:21 | expenditures | 23:24 34:2 | 27:7 40:20 |
| enacted 70:5 | established 6:4 | 37:5 81:11 | 70:12 | fire 57:10 58:4 |
| endangered | 50:18 54:2,10 | expense 15:2 | favor 15:8 42:14 | 58:24 81:24 |
| 20:23 | 56:23 60:21 | expenses 24:5 | 80:9 | firefighters 57:3 |
| enforced 60:3 | 68:8 | 44:22 46:25 | fear 43:19 70:17 | 57:5,7,9,23 |
| 70:5 | et 1:3,7 3:5 | experiences | federal 11:11,19 | first 3:14,18 6:2 |
| enforcement | 58:19 65:15 | 56:18 61:19,21 | 28:3 36:19 | 6:5,19 7:19,24 |
| 81:14 | ethics 37:1,7 | explain 59:4 | 50:12,16 51:3 | 8:19,20 9:19 |
| engage 6:22 | everybody 78:13 | explains 57:6 | 80:1,9,15 | 13:22 17:19 |
| 17:6 23:20,21 | everybody's | explicitly 31:25 | Federalism | 18:8 21:18 |
| 36:11 | 50:9 | express 44:14,15 | 61:17 | 30:24 31:6 |
| engaged 25:18 | evidence 19:6 | expressed 32:6 | fee 21:10 22:1 | 32:22 34:2 |
| 44:23 | evolves 54:7 | extended 19:11 | 22:15 24:24 | 37:22 39:7 |
| engaging 10:24 | exact 22:12 | extinguished | 35:4,22 55:14 | 54:2 62:4 |
| enriched 44:12 | 31:11 | 17:5 | 58:11 59:8,11 | 69:17,19 73:10 |
| ensure 8:3,9 | exacting 70:2 | extraordinarily | 59:11 66:10,19 | 77:6 78:25 |
| 9:11 67:6 71:3 | 75:10,21 77:9 | 55:22 | 70:9,15 71:25 | 82:15 |
| entire 27:11 | exaction 21:11 | extremely 18:21 | 72:10 81:19 | fiscal 79:20 |
| 32:11 | exactly 5:11 | 31:21 32:5 | feels 45:5 | fits 31:9,10 |
| entirely 11:4 | 14:14,15 15:11 | eyes 65:22 | fees 4:7,8 7:13 | flexibility 47:10 |
| entitled 30:24 | 28:10 61:1 | | 17:7 21:12 | 69:6 |
| entity 12:9,11 | 81:24 | F | 22:21 24:15,17 | flip 59:5 |
| entry 79:12 | example 4:8 9:4 | fabric 70:16 | 25:8 26:8 | focus 15:20 |
| equal 78:4 | 10:3,19 14:19 | facial 60:14 | 27:23 28:23 | 28:10 |
| equally 33:13 | 23:19,21 34:16 | fact 4:1 5:12 | 30:10 39:16 | following 33:17 |
| 43:9 | 46:16 59:9 | 13:12 19:11,21 | 43:11,12 47:22 | follows 69:1 |
| equate 78:13 | 79:15,25 | 32:18,20 35:7 | 50:1,11,13 | force 4:17,20 |
| equipment 58:1 | examples 54:13 | 45:23 46:10 | 53:10,15 57:1 | 10:5 34:24 |
| 58:6 81:16 | excise 25:7 | 55:7 72:15 | 57:4,14,24,25 | 61:10 78:4 |
| erode 69:22 | exclusive 3:21 | 80:10 | 59:17 60:3,11 | forced 3:24 |
| erroneous 18:14 | 3:25 4:1,5,12 | fact-finding | 60:17 63:7 | 16:21 |
| 19:1 20:15 | 12:19 13:7 | 51:8,10 | 67:21,22 70:20 | formation 78:22 |
| 34:7 | 24:7 40:2 | facts 79:20 | 71:4,25 72:4 | forth 44:20 80:8 |
| erroneously | 53:25 55:15 | factual 22:17 | 79:15,24 80:2 | fortifies 69:21 |
| 17:20 | 56:14 66:11 | 49:5 51:8,12 | 80:9,11,13,14 | forum 53:8,10 |
| error 56:2 | excuse 18:3 | 60:13 79:8 | 80:17 81:1,16 | 53:12,14 |
| especially 78:5 | 27:15 40:18 | factually 51:14 | felony 27:9 | forward 22:13 |
| espouse 52:20 | 49:2 80:11 | 51:15 | Ferguson 33:10 | found 18:6 |
| ESQ 1:16,18,21 | executed 20:13 | fair 56:8 61:21 | fight 57:10 58:3 | foundation |
| 1:23 2:3,6,10 | execution 20:14 | 71:16 | final 41:11 | 65:14 |
| 2:13,17 | exist 27:21 | fairly 42:12 | finances 30:21 | foundations |
| essential 57:24 | existed 27:22 | faith 14:18 | find 18:21 28:25 | 69:22 |
| 82:21 | exists 14:19 | 15:23 19:6 | 34:6 36:23 | founding 34:23 |
| essentially 8:3,9 | 15:23 24:22 | fall 8:7,13 | 60:17 62:14 | four 69:17 70:4 |
| 18:17 22:12 | expand 17:21 | falls 35:2 | fine 3:23 | four-decade |

| | | | | |
|---|--|---|--|---|
| 65:17 Fourteenth 18:9 Fourth 18:8 19:4,7,10,22 framework 31:23 35:16,18 Francisco 1:19 frankly 75:14 Frederick 1:21 2:10 51:1 53:17,18,20 55:7 56:7 57:16 58:8 59:2,5,19,25 60:5,8,12,20 60:23 61:13,23 62:4,16,19 63:15,22 64:8 64:16,19,22 65:10,16 66:3 66:7,9,25 67:9 67:18 68:18 69:8 80:5 Fredericks 63:25 64:4,5 free 4:11 19:18 39:10 42:6 43:4 52:21 55:20 77:6 free-rider 4:13 17:2 41:25 frequently 11:9 Friedrichs 1:3 3:4 62:6 friendly 31:20 friends 75:17 frustration 32:6 functioning 40:3 fund 23:15 24:10 25:10,15 26:11 27:19 40:22 53:15 fundamental 17:20,21 48:9 48:19,20 49:18 69:16 funded 28:2 | 42:20,20 70:19 funding 22:25 23:4,8,9 28:7 61:7 funds 26:21 28:4 further 38:22 55:11 68:22 future 20:13 21:25 43:8,8 <hr/> G <hr/> G 3:1 Gant 17:22 19:23,23 Garcetti 64:9 75:14 77:19 GEN 1:23 2:13 69:10 general 1:20,23 2:7 39:1,3 46:12 50:5 51:7 53:16 69:9,13 72:20 72:25 73:8 74:5,8,15,19 74:21,25 76:6 77:1,17 78:12 78:17,20 79:3 80:22 81:17 generality 35:25 generally 8:2 73:12 germane 7:14 37:1 48:16 getting 24:6 44:11 48:23 58:1,6 69:4 GINSBURG 3:19 6:25 7:3,6 7:8,18 21:3,6,9 21:14 34:25 50:22 51:2 61:23 Ginsburg's 79:19 give 4:20 11:10 13:16 20:8 | 27:10 34:11,11 34:17 38:16 46:24 60:10 69:25 78:14,15 given 10:16,18 13:17 22:14 42:5 65:16 78:5 gives 19:12 giving 23:5 28:1 36:1,2 Glickman 30:25 36:5 go 7:14 16:16 19:5 22:13,17 25:14 26:8,9 27:4 28:13 33:5,7,17,19 40:19 48:23 52:21 55:11,20 64:24 71:19 goals 72:11 goes 70:12 72:2 75:1 78:22 going 14:9 22:19 25:2,5 26:15 27:25 29:12 39:15 40:9 42:9,16 46:21 46:23 47:1 56:9,11,25 57:2,14 58:24 61:6 62:9 63:16 70:23,25 71:2,8 76:14 81:11 good 14:18 15:23 19:5 20:4 28:11,12 33:6 40:12 58:23 gotten 22:10,14 govern 41:19 47:11 78:6 government 6:21,22 8:3,4,6 8:9,11,16 9:11 | 9:14 11:25 12:4,7,9 15:17 23:15,15,19,21 23:24 25:17 26:10,21 27:18 30:5 33:20 45:15,16,24 46:1 47:21 53:25 54:16 55:22 56:8 57:1,17 62:24 66:2 68:6 69:23 70:3 71:14 73:13,14 75:2,3,6,7,18 76:13,13,24 77:9,12,25 78:1,13,14,15 80:1 government's 31:13 57:20 62:25 65:25 77:7 81:5 government-a... 9:19 governmental 42:23 governments 41:16 governor's 38:12,18 great 71:13 82:16 greater 7:24 9:5 10:13 23:24 grievance 24:4 ground 56:6 group 3:12 9:25 11:17 43:25 47:16 56:3 58:18 80:20 grudging 6:20 guaranteed 44:3 guess 18:6,20 20:7 28:19 29:7 31:8 63:12,16 77:1 | 77:11 gun 36:19 <hr/> H <hr/> half 54:3 hand 56:24 hands 33:19 happen 5:20 21:3,6 80:6 happened 59:7 happens 29:18 happy 62:7 hard 18:6 40:25 harm 71:8 Harris 5:5 6:19 30:6,19 31:2 31:18,19,24 32:16 35:8 36:1 Hatch 10:24 head 30:14 health 14:6 54:19 66:11 hear 3:3 34:9 72:22 heard 58:14 heart 34:2 73:18 heavy 17:9 held 53:22 help 70:9 72:10 helpful 63:23 high 17:14 higher 12:5 45:16 80:24 history 26:14,20 49:22 56:17 65:17 Hold 12:16 65:4 Honor 4:19 5:18 5:23 7:21 10:16 15:11 19:21 38:7 45:22 51:24 52:3 53:1 honorarium 80:23 hope 37:2 |
|---|--|---|--|---|

| | | | | |
|---|--|---|--|--|
| <p>hospitals 60:16 host 28:24 hostile 36:23 hot-button 54:18 hour- 63:7 hours 34:1 47:24 58:19 housing 47:2 Hudgens 32:23 33:1 Hudson 69:1 huge 30:7 74:1 hundred-page 62:21 hundreds 11:12 18:23 33:18 hurting 82:14 hypothesis 63:18 hypothetical 6:16 19:22 35:8</p> <hr/> <p style="text-align: center;">I</p> <p>i.e 77:16 idea 18:7 53:7 ideological 3:13 82:2 illegal 23:14 imagine 22:6 impasses 14:18 impinges 4:2 implications 46:12 import 62:10 importance 82:22 important 13:5 15:20 20:17 39:17 40:6,22 41:8 42:18 43:17 44:10 48:17 53:3 59:3 67:2 72:1 79:9 82:2 impose 7:15</p> | <p> 28:4 46:3 52:8 imposes 9:5 imposing 6:23 15:21 impossible 36:15 improperly 18:18 39:11 improvement 63:8 inadvertence 38:19 inapplicable 56:5 incentives 71:2 incident 37:6 incidents 19:15 include 54:15 includes 15:6 including 33:20 increase 22:19 22:20 indications 31:20 individual 19:17 20:5 52:14,15 individually 4:3 individuals 61:3 inflate 38:18,20 influence 27:11 information 63:20 infringement 11:5 inherent 11:6,20 inhibition 19:18 initial 18:18 36:5 input 56:10 insight 75:13 insignificant 42:1 insist 53:23 instance 15:6 institution's 77:15 integrated 28:22</p> | <p>interest 20:25 31:13,13 52:2 57:4 76:20,25 77:16 81:5 interests 17:24 19:25 39:8,9 39:17 40:14 49:19,20 61:18 65:14 71:19 73:14 77:7 interpretation 7:16 invented 34:15 involve 30:18 73:22 involved 19:23 30:20 39:8 52:11 involves 47:13 47:13 48:21 77:15 involving 11:19 isolated 43:20 issue 23:12 38:3 38:5 46:9 47:3 49:25 50:1 58:14 64:25 68:19 issued 49:24 issues 12:25 30:21 36:14,14 43:6,18 44:10 47:14 54:18,19 62:20 67:3 82:3 items 27:20</p> <hr/> <p style="text-align: center;">J</p> <p>James 34:13 January 1:10 Jefferson 34:12 jeopardy 35:10 37:10 job 51:19 75:20 77:15 Johanns 23:19 join 37:18,21</p> | <p> 55:5 61:8,9 Joint 54:12 JR 1:23 2:13 69:10 judge 57:19 judges 19:9 judgment 61:24 61:25 79:12 82:9 judgments 61:15 71:15 judiciary 11:11 11:19 jurisdiction 36:19 jurisprudence 3:18 6:14 8:20 69:18,20 Justice 1:24 3:3 3:9,19 4:16,21 5:3,8,11,19,24 6:1,6,25 7:2,3 7:6,8,9,18 8:1 8:18 9:7,9 10:2 10:7,9 11:24 12:13,15,18 13:4,12,15,19 14:1,7,14,22 14:24 15:5,12 16:4,9,12,18 16:23 17:8,19 17:25 18:3,5 18:16,20,24 19:3,14 20:3 20:16,20,21 21:3,6,9,14 22:2,4,22,24 23:13,18 24:2 24:9,12,18,21 25:1,5,9,13,20 26:1,4,13,14 26:23 27:1,4,7 27:13,16 28:8 29:2,16,17 31:4,7 33:2,4 34:25 35:1,13 35:15,21 36:10</p> | <p> 36:21 37:10,11 37:15,24 38:24 39:5,19,21 40:16,19,25 41:20,23 42:22 44:17 45:1,11 45:13 46:4,8 46:15,22 47:18 48:11,25 49:4 49:10 50:5,22 51:2,7,12,18 52:1,19 53:7 53:16,21 54:18 55:4,11,25 56:7 57:11,16 58:5,12,13,20 59:3,15,23 60:1,6,9,12,19 60:22,25 61:14 61:23 62:6,13 62:18 63:2,15 63:19,25 64:2 64:3,4,9,11,18 64:21,21,23,23 64:24 65:12,20 66:3,4,8,25 67:15 68:9 69:7,9,13 72:2 72:15,21 73:5 73:9,17 74:6,9 74:10,16,17,20 74:23 76:2,16 77:2,11 78:12 78:18,19,21 79:3,19 80:18 81:13,22 82:7 82:11,14,23 justification 4:13 17:16 18:15,17 32:13 68:16 72:17,22 80:24,25 justifications 17:19 justified 4:4,8 justifies 30:10 justify 73:16</p> |
|---|--|---|--|--|

| | | | | |
|--|--|---|---|--|
| <p style="text-align: center;">K</p> <p>Kagan 7:2 8:1 8:18 9:7,9 10:7 10:9 17:8,19 17:25 18:3,5 18:16,20,24 22:2,4,22,24 31:4,7 35:13 35:15,21 36:10 36:21 Kagan's 20:21 keep 57:2 Keller 35:3,9,14 36:17 37:2,5,9 Kennedy 5:19 5:24 6:1,6 7:9 14:22,24 15:5 20:16,20 37:10 37:24 42:22 44:17 45:1 52:1,19 53:7 54:18 55:4,11 55:25 56:7 64:2,4,9,11 65:20 66:4,8 Kennedy's 62:6 80:18 key 15:17 35:25 36:3 73:10 75:12,23 kind 6:10 28:14 29:19 32:8 38:17 41:12 48:16 62:9 68:7 71:1 72:12 81:19 kinds 28:4 36:12 36:12,17 37:12 know 5:11 7:12 19:5 26:9,16 28:9 33:6 48:3 48:13 49:11 51:1,1,14,15 51:20 59:20 63:3 77:12 79:23</p> | <p>Knox 30:7 31:19 31:19 32:17</p> <hr/> <p style="text-align: center;">L</p> <p>labor 7:1,4,6,11 19:19 26:15 28:20 49:23 54:3 56:18 lasted 29:6 latitude 69:25 70:7 law 4:22,24 10:20 11:3 12:10 24:22 32:11 45:3,5 47:20 55:14 63:4 66:21 69:18 73:11 81:14 law-related 37:8 laws 70:5,13,14 lawsuit 5:17 lawyer 37:1,7 lawyers 36:7,8 36:11 lead 62:10 79:16 81:2 leave 81:18 led 49:23 leeway 23:25 legal 37:7 49:5 54:24 legislative 41:11 44:14 45:6 50:2,4 57:4 legislators 14:20 legislature 13:10 13:16 14:4,5,9 15:14,14 16:2 16:17 56:24 legitimate 50:4 53:12,14 legitimately 41:13 Lehnert 15:3 30:12,13 45:8 67:22</p> | <p>lesser 8:8 9:9,10 45:17 let's 4:22 20:16 20:17,17,18 25:20,20 52:12 letter 68:12 level 10:17 33:14,16 35:24 68:2 levels 12:8 leverage 8:10 9:23 leveraging 10:4 11:22 39:11 75:7 life 50:9 limiting 7:22 line 9:11,21 22:20 33:7 47:5,19 48:7,9 48:10,14,18 67:22 lines 32:22 33:22 75:22 list 30:3 listen 16:3 literally 11:12 litigation 36:12 36:13 48:6 little 26:13 Lloyd 32:25 lobby 4:9 16:13 16:16 lobbying 4:15 14:13,19 15:19 16:22,24 17:6 17:7,7 47:23 local 41:15,16 70:8 72:13 Lodge 6:14 Logan 32:24 long 26:18 49:22 54:14,20 66:15 long-term 70:23 longer 21:25 24:6 look 35:22 54:12</p> | <p>57:22 75:16 looks 73:2 lot 12:8 17:25 18:5 19:8 23:20 29:11,20 35:19 37:16 57:7 65:1 low 51:3 lunch 54:21</p> <hr/> <p style="text-align: center;">M</p> <p>Madison 28:16 34:13 main 72:17 major 34:7 45:20 majority 42:15 44:5 55:8,16 66:23 67:19 making 6:15 10:20 43:5 51:18 59:20 67:6 manage 39:10 70:1 75:7 management 26:15 54:3 56:12,18,23 70:17,21 71:8 71:17 management--- 60:16 managers 41:15 41:16 managing 69:24 75:3 77:25 mandatory 35:3 35:22 39:16 Marbury 28:15 matter 1:12 5:13 7:16 22:17 27:24 29:14 47:6 52:17 73:1 76:3,5,19 76:24,24 77:19 82:1 83:1 matters 30:18</p> | <p>42:24 81:4 maximum 71:3 mean 18:11,23 19:5,15 27:17 28:15 31:7 32:7 36:15 37:12 43:22 59:24 63:3 meaning 13:1 means 38:10 52:22 meant 8:8 media 44:19 mediate 14:18 meet 14:17 16:6 meeting 47:25 member 4:25 69:5 members 4:24 15:9 23:10 36:23 50:24 55:1,2 58:9 80:2,3 members' 22:19 membership 6:10 50:20,23 50:25 51:3 80:4 memo 65:21 mentioned 45:2 58:15 merit 15:1 43:2 43:2 44:19 64:12 66:22 mess 63:4 MICHAEL 1:16 2:3,17 3:7 79:5 Michigan 56:22 micromanaging 11:12 mileage 46:20 46:24 66:12 million 17:15 millions 17:14 33:14 70:14 mind 29:3 minimize 52:12</p> |
|--|--|---|---|--|

| | | | | |
|------------------------|-------------------------|--------------------------|--------------------------|-------------------------|
| minority 66:22 | neglect 38:20 | 77:21 | operating 57:18 | overrule 17:10 |
| minute 29:13 | negotiate 12:23 | numerous 18:22 | operational | 29:5,7,23 |
| minutes 27:1 | 14:18 15:23 | | 12:20 | 31:25 32:2,7 |
| 79:4 | 16:6 17:1,4 | O | opinion 19:4 | overruled 21:2 |
| Mm-hmm 26:1 | 23:8 24:3 | O 2:1 3:1 | 30:12 31:3 | 32:25 33:11,12 |
| modern 6:14 | 57:15 58:18 | object 15:10 | opponents 51:19 | 34:8 |
| moment 52:10 | 66:11 | objected 6:16 | opportunity | overruling |
| Monday 1:10 | negotiated 46:17 | 64:10 | 61:19 62:2 | 28:24 29:18,25 |
| monetary 54:17 | 54:16 57:9 | objecting 6:11 | oppose 3:13 5:6 | 32:1 54:1 |
| money 5:1 24:6 | negotiating 4:3 | 61:11 69:5 | 5:13 79:12 | 71:21 |
| 27:10 28:1 | 46:6 48:1 | objection 3:24 | opposed 32:19 | overturn 30:13 |
| 33:19 34:11,17 | negotiation | objectives 64:15 | 47:2 50:22 | overturned 3:15 |
| 34:18,18 36:1 | 24:13 | objects 73:25 | 61:7 67:5 | 32:10 |
| 36:2,20 38:16 | neither 11:15 | obligation 15:22 | opposite 30:2 | overturning |
| 46:22,23,23,25 | 35:9 | obligations | 61:1 | 32:14,23 65:8 |
| 47:1 58:10 | never 13:25 19:1 | 70:19 | opposition | overwhelming |
| Moose 6:14 | 27:21 28:6 | obviously 7:23 | 79:11 | 55:8 67:19 |
| morning 3:4 | 57:17 68:15 | 10:1 13:24 | opt 38:8,8,13 | overwhelmingly |
| mouth 37:23 | 72:3 | 63:3 | 67:13,17,17 | 41:14,24 |
| move 20:2 | nevertheless | occur 59:8 76:14 | 68:11,17,19,21 | overwritten |
| movement 26:17 | 43:14 | occurring 59:10 | opt-in 67:5 68:9 | 32:20 |
| mundane 54:19 | new 30:4 59:9 | occurs 76:7 | opt-in/opt-out | |
| 66:17 | newspaper | odd 52:19 | 38:2 | P |
| | 44:18 | offense 10:13 | opt-out 67:5 | P 3:1 |
| N | NLRA 26:21 | offered 29:24 | 68:9 | page 2:2 79:11 |
| N 2:1,1 3:1 | 27:9 | 30:19 | opted 55:10 68:5 | paid 21:12 46:24 |
| name 30:15 | NLRB 32:24 | offering 17:17 | oral 1:12 2:2,5,9 | paper 19:8 |
| national 4:23 | nonchargeable | officers 57:2,3 | 2:12 3:7 39:2 | Parenthood |
| nearly 54:3 | 67:22 | official 12:20 | 53:18 69:10 | 23:22,23 |
| necessarily | nonmember | 13:6 40:3 | order 23:1 69:25 | part 11:7,20 |
| 45:19 49:18 | 10:21 11:1 | officials 14:4,17 | ordinary 34:3 | 13:2 15:7 |
| 56:10 | nonmembers | 15:13,22 16:6 | organ 40:5 | 24:13 25:8,22 |
| necessary 37:6 | 30:11 50:12,13 | 17:4 | organization | 47:5 50:1 |
| 65:5 72:4 | 53:23 58:9 | Oh 12:13 13:12 | 34:18,20 | participate |
| necessity 57:16 | 80:5 | 25:11,23 37:14 | orientation 9:1 | 71:15 |
| 78:25 | nonspeech 36:4 | 37:20 | ought 9:16 | participates |
| need 4:4 14:12 | note 56:16 59:7 | okay 4:17 5:3 | 66:24 67:10 | 24:4 |
| 18:17 22:25 | noted 11:9 | 25:23 | 72:12 78:6 | participation |
| 38:8 40:10 | notice 68:22 | once 21:18 | oughtn't 8:10 | 6:9 10:25 |
| 41:17 44:6 | 69:3,5 | 42:15 | 9:12 | particular 13:21 |
| 45:4 47:9,15 | notion 30:9,17 | one's 82:5 | outlawed 20:11 | 47:11,12 48:23 |
| 48:7,20 50:7 | 80:6,8 | one-page 68:3 | outset 73:9 | 49:1 61:7 |
| 51:21 52:4 | notwithstandi... | ones 45:1 | outside 9:24 | particularly |
| 54:20 71:7,22 | 22:13 | ongoing 3:16 | 11:17 44:11 | 17:11 27:23 |
| needs 43:24 | NTEU 80:20 | 82:16 | 80:23 | parties 4:23 |
| 58:16 70:8 | number 22:7 | open 46:2 53:10 | outweighs 17:23 | 31:24 73:3 |
| 71:22 72:13 | 67:24 71:3 | operate 21:1 | 19:25 | partner 40:12 |

| | | | | |
|--|---|--|--|---|
| <p>81:11 party 4:25 10:6 11:18 pay 13:10 14:5 15:1,25 21:10 42:6 43:2 44:19 45:16 51:4,6 52:20 53:23 62:8,12 64:12 66:22 68:15,16 71:4 paying 26:17 66:10 67:21 68:5 pays 24:5 pence 34:13 people 19:9 20:13 21:11 28:16 29:7,11 33:13,14,20,20 33:25 34:10,17 34:24 38:20 42:3 43:9 44:8 58:18 62:22 63:12 67:6,21 70:14 71:3 81:14 perceived 40:13 40:23 71:16 percent 5:17 22:18,20 38:12 50:19 67:20 80:4,5 percentage 55:9 perfectly 29:6 perform 23:1 54:21 performance 75:19 period 41:21 68:13 periods 47:12 permissible 3:20 permitted 12:6,7 permitting 6:21 perpetual 68:19 Perry 40:3</p> | <p>person 56:4 66:6 67:12,16 68:16 75:9 81:7 personal 52:13 personnel 11:13 11:19 80:20 persons 56:3 66:5 perspective 65:25 69:4 71:10 Petitioner 68:4 Petitioners 1:4 1:17 2:4,18 3:8 3:11 57:12 79:6 Petitioners' 10:16 petitioning 77:4 philosophically 56:1 phrase 11:21 physical 34:3 pick 44:1 Pickering 9:3,21 30:8,20 31:11 31:12 56:1,5 72:21,24 73:2 73:3,7,17,18 73:21,22 75:24 80:21,22 place 33:8 40:3 59:11 plaintiff 62:10 Planned 23:22 23:23 play 72:1 pleadings 61:25 79:13 please 3:10 27:7 39:6 53:21 69:14 Plessy 33:10 Plus 9:3 11:10 pocket 33:19 pockets 22:21 point 5:16 12:3</p> | <p>14:3,16 15:12 15:17 16:15 19:19 21:23 26:7 29:3 40:6 40:8,13 42:8 42:19 44:6,10 48:19 52:5,8 53:5 56:23 62:17,24 63:21 65:11,21 71:20 72:2,17 73:10 75:23 79:9 82:2 pointed 32:21 36:1 51:3 points 8:1 42:24 43:15 63:23 66:17 76:1 police 19:5,12 57:3 policies 54:22 60:21 policy 36:13 43:17 46:6,10 46:11,19 47:3 48:22 55:3 66:14 80:9,15 political 4:23 8:24 10:6,20 10:24 11:1,18 25:18 26:10,11 27:17 34:17 38:18 45:6,15 45:19 61:4,6 67:23 75:15,18 77:4 posed 51:13 position 8:5,10 9:12 12:20 13:6,25 23:10 36:19 43:1 48:6 49:7,13 55:19,20 57:15 59:22 63:1,9 65:2,23 66:24 positions 36:13 36:18 43:11,14</p> | <p>44:4 55:1 62:7 62:11 positive 59:14 possible 23:3 possibly 81:1 potential 69:5 power 25:17 practical 41:18 49:20 practice 37:19 precedent 29:25 30:16 32:9 71:21 precisely 11:3 21:1,24 29:22 40:7 predictability 3:17 17:24 preempts 80:13 prefer 42:5 51:16 preliminary 39:22 premise 8:19 prerogatives 77:7 prescinding 48:21 prescribes 21:20 present 11:15 46:18 presentation 49:15,16 presentations 72:23 presented 48:4 67:10 68:22 presents 55:3 preserving 30:15 48:18 presumably 28:6 presumption 51:13 pretty 31:10 34:2,3 prevail 5:20</p> | <p>57:12 61:7,11 prevents 71:18 primarily 49:20 principal 29:22 32:23 principle 5:5 34:6 37:6 78:10 principles 15:8 30:14 32:15 34:23 prior 20:15 24:20 68:11 72:14 private 5:20 6:3 6:17,21 7:9,16 7:20 8:5,12,15 8:21,23 9:6,17 11:25 39:11 41:7 52:7 56:19 70:1,7 72:7,8 74:23 76:18,22 80:17 problem 8:16 12:5 41:18 42:7 45:13 61:2 71:9 76:17 procedure 24:4 process 44:1,2 57:8 58:11 59:8 60:24 61:16 66:19,21 69:1 72:1 78:22 programs 12:7 44:18,19 progress 42:21 prohibit 79:24 80:12 prohibits 80:11 80:12 prominently 72:22 promote 45:17 promotion 43:2 pronounceme...</p> |
|--|---|--|--|---|

| | | | | |
|---|---|--|---|---|
| <p>37:3 proof 18:25 properly 9:13 proprietor 57:18 prosaic 82:3 prosecutor 64:10 prosecutor's 65:21 prospective 21:21 73:25 prospectively 21:20 prosper 50:14 50:19 protecting 44:20 protection 30:24 31:6 64:13 protest 15:1 provide 3:12 69:3 76:22,23 81:15 provided 53:24 provides 55:14 providing 55:13 provision 22:10 22:15 47:20 54:8 provisions 17:13 22:5,8 public 6:23 7:22 7:23 8:2,21 9:1 9:5 10:23 11:13 14:17,25 15:8,16,22 16:6 17:4 27:23 30:18 32:4 36:13 38:11 39:10,16 41:3,3,6 42:24 43:17 44:18 46:6,9,11,13 46:14,18,19,21 47:1,2,3,6,9 48:22 53:8,10 56:23,25 57:2</p> | <p>70:6 71:9 72:12 73:11,23 74:13 76:4,5 76:19,25 77:16 77:20 78:9 81:11 82:1,21 public's 43:19 70:17 publicly 55:20 62:7,11 66:20 pudding 18:25 punishment 20:6,11 pure 41:1 purpose 38:17 38:19 53:5,9 59:21 purposes 70:10 pushing 61:10 put 8:4 29:21 33:16 59:11 62:3,5 63:20 80:8 putting 5:12 58:10</p> <hr/> <p style="text-align: center;">Q</p> <p>question 23:14 23:18 25:12 29:22 35:20 39:22 41:10 45:8,9 46:6,10 46:19 48:4,4,8 48:9 51:13 52:6 58:14 62:6 63:16 67:9,14,25 71:24 74:13 75:20 79:19 80:18 questions 20:21 35:17 38:22 45:19,19 48:11 65:2 66:14 73:19 82:21 quite 8:20 28:25 35:9 72:1</p> | <p>80:21 quote 47:22 79:12 quoting 19:24</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 radical 30:23 railroads 7:20 Railway 6:25 7:3,6,11 raised 42:1 58:14 68:20 72:2 raises 13:11 14:6 15:25 range 54:15 55:12 rate 50:20,23 rates 46:20 rational 61:14 rationale 17:2 30:4 32:23 35:10,11 rationales 29:23 reach 6:19 42:21 47:11 reaching 41:18 47:13 read 19:7 22:9 77:2 79:24 reaffirm 78:8 reaffirmed 69:16 real 79:22 realistically 38:15 really 5:13 9:16 15:13 19:11 31:17 32:18 38:21 42:1 54:9 73:7 realm 43:19,20 44:14 reason 5:16 15:21 29:23 33:9 61:5</p> | <p>reasonable 52:7 56:12 57:21 61:15 62:22 75:19 reasonableness 62:25 66:1 69:25 75:22 77:8 reasonably 29:6 53:23 reasoning 32:15 reasons 8:18 24:15 68:24 69:16 REBECCA 1:3 REBUTTAL 2:16 79:5 receive 69:24 receiving 82:8 recipients 28:3 recognized 12:19 56:15 61:17 67:11 69:23 73:13 78:9 recognizes 31:5 recognizing 77:6 recollection 26:19 recommendati... 12:25 recompensed 21:17 record 60:13 62:1,2 63:20 63:23 79:8 reelection 38:13 referring 9:4 reform 82:17 regardless 26:24 38:4 regime 38:10 regulating 36:7 37:7 41:5 70:3 73:15 75:4 77:10 78:2 Regulation 34:4</p> | <p>regulations 57:6 57:7 regulator 77:10 reimbursement 46:20 66:12 related 31:14 relation 70:16 relations 15:1,8 15:16 26:15 44:18 69:19,20 relationship 9:23 10:5 11:7 11:21,22 41:1 41:5 56:9 76:8 relationships 54:10 70:23 relatively 66:17 relevant 48:13 reliance 17:24 19:25 20:25 65:14 70:12 71:19 relied 21:18 relief 21:21 remain 21:24 remainder 38:23 remember 22:4 52:12 removed 34:2 replace 23:6 70:25 replete 12:3 report 49:24 60:13 represent 30:11 42:12,17 representation 54:25 representative 3:21,25 4:2,5 4:12 12:19 13:7 24:7 40:2 40:11,12,24 42:16,19 44:7 54:1 55:15 56:14 66:11</p> |
|---|---|--|---|---|

| | | | | |
|---|---|---|--|---|
| represented 47:16 56:13 | 1:22,25 2:11 2:15 16:10 | 82:19 | San 1:18 | sector 7:9,16,20 39:16 51:3 |
| representing 40:14 | 49:12 53:19 69:12 | rights 3:17 8:21 10:16 19:17 22:20 68:1 | saying 5:7 16:2 18:20 19:17 22:12 30:1 37:17 47:5 51:21 53:9,11 55:12 57:23 60:2 61:5,13 67:16,16,17 68:16 76:4,6 77:3 81:17 | 52:7 56:19,23 56:25 72:7,8 |
| represents 44:5 | Respondents' 30:23 | rise 68:1 | 60:2 61:5,13 67:16,16,17 68:16 76:4,6 77:3 81:17 | secure 47:23 |
| Republican 4:24 | response 15:12 34:8 62:5 79:18 80:18 | risk 51:16 | says 4:24 7:17 8:21 12:18 19:24 27:18 47:21 60:2 65:5 68:14 74:12 77:14 | secured 47:25 |
| Republicans 4:20 | responsibilities 13:3 23:1,2 | rival 42:13 | Scalia 4:16,21 5:3,8,11 27:13 27:16 37:11,15 45:11,13 50:5 51:18 59:15,23 60:1,6,9,12 72:2 76:16 77:2 | see 29:11 33:14 33:17,21 37:25 37:25,25 52:25 60:6 79:25,25 |
| require 11:1,22 11:23 23:22 28:23 34:16 42:11 43:11,12 45:12 54:24 76:21 80:14 | restore 3:17 | ROBERTS 3:3 38:24 40:16,19 40:25 41:20,23 46:4,8,15,22 48:25 49:4,10 53:16 57:11 58:5 60:19,22 60:25 62:13,18 64:21,23 66:25 67:15 69:7,9 72:15,21 73:5 78:19 79:3 82:23 | Scalia's 58:13 | seek 80:13 |
| required 3:11 4:11 37:21 52:20 69:2 | restrict 11:8 12:4 | 67:15 69:7,9 72:15,21 73:5 78:19 79:3 82:23 | Scholar's 58:13 | seized 19:7 |
| required 3:11 4:11 37:21 52:20 69:2 | restricting 9:20 10:10 11:5,6 | robust 81:8 | scheme 68:8 | sell 22:19 |
| requirement 38:3,17 70:15 75:19,20 | restriction 36:4 52:14 | role 29:4 37:6 39:12 71:25,25 75:9 | school 4:4 12:21 15:25 16:2 30:21 40:4 41:17 54:23 57:1 59:13 60:15 | send 68:3,12 |
| requirements 57:15 70:9 | restrictions 28:4 49:2 55:23 74:2 | room 33:25 44:16 | scope 13:23 50:17 | seniority 45:18 |
| requires 11:16 12:24 14:17 24:15 51:17 | result 29:24 | rule 7:15 11:16 19:6,11,14 38:4 58:16 74:1 76:22 80:22 | score 36:16 | sense 23:24 42:4 52:24 |
| requires 11:16 12:24 14:17 24:15 51:17 | results 56:20 | rules 6:4 57:9 | scrutiny 10:4,16 10:18 70:2 75:10,21 77:6 77:9 | sensitive 67:2 |
| requiring 4:6,8 34:10,13 67:4 | retroactively 21:22 | run 15:16 45:25 46:1 47:9 48:20 | se 45:8 | separate 23:12 25:11 43:17 |
| research 54:24 | review 9:4,22 11:10 30:4,6 41:3 69:25 77:8 | running 38:1,9 | search 19:5,12 | serious 6:20 |
| reserve 38:23 | revoke 16:1 | Rutan 10:3 34:16 | second 18:2 20:2 33:23 67:9 70:4 74:2 | seriously 73:7 |
| respect 9:15 12:25 14:8 16:25 18:25 19:6 24:16 42:2 51:24 52:3 71:24 72:7,8 76:11 80:15,16,23 | ride 4:11 | S | section 12:16 47:20 | serve 39:16 |
| respectfully 8:19 22:16 32:12 35:23 72:25 78:3 | rider 43:4 | S 2:1 3:1 | | service 37:1 55:14 66:10 |
| respectfully 8:19 22:16 32:12 35:23 72:25 78:3 | riders 43:6 | sacrifice 59:20 | | services 53:24 54:15,24 55:13 59:12,13 |
| respects 73:21 | right 5:8,18 7:10 13:17,18,20 17:3,20,21,22 18:8,18,19 19:1,24 20:5 21:8,14,17 24:3,8,25 25:1 25:7 26:4,7 29:9,10,10 31:15 33:13 37:22 51:4 58:8 63:4,19 75:1,1 77:14 82:5,10,15,18 | safe 57:10 | | set 8:8 9:9,10 11:16 65:2 66:13 71:2 76:9 |
| respond 25:2 35:2 72:13 | | safety 46:21 57:2,6,15 81:25 | | sets 76:13 |
| Respondent 1:19 2:7 39:3 | | | | severability 54:8 |
| Respondents | | | | severable 22:5,8 |

| | | | | |
|---|---|---|---|---|
| show 51:20 52:4 54:20 63:6 65:13 66:14 68:6 75:18 81:1 | 48:21 sorry 9:8 12:14 21:5 22:23 49:3,8 58:5 sort 25:6 49:11 49:12 | 12:4 21:18 23:20 25:17,18 28:5 30:25 31:1,9,14 34:19 36:5,6 39:13,18 40:23 43:19 44:24 47:6 49:2 52:13,15,16 55:18,21,23 64:7,10,22 65:22,24 66:5 66:9 73:16 77:3,19 78:14 78:16 | 28:4 38:11 39:9,17,25 40:5 41:17 47:19 48:17 49:6 50:7 51:16 53:3 55:14 59:6 64:5 70:13 80:12 81:18 State's 40:8 statement 73:24 74:4,4,18 states 1:1,13,25 2:14 53:22 56:17 57:6 60:15 61:14,18 61:20 69:11 70:5,6,15,18 79:23 80:12,13 | 10:4 14:10 15:13 17:23 21:25 27:14,17 27:17 28:9 30:5 66:22 76:9 submit 65:16 68:2 78:3 submitted 41:3 59:7 81:14 82:24 83:1 subordinate 14:4 subordination 15:13 subsequent 32:14 subsided 10:17 subsidization 11:4 12:5,6 subsidize 3:14 3:24 5:10 9:24 10:22 11:1,17 16:21 23:22,23 25:17,25 43:14 82:5,20 subsidizing 10:10 25:18 74:4 subsidy 78:13 78:15,22 substantially 54:2 substantive 73:6 subsumes 15:6 successfully 68:5 sudden 27:24 suddenly 20:22 suffice 73:16 sufficient 78:7 suggest 51:23 suggesting 13:8 suggests 10:21 10:25 41:4 summarizing 69:15 |
| shown 41:14,24 side 28:11,12 29:15 33:6 45:21 48:14 58:17 59:5 68:4 82:18,20 sides 10:12 73:3 significance 63:17 significant 3:12 71:9 significantly 35:11 silence 10:14 78:16 silenced 66:5,10 Similarly 10:8 simply 16:1 21:24 32:3 41:4 54:7 67:4 80:7 sinful 34:12 single 68:17 73:23 80:19 Sir 27:4 situation 50:16 71:1 73:20 75:5 76:21 situations 64:17 six 33:25 size 43:3 64:14 65:23 82:17 small 55:9 smaller 67:24 so-called 79:11 society 27:22 29:4 Solicitor 1:18,23 somebody 4:17 17:10 68:14 somewhat 28:9 | sounds 10:7 60:25 Southworth 35:9 53:2,6,8 sovereign 8:7 70:3 73:15 75:4,9 77:10 78:1 speak 44:8 53:6 55:20 66:20 76:14 81:7 82:12,15 speaker 53:4 speaking 16:14 44:9 special 17:16,18 18:15,17 19:12 specialized 76:12 specifically 32:7 35:18 74:22 speech 3:16 6:10 9:19,20 10:10 10:11,12,17,18 10:18 11:5,6,8 | speeches 21:19 spend 33:20 36:20 52:22 sphere 45:6,7,15 spheres 43:22 square 80:7 stability 29:19 stably 42:20 stage 41:12 stake 61:18 standard 30:4 57:17,17,22 78:25 standards 76:10 standing 71:22 stands 78:11 stare 17:24 18:10,22 19:1 19:18,25 20:8 20:17 32:13 65:9 78:5 stark 80:19 start 27:25 29:17 35:15 state 5:21 6:8,9 6:13 11:23 12:9,10 13:1,8 13:9,9,16,24 14:3,4,5,8,20 15:13,14,14 16:2,16 24:15 24:22 26:3 | statute 6:5,8 24:15,17 27:18 27:24 statutory 7:16 stop 10:19,23 stops 19:15 story 59:14 strange 20:12 Street 7:12 strict 10:4 strictly 7:22 strike 30:22 63:5,5 strikes 59:10 63:10 stripping 23:5 strong 81:10 strongly 15:9 43:1,1,6 struck 36:17 37:8 54:6 62:23 structure 12:21 27:12 student 28:23 35:4 students 53:6 subject 7:23 | |

| | | | | |
|-------------------------|--------------------------|-------------------------|-------------------------|-------------------------|
| supplying 58:11 | 72:6 | termination | 63:2,22 65:25 | 54:22 |
| support 3:12 4:9 | take 13:19 15:1 | 73:22 | 66:18 67:1,10 | transit 59:12 |
| 29:24 61:3 | 18:22 25:20 | terms 10:15 16:9 | 68:11 71:8,19 | translate 16:7 |
| 67:22 | 27:25 34:25 | 28:18 73:5,6 | 72:1 73:1,4,8 | treat 33:13 |
| supported 42:12 | 36:13 38:3 | 75:13 79:20 | 73:10 74:21,25 | treating 11:25 |
| 42:13,15 60:17 | 40:17 51:16 | test 31:16 | 75:11,23 76:10 | treatment 17:23 |
| supporting 1:25 | 66:24 70:22 | Thaler 63:4 | 77:18 78:14 | 19:25 |
| 2:15 34:19 | 74:5,11 82:18 | thank 38:24 | 81:25 | tricky 23:18 |
| 67:7 69:12 | taken 44:4 48:6 | 53:16,20 69:7 | thinking 4:22 | trouble 4:23 |
| suppose 14:25 | 70:18 | 69:8 79:2,3,7,7 | 29:18 | trucks 58:24 |
| 22:7 27:17 | talk 29:13 44:19 | 82:23 | thinks 9:1 38:15 | true 6:7 17:9,11 |
| 55:4 56:8 62:9 | 54:5 | theory 35:6 | third 71:20 80:2 | 33:24 42:25 |
| 64:2,5 68:14 | talking 17:5 | thing 33:23 | Thomas 34:12 | 76:16 |
| suppress 39:12 | 25:21 33:25 | 34:14 36:3 | thought 10:11 | try 39:14 44:12 |
| 44:12 64:7 | 37:11 55:12,13 | 48:16 62:4 | 19:10 23:17 | 47:5 71:6 |
| suppresses | 63:24 64:19 | 63:3 76:22,23 | 26:17 | trying 26:8 33:8 |
| 66:19 | 66:4 67:20 | 77:20 81:4 | thousand 5:17 | 45:25 46:1 |
| suppression | 71:21 81:4 | things 7:14 8:10 | thousands 11:12 | 47:9,10 49:11 |
| 64:9 67:25 | tax 26:6 | 8:12,14 9:12 | 17:13 18:23 | 49:12 55:1 |
| Supreme 1:1,13 | taxpayer 27:25 | 9:16 11:3 | 20:22 33:18 | 71:2,3,6 |
| sure 12:17 18:4 | teacher 43:2 | 14:11 15:25 | 70:13 | turning 30:14 |
| 20:19 27:24 | 55:19 66:13 | 19:8 22:10,14 | three 28:25 | turns 6:15 |
| 34:10 37:2 | 81:23 82:17 | 22:14 24:10 | 34:13 49:11 | Twenty-five |
| 54:18 59:2 | teachers 1:6 3:5 | 29:18 33:18,21 | 69:15 79:4 | 79:23 |
| 78:19 | 15:9 16:12,13 | 36:10 37:8,16 | thrust 61:24 | two 5:25 8:18 |
| survival 72:4 | 16:16 39:24 | 37:19 44:19 | time 18:7 36:11 | 10:11 11:3 |
| survive 50:11,14 | 42:25 43:5,7 | 45:5,24 58:24 | 38:1,10,23 | 14:11 17:18 |
| 51:14,20,22 | 43:13 44:20 | 59:17 66:13 | 41:22 47:12 | 22:7 24:14 |
| 52:5 57:12 | 45:17 46:24 | 80:7 81:19 | 54:7,10 59:10 | 27:1 28:24 |
| 65:3 | 50:23 54:20,22 | think 4:19 6:6 | 68:13 70:24,25 | 31:18,21 32:5 |
| survives 80:3 | 55:5,8 57:1 | 6:12 12:2,5 | 71:10 73:12 | 32:21 37:12 |
| sustained 65:19 | 64:13 66:14,20 | 13:4 15:17 | times 18:11 | 43:22 45:24 |
| sympathize 50:6 | 66:23,24 | 18:25 19:3 | 54:20 | 81:7 |
| system 40:10 | teachers' 17:3 | 20:5,12 25:16 | today 72:18 | tyrannical 34:12 |
| 41:12,13 50:3 | 65:23 | 26:2,10 28:11 | 82:18 | |
| 50:7 53:3,5 | technical 73:1 | 28:24 29:9,9 | tomorrow 38:11 | U |
| 54:9 56:12,19 | technique 52:6 | 29:11,21,22 | topics 12:23 | U.S.C 80:10 |
| 59:11 60:18 | tell 13:10,11 | 31:10 32:13,16 | 13:21 46:12 | Uh-huh 16:18 |
| 61:16,21 65:18 | 14:5 15:24 | 33:10 36:15,21 | 76:15 | unconstitutio... |
| 66:2 67:19 | 16:7 20:12 | 37:11 39:15,24 | tough 29:20 | 17:23 20:14 |
| systems 54:3 | tells 12:23 13:15 | 40:1 41:10 | trade-off 56:15 | 21:11 |
| | ten 65:4 | 43:7 47:19 | training 12:24 | underlays 75:14 |
| T | tenor 46:13 | 48:4,13,13,15 | 13:2 58:3 | 75:14,15 |
| T 2:1,1 | tens 17:12 18:11 | 49:17,18 50:3 | 70:19 81:15,23 | underlying 65:1 |
| table 3:22 14:10 | tenure 43:2 | 50:10 51:17,25 | 81:25,25 82:17 | undermined |
| 58:18 | term 43:4 47:7 | 56:8 59:3 | transfer 66:13 | 32:15,17 |
| Taft-Hartley | terminate 74:11 | 62:14,16,18,19 | transferring | underperform... |

| | | | | |
|---|---|---|---|---|
| <p>44:20 64:13 underpinnings 32:18 understand 18:7 18:21 21:19 43:11 44:9 58:21 59:15,16 59:25 understanding 25:24 understands 39:7 undo 24:23 undoubtedly 62:20,20 undue 52:9 unduly 39:17 union 1:22 2:11 3:20 4:9,11,15 5:21 11:18 12:10,20,23 13:2 14:25 15:7,24,24 16:8,19,20 17:4 22:14,17 23:16 24:2,4 25:3,10,15,22 25:24 26:17 27:20 36:2 40:1,7 42:10 42:10,13 43:1 43:5,9,10,14 43:25 44:2,4 44:17,23 47:16 49:7 50:9,10 50:12,24 52:5 53:19,24 54:16 55:2,5,6,9,15 58:8,9,11,21 60:1,3 61:9,9 61:11 62:8 65:3 67:3,7 69:2 71:1,4,7 71:14,17 72:4 76:3 79:16,24 79:25 80:2,3,4 81:2,6,8</p> | <p>union's 10:22 13:25 16:22 21:24 25:25 30:9 38:20 48:5 49:15 55:19 62:11 63:9 79:20 unionism 42:14 unions 10:19 13:10 14:19 19:20 22:9,22 26:17,21,24 27:10,11 28:1 28:5 42:14 44:17,21 50:12 50:24 57:14 70:18 71:5 79:12 81:15,20 81:22 82:18 unique 14:17 unit 58:1,10 United 1:1,13,24 2:14 21:17 32:21 69:11 universities 28:23 unlawfully 19:7 unreasonable 68:7 unrest 49:23 unwilling 22:1 unworkable 30:15 65:18 upheld 19:1 32:24 37:5 38:10 75:21 uphold 78:8 upholding 55:23 use 8:9 9:12 11:21 47:7 56:1 user 53:14 uses 52:7 usually 32:9,9</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 28:15</p> | <p>32:24 33:10 Valley 32:24 variety 44:12,24 various 8:6 vehicle 4:13 Verrilli 1:23 2:13 69:9,10 69:13 72:20,25 73:8 74:5,8,15 74:19,21,25 76:6 77:1,17 78:17,20 view 3:20 20:8 28:13 29:3 40:8,13 42:4,9 42:19 44:6 52:6,8 82:19 82:19 viewed 65:22 viewpoint 3:13 viewpoint-dis... 25:19 26:12 viewpoints 44:13 views 36:24 56:3 56:11,13 61:4 61:6,12 82:20 violating 37:3 violation 3:15 37:2 virtually 37:22 visualize 41:1 vividly 5:6 voice 44:8 void 20:23 voluntary 28:2 37:12 38:16,21 66:13 voted 55:16 vouches 71:17</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wage- 63:7 wages 34:1 45:16,17 47:24 58:19 wait 20:3</p> | <p>walk 30:3 want 4:25 5:15 11:11 14:21 21:9 24:9 33:24 40:9 41:14,24 42:3 42:10,10 46:10 47:7 48:18 52:11 61:8,9 63:20 68:14,15 68:15,21 73:19 75:25 77:13 81:9 wanted 25:14 61:25 67:13 68:11 79:10 wants 58:17 81:10 war 38:18,20 Washington 1:9 1:16,21,24 way 23:3,5 24:3 25:19 26:12 27:22 33:9 35:22 38:4 49:14 53:5 57:10 61:1 65:18,24 68:21 69:21 70:16,16 71:5 76:21 ways 22:25 23:3 41:8 We'll 3:3 we're 21:21 22:19 24:6 27:25 33:25 37:11 40:9 42:9 45:24 47:8,10 55:13 56:25 57:2 62:9 63:24 67:1,20 71:21 75:12,13 81:4 we've 12:6,7 30:11 34:15 38:5 weaker 4:14</p> | <p>17:2 weighs 67:4 weight 20:8 welfare 47:2 54:19 66:12 well-being 79:20 went 50:2 wholly 28:6 30:15 77:5 wide 44:12 46:2 54:15 wide-ranging 15:7 widely 52:7 willing 60:9 71:4 Wisconsin 56:21 56:24 wish 3:13 5:9 34:11 word 37:23 words 7:15 8:5 8:14 13:23 34:4 work 28:20 42:20,21 57:9 workability 28:19 61:15 62:24 workable 41:13 47:11 48:12 60:18 worked 29:5 65:18 70:15 workers 55:16 56:10 57:1,25 58:19 59:20 70:17 workforce 9:15 55:2 69:24 70:2 71:16,18 78:1 80:16,17 working 33:15 34:1 58:19 59:21 working-cond... 63:7 workplace 11:10</p> |
|---|---|---|---|---|

| | | | | |
|-------------------------|------------------------|--|--|--|
| 44:15 45:25 | 2 | | | |
| 47:9 52:16,16 | 20 70:4,13 | | | |
| 64:11,17,20 | 2016 1:10 | | | |
| 65:22,24 70:8 | 29 80:10 | | | |
| 70:20 72:11,13 | | | | |
| 75:3,7 | 3 | | | |
| workplace-rel... | 3 2:4 | | | |
| 52:17 | 30 50:19 | | | |
| workplaces | 3546(b) 47:20 | | | |
| 47:12 48:21 | 39 2:8 | | | |
| world 29:19 | | | | |
| 79:22 | 4 | | | |
| wouldn't 4:19 | 4 79:11 | | | |
| 5:13 14:7 | 40 28:14,14,15 | | | |
| 50:18 73:15 | 29:5 71:21 | | | |
| woven 70:16 | 72:16 | | | |
| written 63:13 | | | | |
| wrong 16:13 | 5 | | | |
| 28:16 29:9,10 | 500 52:20,23 | | | |
| 43:10,12 65:14 | 50s 49:23 | | | |
| | 53 2:11 | | | |
| X | | | | |
| x 1:2,8 52:19 | 6 | | | |
| | 6 80:10 | | | |
| Y | 69 2:15 | | | |
| Yeah 74:8 | | | | |
| year 3:11 18:12 | 7 | | | |
| 68:15,17 | 70s 50:3 | | | |
| years 26:16 | 75 26:16 | | | |
| 28:14,14,15 | 79 2:18 | | | |
| 29:6 72:16 | | | | |
| years' 71:22 | 8 | | | |
| York 59:9 | 80 26:16 | | | |
| young 43:8 | | | | |
| | 9 | | | |
| Z | 9 22:20 | | | |
| | 90 67:20 80:4,5 | | | |
| 0 | | | | |
| 1 | | | | |
| 1 38:12 | | | | |
| 10 17:15 22:18 | | | | |
| 10:04 1:14 3:2 | | | | |
| 11 1:10 | | | | |
| 11:26 82:25 | | | | |
| 14-915 1:4 3:4 | | | | |
| 164(b) 80:10 | | | | |
| 1960s 49:23 | | | | |