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April 7, 2017

Sent Via Electronic Mail:

The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Question for the Record from Senator Whitehouse
Hearing on the Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States

Dear Mr. Chairman:

I am writing to respond to the below Question for the Record from Senator Whitehouse submitted on March 24, 2017:

> *In response to my question about recent Supreme Court rulings on collective bargaining and unions, you said you thought the Supreme Court is undertaking a "project" to harm workers' rights and harm workers' organizations. Can you please elaborate on what you meant by the term "project?"*

A project is a plan or series of conscious efforts intended to accomplish a certain goal. The term "project" was used in the *New York Times* article referenced at the hearing by Senator Whitehouse.[1] The author of that article, Adam Liptak, correctly described as a "project" the signals sent by Justice Alito in his *Harris v. Quinn*[2] decision and the series of actions by anti-union interests triggered by those signals.

Specifically, in *Harris v. Quinn*, the 5-justice majority ruled that *Abood v. Detroit Board of Education*,[3] which upholds the right of public employers and unions to charge fair share fees to union-represented public employees to cover the cost of union representation, did not extend to home care providers, as the majority ruled these workers are not full-fledged public employees. While not applying *Abood* to the case at hand and therefore having no basis to overturn *Abood*, Justice Alito repeatedly criticized *Abood*, referring to "*Abood*'s questionable foundations" and deriding one argument as "an effort to find a new justification for *Abood*." Given the majority's finding that *Abood* was inapplicable to the case at hand, all of these comments were superfluous to the case. The

[1] Adam Liptak, "With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear," New York Times (July 6, 2015).
[2] 134 S.Ct. 2618 (2014).
[3] 431 U.S. 209 (1977).

majority opinion's not-so-subtle hints about *Abood* eventually led dissenting Justice Kagan to write: "Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so."

The readers of Justice Alito's opinion certainly included anti-union interests such as the Center for Individual Rights. The signal sent by Justice Alito was clear: I am interested in overturning *Abood*, but I need a case or controversy that would allow me to do so. As noted at the Senate hearing, the Center for Individual Rights proceeded to file a suit aimed at overturning *Abood*. Recognizing that lower courts would follow long-standing precedent and uphold *Abood*, the Center for Individual Right's case, *Friedrichs v. California Teachers Association*, was rushed through the early stages of litigation. The plaintiffs did not bother developing a factual record and asked the trial court and the Ninth Circuit to summarily rule in favor of the defendants. This litigation strategy is unusual, to say the least, but fits squarely with the notion of a "project" to overturn *Abood* – to bring the right case or controversy to the Supreme Court to establish the new law that the majority decision in *Harris* overtly suggested it wanted to establish.

This project is one to harm workers' rights and workers' organizations. Overturning *Abood* is the equivalent of imposing a "right to work" law on all of the public sector workforce. The aim of such laws is to deny resources to labor unions. Under current law in non-right-to-work states, while unions are obligated to represent all workers in a bargaining unit, those workers need not become dues-paying members. However, unions and employers, including public employers, may require those workers to at least pay fees covering the cost of their representation, i.e., pay their "fair share." Paying this fair share does not make a worker a member of the union, and the worker is protected from having to pay a fee for anything not germane to collective bargaining, such as political contributions. A "right to work" law, on the other hand, allow those workers to not pay any fees at all while obtaining the benefits of union representation. In other words, it creates a free rider problem, with unions obligated to provide representation and workers not obligated to pay for that representation.

The free rider problem created by "right to work" is intended to weaken unions. Public sector union density in non-right-to-work states is about 49.6 percent, compared to 17.4 percent in right-to-work states.[4] Weakened unions mean a weakened ability to organize and mobilize workers to protect their rights on the job. This hampering has a material effect on workers and their families, as one study found that overturning *Abood* may lead to a 9 percent reduction in public sector workers' compensation.[5] We already know that workers in fair-share states make higher wages, are more likely to have employer-sponsored health insurance, and have lower rates of workplace deaths, than workers in right-to-work states.[6]

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[4] For the period 2000-2014. Source at *infra* note 5.
[5] 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 (October 13, 2015).
[6] See these and other comparisons compiled from various studies at http://wrongforeveryone.org/more-facts-on-right-to-work/ (accessed April 6, 2017).

Following the death of Justice Scalia, *Friedrichs* ended in a 4-4 tie, thereby upholding Abood.[7] But the project that began with Justice Alito's signals in *Harris v. Quinn* continues. Dozens of suits attacking workers' organizing and collective bargaining rights have been filed in state and federal courts since the *Harris* decision – some of which may make their way to the justices who effectively implored the bar to bring them a case or controversy that would allow them to eliminate fair share rules for public sector workers.[8]

This project is one of many to dismantle workers' rights and workers' organizations. State legislatures are another venue for these projects. A disproportionate amount of attention is paid by some state legislators to the question of whether union-represented workers should be obligated to pay their fair share of the costs of union representation. This obsession is well-funded by rich anti-union interests. Ignored are the challenges of millions of American workers who do not have union representation and face a gauntlet of union busting intimidation and discrimination when they seek to organize a union to improve their lives at work. Thanks to these assaults on labor unions, via both legislatures and courts, the percentage of non-union workers who are unable to collectively bargain a better deal at work increases. This decrease in collective bargaining is a driving force behind the lag in workers' pay relative to their increased productivity, as well as the rise of income inequality and the middle class squeeze, all of which threaten the vibrancy of American democracy and our ability to defend other civil rights and liberties against powerful interests.

Thank you for the opportunity to help complete the record of the hearing.

Sincerely,

Guerino J. Calemine, III
General Counsel

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[7] 136 S.Ct. 1083 (2016).

[8] *See, e.g., Janus v. AFSCME Council 31*, Case No. 16-368 (filed in Northern District of Illinois on Feb. 9, 2015); *Jarvis v. Cuomo*, Case No. 16-441 (filed in Northern District of New York on Dec. 2, 2014); *Berman v. Public Employees Federation*, Case No. 1:16-cv-00204 (filed in Eastern District of New York on Jan. 14, 2016); *Cochran v. Jefferson County Public Schools Board of Education*, Case No. 3:15-cv-00751 (filed in Western District of Kentucky on Sep. 23, 2015); *Wagenblast v. Inslee*, Case No. 3:15-cv-05407 (filed in Western District of Washington on June 15, 2015); *Lamberty v. Connecticut State Police Union*, Case No. 3:15-cv-00378 (filed in District of Connecticut on March 14, 2015). These suits have generally been brought by the National Right to Work Foundation and occasionally the Freedom Foundation.