No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS*[1]

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the active Catholic bishops of the United States. The USCCB provides a framework and a forum for the bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. As such, the USCCB advocates and promotes the pastoral teaching of the U.S. Catholic bishops in such diverse areas of the nation's life as the free expression of ideas, including through voluntary associations operating in a vibrant civil society; fair employment and equal opportunity for the poor and vulnerable; protection of the migrant and refugee; protection of the rights of parents and children, especially in education; the sanctity of human life; and the nature of marriage.

SUMMARY OF ARGUMENT

The Catholic bishops of the United States have long and consistently supported the right of workers to organize for purposes of collective bargaining. Because this right is substantially weakened by so-called "right-to-work" laws, many bishops—in their dioceses, through their state conferences, and through their national conference—have opposed or cast doubt on such laws, and no U.S. bishop has expressed support for them.

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[1] No one other than *amicus* and its counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

Petitioner invites this Court to constitutionalize the "right-to-work" position—instantly, without exception, for all fifty states, almost irreversibly—in the public sector. Petitioner's proposed rationale for this dramatic move appears designed to lay the foundation for a still more dramatic one: constitutionalizing, in a subsequent case, the "right-to-work" rule in the private sector as well.

The Court should decline this invitation. It should leave constitutional space for the public policy position supported for so long by so many bishops and bishop-led institutions, rather than declare still another such position outside the bounds of what policymakers are permitted to implement by law. *See, e.g., Obergefell* v. *Hodges,* 135 S. Ct. 2584 (2015) (definition of marriage); *Roe* v. *Wade,* 410 U.S. 113 (1973) (prohibition of abortion). By its decision in this case, the Court should not only preserve that room for debate as to the public-sector context now, but avoid any threats to it in the private-sector context in the future.

ARGUMENT

I. The Court Should Not Render a Public Policy Position That Is Widely Held Among U.S. Bishops—Opposition to "Right-to-Work" Legislation—Unconstitutional as to the Public-Sector Context.

Beginning with *Rerum Novarum* in 1891, the social doctrine of the Catholic Church has contained "repeated calls … for the promotion of workers' associations that can defend their rights." Pope Benedict XVI,

Caritas in Veritate, no. 25 (2009).[2] These calls arise from the strong commitment of the Church to protect *both* the poor and vulnerable from exploitation, *and* the right of association from governmental infringement.[3] Accordingly, the Catholic bishops of the United

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[2] *See* Pope Leo XIII, *Rerum Novarum,* no. 55 (1891) ("The bishops, on their part, bestow their ready good will and support" on those who "strive to unite working men of various grades into associations, help them with their advice and means, and enable them to obtain fitting and profitable employment"). *See, e.g.,* Pope St. John Paul II, *Laborem Exercens*, no. 20 (1981) ("The[] task [of unions] is to defend the existential interests of workers in all sectors in which their rights are concerned. The experience of history teaches that organizations of this type are an indispensable *element of social life,* especially in modern industrialized societies.") (emphasis in original); Pope Francis, Audience with Delegates from the Confederation of Trade Unions in Italy (June 28, 2017) ("There is no good society without a good union, and there is no good union that is not reborn every day in the peripheries, that does not transform the discarded stones of the economy into its cornerstones.") (available at https://press.vatican.va/content/salastampa/en/bollettino/publico/2017/06/28/170628a.html).

[3] *See, e.g., Rerum Novarum,* no. 3 ("[W]e clearly see … that some opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class"); *id.* no. 51 ("For, to enter into a 'society' of this kind is the natural right of man; and the State has for its office to protect natural rights, not to destroy them;"); Pope St. John Paul II, *Centesimus Annus,* no. 15 (1991) ("[S]ociety and the State must ensure wage levels adequate for the maintenance of the worker and his family, including a certain amount for savings. … The role of trade unions in negotiating minimum salaries and working conditions is decisive in this area."); *id.* no. 7 ("Here we find the reason for the Church's defence and approval of the establishment of what are commonly called trade unions: certainly not because of ideological prejudices or in order to surrender to a class mentality, but because the right of association is a natural right of the human being, which therefore precedes his or her incorporation into political society."). *See also Catechism of the Catholic*

States have consistently affirmed and defended the right of workers to organize, precisely in service to these same two values.[4]

With these broader principles in mind, bishops in the United States have generally been very inimical to "right-to-work" laws, which make union security clauses illegal. Without these clauses, unions face a "free rider" problem that dramatically weakens them and, in turn, their bargaining power on behalf of workers, as experience in "right-to-work" states to date has borne out.[5] Thus, "right-to-work" laws are seen to rep-

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Church, no. 1882 (2d ed. 1992) ("To promote the participation of the greatest number in the life of a society, the creation of voluntary associations and institutions must be encouraged 'on both national and international levels, which relate to economic and social goals, to cultural and recreational activities, to sport, to various professions, and to political affairs.' This '*socialization*' … develops the qualities of the person, especially the sense of initiative and responsibility, and helps guarantee his rights") (citations omitted).

[4] *See, e.g.,* National Conference of Catholic Bishops, *Economic Justice for All: Catholic Social Teaching and the U.S. Economy,* no. 104 (1986) ("The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions. This is a specific application of the more general right to associate. … No one may deny the right to organize without attacking human dignity itself.").

[5] For example, between 2000 and 2014 in non-"right-to-work" states, unions were certified to represent 49.6% of public-sector workers (teachers, firefighters, police, etc.); but during the same period in "right-to-work" states, unions were only certified to represent 17.4% of public-sector workers. Jeffrey Keefe, "Eliminating fair share fees and making public employment 'right-to-work' would increase the pay penalty for working in state and local government," *Economic Policy Institute*, 2-3 (2015) (available at http://www.epi.org/files/pdf/93216.pdf). In non-"right-to-work"

resent a governmentally imposed "limit [on] the freedom or the negotiating capacity of labour unions," which poses "greater difficulty [to those unions] in carrying out their task of representing the interests of workers." *Caritas in Veritate,* no. 25.

As detailed below, there is some meaningful variation in the extent of this opposition and how it is expressed, but every episcopal statement we have found has fallen in the range between strongly negative and neutral. Our research has revealed not a single statement of support from a U.S. bishop for a "right-to-work" law at any level of government.

1. The question of "right-to-work" legislation first came before Congress in 1947, in connection with consideration of the Taft-Hartley Act.[6] That Act did not contemplate a prohibition on union security clauses nationwide, but in its Section 14(b), it authorized states to pass such prohibitions.[7] In response, the So-

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states, only 6.8% of the bargaining units were non-union members, and even these were required by the security clause to pay agency fees of approximately 85% of ordinary union dues; but during the same period in "right-to-work" states, 20.3% of the bargaining units declined to join the union and to pay dues. *Id.* More broadly, the unionization rate tends to be lower in right-to-work states than in non-right-to-work states. *See, e.g.,* "Right-to-Work Laws," *National Conference of State Legislatures* (May 2012) (available at http://www.ncsl.org/Portals/1/Documents/magazine/articles/2012/SL_0512-Stats.pdf).

[6] *See* Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-197 (80 H.R. 3020, Pub. L. 80-101, 61 Stat. 136, enacted June 23, 1947).

[7] 29 U.S.C. § 164(b) ("Agreements requiring union membership in violation of State law. Nothing in this subchapter shall be construed as authorizing the execution or application of agreements

cial Action Department of the National Catholic Welfare Conference (NCWC)—the predecessor of USCCB's current Department of Justice, Peace and Human Development—opposed the Act, in part because of Section 14(b), which

> …would tend to encourage the separate States to enact anti-labor legislation. It would do so by going out of its way in a most unprecedented manner to provide that in spite of the federal law the States are free to outlaw the union shop in any of its various and long-established forms.[8]

Some bishops added their individual voice in advocating against Taft-Hartley, also citing the bill's authorization of state laws forbidding security clauses as one reason for their opposition.[9]

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requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.").

[8] *See* NCWC Social Action Department, Statement on Taft-Hartley Bill at 2, para 3 (June 13, 1947) (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/06-13-47-NCWC-Social-Action-Statement-re-Taft-Hartley.pdf).

[9] *See, e.g.,* Most Reverend Bernard J. Sheil, Auxiliary Bishop of Chicago, "Address Delivered over the American Broadcasting Company Network," at 2 (June 5, 1947) ("The alleged interest in preserving the freedom of the individual worker is merely a mask covering a death-blow at all unionism.") (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/06-05-47-Bp-Sheil-Speech-re-Taft-Hartley-on-ABC.pdf).

Taft-Hartley nonetheless passed, and immediately thereafter, states began to consider laws outlawing union security provisions. Accordingly, as discussed further below, most of the activity in this policy area occurred at the state level after 1947.

In 1965, however, there was an effort in Congress to repeal Section 14(b). In response, NCWC's Social Action Department expressed support for this repeal in various ways, including through the legislative testimony of its Director, Msgr. George Higgins.[10] NCWC also coordinated an ecumenical and interfaith campaign of telegrams to members of Congress to express support for the repeal of 14(b).[11]

In response to the claim that union security provisions restrict the freedom of workers generally, Msgr. Higgins' testimony suggested that this general concept of freedom was too absolute and extreme, and that the requirement of financial support for the union was a legitimate limitation on such a broad freedom for two reasons. First, it was a necessary concomitant of the right of workers to organize and bargain collectively; and second, like many other workplace rules, it served

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[10] *See* Monsignor George G. Higgins, Director, NCWC Social Action Department, Testimony Before the Special Subcommittee on Labor of the House Committee on Labor and Education (June 3, 1965) ("Higgins Testimony") (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/06-03-65-Higgins-Testimony-re-Right-to-Work.pdf).

[11] *See* NCWC News Service, "Churchmen Reiterate 'Right to Work Laws' Opposition" (July 26, 1965) ("Telegram Campaign") (available at http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/07-26-65-NCWC-Release-re-Right-to-Work-Telegrams.pdf).

the orderly functioning of the workplace and the common good of workers. *See* Higgins Testimony, *supra* note 10.

The telegrams referenced above responded to the claim that union security provisions restricted the religious freedom of workers who object to union support or participation based on religion (such as Seventh-day Adventists). The telegrams both suggested that religious freedom should be respected by means other than the wholesale prohibition of union security clauses, and made clear that this concern did not mitigate their opposition to Section 14(b) and right to work laws. *See* Telegram Campaign, *supra* note 11. Consistent with this approach, federal and many state laws—including that of Illinois here—have provided that employees with religious objections to supporting unions can contribute the amount of the required fees to a charitable cause instead.[12]

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[12] *See, e.g.,* 29 U.S.C. § 169 ("Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund…"); 29 C.F.R. § 1605.2(d)(2) ("Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization."); 5 Ill. Comp.

2. As noted above, debates over "right-to-work" laws largely shifted to the state level after the passage of Taft-Hartley in 1947. At that level, the policy positions of Catholic bishops are generally expressed through State Catholic Conferences. Individual diocesan bishops will sometimes address state legislation as well, but that most often occurs when a bishop's diocese encompasses an entire state. The statements of these State Catholic Conferences and individual bishops reflect the same themes as the statements directed at federal law, and none expresses support for "right-to-work" laws.

Several State Catholic Conferences have squarely opposed state right to work laws, such as in Ohio (1958),[13] Missouri (1978),[14] and New Mexico (2015).[15]

Stat. Ann. 315/6(g) (allowing religious objectors to pay an equivalent fee to "a nonreligious charitable organization mutually agreed upon by the employees affected" and the union).

[13] Charles C. Webber, AFL-CIO Office for Religious Relations, "Ohio's Catholic Bishops Oppose 'Right to Work' Amendment" (Apr. 3, 1958) (supplying entire statement of Ohio Catholic Welfare Conference) (available at https://www.lib.umd.edu/binaries/content/gallery/exhibits/unions/social-rights/religious-freedom/objects-in-cases/case-2/labor-063900-0001-tn28532.jpg).

[14] Mike Hoey, Missouri Catholic Conference, "A Short History of the Missouri Catholic Conference 1967-2007," at 7 (2007) (available at http://www.mocatholic.org/wp-content/uploads/2012/10/MCC-Short-History-1.pdf). More recently in Missouri, in 2014, Archbishop Robert Carlson of St. Louis joined an interfaith coalition letter expressing opposition to right to work bills and referenda. *See* Joseph Kenny, "Interfaith Partnership opposes 'Right to Work' legislation," *St. Louis Review* (Apr. 2, 2014) (available at http://stlouisreview.com/article/2014-04-02/interfaith).

[15] Allen Sánchez, Executive Director, New Mexico Conference of Catholic Bishops, Open Letter (Mar. 10, 2015) (available at

The themes reflected in these statements of opposition are similar to those in Msgr. Higgins' testimony, cited above.

Although not a detailed treatment, the Kentucky Catholic Conference made its position on the issue clear in the context of a broader 2007 pastoral letter on justice for workers, stating that "Kentucky workers have benefited from the rejection of a right to work law."[16] More recently in Kentucky, the Bishop of Lexington issued an additional statement expressing opposition to "right-to-work" legislation pending in early 2017.[17] In 1954, the Archbishop of New Orleans sent a telegram to the state legislative committee considering a "right-to-work" bill, stating that it "actively denies what it pretends to give, namely the right to work," and sent his personal spokesman to the state capitol to testify against the bill.[18]

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https://www.teamsters492.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=481832).

[16] Kentucky Catholic Conference, *Just Work: A Pastoral Letter About Work and Justice*, at 3 (2007) (available at https://www.cdlex.org/documents/Money/Building%20Comm/2007_Just_Work_Labor_Pastoral_Letter.pdf).

[17] *See* "Kentucky Bishop on Right to Work: 'This cannot be seen as contributing to the common good,'" *Catholic Labor Network* (Jan. 26, 2017) (supplying entire open letter of Most Reverend John Stowe, OFM Conv., Bishop of Lexington) (available at http://catholiclabor.org/2017/01/kentucky-bishop-on-right-to-work-this-cannot-be-seen-as-contributing-to-the-common-good/).

[18] Thomas A. Becnel, "With Benefit of Clergy: Catholic Church Support for the National Agricultural Workers Union in Louisiana, 1948-1958," *LSU Historical Dissertations and Theses,* No. 2380, at 230-31 (1973) (available at http://digitalcommons.lsu.edu/gradschool_disstheses/2380).

In the Diocese of Manchester, which encompasses all of New Hampshire, the equivalent of its State Catholic Conference director sent a letter to the legislature in 2013 expressing opposition to a pending "right-to-work" bill.[19] In 2017, in response to a similar bill, the director sent a letter that tracked the 2013 letter in many ways, but stopped short of explicitly opposing the bill, instead posing a series of skeptical questions rooted in applicable Catholic Social Teaching.[20]

This latter approach is reflected in statements on "right-to-work" legislation from the bishops' conference of Wisconsin in recent years,[21] and in a major public address by the Archbishop of Chicago in 2015, in which he explained that:

> …in view of present day attempts to enact so-called right-to-work laws the Church is duty bound to challenge such efforts by raising questions based on longstanding principles. We have

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[19] *See* Meredith P. Cook, Esq., Letter to Hon. Andrew White (Feb. 1, 2013) (available at https://www.catholicnh.org/assets/Documents/Community/Current-Issues/Labor-Unions-and-Just-Wage/HB323RightToWork.pdf).

[20] *See* Meredith P. Cook, Esq., Letter to Hon. Daniel Innis (Jan. 10, 2017) (available at https://www.catholicnh.org/assets/Documents/Community/Current-Issues/Labor-Unions-and-Just-Wage/SB11-RightToWork.pdf).

[21] *See* John Huebscher, Executive Director, Wisconsin Catholic Conference, Testimony on Senate Bill 44: Right-To-Work (Feb. 24, 2015) (available at http://www.wisconsincatholic.org/SB_44_Right_to_Work_1.pdf); Most Reverend Jerome E. Listecki, Archbishop of Milwaukee and President of the Wisconsin Catholic Conference, "Statement Regarding the Rights of Workers and the Value of Unions" (Feb. 16, 2011) (available at http://www.archmil.org/News/StatementRegardingtheRightsofW.htm).

> to ask, "Do these measures undermine the capacity of unions to organize, to represent workers and to negotiate contracts? Do such laws protect the weak and vulnerable? Do they promote the dignity of work and the rights of workers? Do they promote a more just society and a more fair economy? Do they advance the common good?"[22]

The 2011 statement of the bishops of Indiana is more general and closer to neutral,[23] as is the brief statement from the bishop of the Diocese of Wheeling-Charleston, which encompasses all of West Virginia.[24] Even so, these statements still reinforce the fundamental right of workers to organize, and insist that legislative decisions take into account the preservation of this right.

3. In this context, Petitioner urges this Court to construe the Free Speech Clause to forbid public employers from applying union security clauses to any objecting employee, even where the funds collected pursuant to those clauses are used only for collective bargaining, contract administration, or grievance adjustment. Pet. Br. 11-14. If the Court were to adopt this construction, it would have the same effect as if

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[22] His Eminence Blase Cardinal Cupich, Archbishop of Chicago, Address to the Chicago Federation of Labor (Sept. 17, 2015) (available at http://arisechicago.org/archbishop-cupich-addresses-chicago-labor/).

[23] *See* "Indiana's bishops offer statement on state labor issues," *The Criterion Online* (Dec. 16, 2011) (available at http://www.archindy.org/criterion/LOCAL/2011/12-16/labor.html).

[24] See "Message from Most Reverend Michael J. Bransfield" (Feb. 11, 2016) (available at https://dwc.org/a-message-from-most-reverend-michael-j-bransfield/).

all fifty states passed—immediately and virtually irrevocably—"right-to-work" laws that applied only to public-sector unions. That is, employees in unionized public-sector workplaces who do not wish to pay for agency fees would no longer be subject to a job requirement to do so.

In turn, all of the foregoing public advocacy of the bishops against "right-to-work" laws would be rendered practically irrelevant in the public-sector context. The bishops would, of course, remain free to extol the importance of union security clauses for workers and the common good, but that teaching could no longer have any effect on policymaking regarding the government workplace, as those clauses could never be given effect in any such workplace anywhere in the nation.

This would represent another unfortunate decision of this Court that marginalizes the voice of the bishops with respect to an important public policy debate by declaring their position to lie beyond the constitutional pale. Perhaps the most notorious instance of this is *Roe* v. *Wade,* 410 U.S. 113 (1973), by which the Court removed the ongoing debate over legal restrictions on abortion from the political process. The Court found that the position in favor of legal restrictions—which is also the long-standing position of the bishops—fell beyond the range of policy positions that the U.S. Constitution could allow. *Roe* did not, of course, silence the public debate over the question, but it did prohibit laws and regulations generated by the political branches from reflecting the view of one side of that debate.

More recently, the Court read the Constitution to forbid laws defining marriage as the union of one man and one woman. *Obergefell* v. *Hodges,* 135 S. Ct. 2584

(2015). Once again, that decision did not forbid or otherwise bring an end to public debate of this hotly contested question, but rendered that debate incapable of altering public policy, which is now constitutionally fixed against the perennial position of the bishops. *See Obergefell,* 135 S. Ct. at 2602 (acknowledging that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises," but forbidding their "enact[ment in] law and public policy").

This same pattern of marginalization now appears poised to extend to the very different issue of "right-to-work" legislation. Several states have recently been engaged in an intense policy debate over whether to pass such laws.[25] Several other states are expected to debate the issue in the coming year.[26] Many bishops

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[25] *See, e.g.,* Adam Beam, "2 bills targeting labor unions advance," *Courier Journal* (Jan. 4, 2017) (available at https://www.courier-journal.com/story/news/politics/ky-legislature/2017/01/04/right--work-advances-union-workers-protest/96162430/); Natasha Korecki, "Right-to-work goes down in flames in Illinois House with zero yes votes," *Chicago Sun-Times* (May 14, 2015) (available at https://chicago.suntimes.com/news/right-to-work-goes-down-in-flames-in-illinois-house-with-zero-yes-votes/); "Right-to-Work: NM Senate panel tables bill," *KOAT Action News* (Mar. 10, 2015) (available at http://www.koat.com/article/right-to-work-nm-senate-panel-tables-bill/5062637); Scott Bauer, "About 2,000 protest against right-to-work at Wisconsin Capitol," *PBS NewsHour* (Feb. 24, 2015) (available at https://www.pbs.org/newshour/nation/2000-rally-right-work-bill-wisconsin); Adam Sorensen, "Why is Indiana's 'Right-to-Work' Law Such a Big Deal?," *Time* (Feb. 2, 2012) (available at http://newsfeed.time.com/2012/02/02/why-is-indianas-right-to-work-law-such-a-big-deal/).

[26] *See,* Adam Edelman, "Left vs. Right: State pols set to battle over voter rights, guns and unions," *NBC News* (Jan. 13, 2018) (available at https://www.nbcnews.com/politics/politics-news/left-vs-right-state-pols-set-battle-over-voter-rights-n836691)

of the United States have actively participated in those debates, ranging in their views from deep skepticism to direct opposition to those laws, as detailed above. *See supra* notes 8-11, 13-24. The resulting policies have varied from state to state.[27] A ruling for the Petitioner here, however, would yet again consign the positions of those bishops, and millions of Americans who share their views for decent and honorable reasons, to irrelevance with respect to any operative policy—immediately as to public-sector unions, and, depending on the rationale, potentially as to private-sector unions.

The Catholic bishops of the United States, of course, do not claim any entitlement to have their public policy positions—on "right-to-work" or otherwise—*prevail* before the political branches.[28] The point is far more modest: that the Court should allow the position of so many bishops on the "right-to-work" question to *compete* in the policy arena with some possibility of

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(noting that New Hampshire, Pennsylvania, Montana, and Ohio are expected to debate proposed right-to-work legislation in 2018).

[27] For example, since 2015, "right-to-work" legislation has passed in Kentucky, Missouri, West Virginia, and Wisconsin, but has failed in Illinois, New Hampshire, and New Mexico. *See* "Right-to-Work Resources," *National Conference of State Legislatures* (available at http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx) (listing current right to work states).

[28] *See, e.g.,* Pope St. John Paul II, *Redemptoris Missio,* no. 39 (1990) ("On her part, the Church addresses people with full respect for their freedom. Her mission does not restrict freedom but rather promotes it. *The Church proposes; she imposes nothing*. She respects individuals and cultures, and she honors the sanctuary of conscience.") (citation omitted; emphasis in original).

success, and should not declare still another of their positions constitutionally out of bounds.[29] But a decision in favor of Petitioner would do precisely that, at least as to the application of "right-to-work" legislation in the public sector.

II. If the Court Does Constitutionalize the Right-to-Work Position in the Public-Sector Context, It Should Do so on Grounds That Do Not Extend to Private-Sector Unions.

In *Harris* v. *Quinn*, 134 S. Ct. 2618 (2014), a majority of this Court undertook an extensive critique of the distinction that *Abood* v. *Detroit Bd. of Educ.,* 431 U.S. 209 (1977), drew in the public-sector employment context between payment of agency fees for "collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood,* 431 U.S. at 236; *see Harris,* 134 S. Ct. at 2627-34. The current case directly presents the question, once again, whether *Abood* should be overruled, so that agency fees for neither purpose could be required as a condition of government employment.

Consistent with *Abood*, we have urged this Court, *supra* Section I, not to strike down what remains of

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[29] *See McDaniel* v. *Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment) ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."); *Walz* v. *Tax Comm'n,* 397 U.S. 664, 670 (1970) ("Adherents of particular faiths and individual churches frequently take strong positions on public issues including … vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.").

public-sector union security clauses, lest the policy position against "right-to-work" laws—which is held by so many bishop-members of USCCB, as well as its predecessor organization—be denied even the possibility of finding legal effect in the *public-sector* context. This would be a devastating blow to roughly half of union membership across the country.[30]

If, however, the Court does overturn *Abood,* it should do so on grounds that do not extend to the *private sector*. This is so for at least two reasons.

First, if private-sector security clauses are eventually forbidden, the problem described above of the *partial* marginalization of the position of many bishops (and so many others) against "right-to-work" legislation (*i.e.,* as applied to public-sector employment) will become a problem of *total* marginalization. For then, the "right-to-work" position will have been constitutionalized in all employment contexts, and urging the political branches to allow union security clauses will be futile.

Second, forbidding private security clauses as a matter of constitutional law requires a rationale that would represent a grave threat to those voluntary associations of civil society—not just unions, but the Church itself, including its charitable ministries—that

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[30] In 2016, approximately 14.6 million workers nation-wide belonged to a union, 7.1 million in the public sector, and 7.4 million in the private sector. U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members Summary (Jan. 26, 2017). The national unionization rate in the public sector was 34.4% in 2016, more than five times higher than the 6.4% rate in the private sector. *See id.* Nationally, median weekly earnings for nonunion members ($802) were approximately 20% lower than the median weekly earnings of union members ($1,004). *See id.*

organize themselves to express shared views and values, sometimes directed to and at odds with the government.

In particular, if the opinion in this case suggests that a *private* employer's compulsion of its employees to pay agency fees is somehow attributable to the *government*, then it is only a small step to striking that requirement down under the Free Speech Clause as well. That is, objecting private employees could claim that the "state action" necessary to trigger constitutional protections would somehow derive from the private employer's enforcement of the security clause in court. The employees could then claim that they have a general objection to providing any support for trade unionism.[31] Such an objection would then trigger strict scrutiny under the Free Speech Clause, and the requirement to pay in support of that cause would likely fall.

This would be a disaster for private expressive associations that rely on contractual arrangements with

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[31] The objection that Petitioner has emphasized in this case—that he is "forced to pay for union advocacy *to influence governmental policies*" by having to support collective bargaining with the government, Pet. 33 (emphasis added)—would not even be colorable as against a private employer. *See Harris,* 134 S. Ct. at 2632-33 (noting the ease of distinguishing collective bargaining activities from other union activities in private-sector context). Elsewhere, Petitioner has emphasized the broader objection to trade unionism that would likely be emphasized in the hypothetical future case described above. Mark Janus, "Why I don't want to pay union dues," *Chicago Tribune* (Jan. 5, 2016) ("The union voice is not my voice. The union's fight is not my fight.") (available at http://www.chicagotribune.com/news/opinion/commentary/ct-union-dues-supreme-court-afscme-perspec-0106-20160105-story.html).

their employees as a necessary means to secure reliable assistance in developing and perpetuating a particular message. These arrangements allow ideas to take institutional form, by creating for them a durable platform and organizational structure. This is true whether people are gathering to further the message of advocacy for good jobs, decent wages, and hope for the future, as with a union; or the proclamation of the Gospel of Jesus Christ, as with the Church.

If the enforcement of such private arrangements were deemed "state action"—and therefore constitutionally forbidden as against employees who object to the private association's message—such associations would be severely impaired in controlling and perpetuating their messages. *Roberts* v. *United States Jaycees,* 468 U.S. 609, 623 (1984) ("Freedom of association … plainly presupposes a freedom not to associate."). Facing such an impediment to private ordering, the institutions of civil society would soon become less diverse, less vibrant, and so less capable of withstanding overweening powers—whether of the market or of the state—that may threaten the dignity of the person.[32] Ironically then, a misguided effort to protect *one indi-*

[32] *See* Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, no. 417 (2004) ("Civil society is the sum of relationships and resources, cultural and associative, that are relatively independent from the political sphere and the economic sector"); *id.* (noting the tendency of "political ideologies of an individualistic nature and those of a totalitarian character … to absorb civil society into the sphere of the State.").

vidual from government coercion would leave *only individuals* to stand against government (or economic) coercion.[33]

Therefore, however the present case is resolved, this Court should make clear that private-sector employers are not "state actors" when enforcing union security clauses against their own employees. *Cf. Communications Workers of Amer.* v. *Beck,* 487 U.S. 735, 761 (1988) (reserving question whether enforcement of private agency fee agreement involves "state action," and deciding case instead on statutory grounds). For otherwise, contractual arrangements between *private* employers and their employees would be subject to *constitutional* attack, turning the constitutional order on its head and broadly threatening the legitimate freedom of civil society.

[33] Although the United States appears duly concerned to avoid any misplaced constitutional threat to private agency fee agreements, the Petitioner appears less so. *Compare* U.S. Amicus 33 (emphasizing differences between private-sector and public-sector employment contexts), *with* Pet. 33 (urging "cohesive result … that no employee—*whether private or public*—can be forced to pay for union advocacy to influence governmental policies") (emphasis added).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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