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 THE JAMES MADISON INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The James Madison Institute is one of the nation's oldest and largest nonprofit, nonpartisan research and educational organizations. The Institute's policy recommendations are rooted in the principles found in the U.S. Constitution — such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility.

The Institute is a free-market policy organization focused on state-based issues. It has a strong interest in assisting the public and governments in rational economic decision-making.

SUMMARY OF ARGUMENT

In dismissing Mark Janus' complaint, the Seventh Circuit simply stated "it is *Abood* that stands in the way." Pet. App. 8a.

Just three years ago the Court pointed out that *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) "failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2632 (2014). The Court clarified *Abood*'s flaw: "In the public sector, core issues such as wages, pensions,

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[1] The parties filed blanket consents and were timely notified of our intent to file this brief. This brief was not written in whole or in part by counsel for any party, and no one other than amicus made a monetary contribution to its preparation. (Rule 37).

and benefits are important political issues, but that is generally not so in the private sector." *Id.*

Furthermore, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends * * * [I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government." *Harris*, 134 S. Ct. at 2632–33.

This case presents the opportunity to address the questions surrounding *Abood*'s continued validity. *Abood* is inherently contradictory in applying constitutional scrutiny to the political advocacy of public-sector unions, but failing to analyze whether public-sector collective bargaining itself also implicates political and ideological speech. Had *Abood* appropriately analyzed the content of public-sector collective bargaining, it would have found it completely subsumed by political and ideological issues.

Further, the argument in favor of the forced agency fee — namely, the free-rider rationale born from a concern for labor peace — woefully fails any level of constitutional scrutiny other than rational basis. The realities of public-sector unions shows much abuse of the agency fee and the power of the exclusive representative mantle itself. The only way public-sector unions can constitutionally survive is without the government forcing an agency fee from those who do not wish to associate with the union.

ARGUMENT

I. GOVERNMENT HAS NO COMPELLING INTEREST IN AN AGENCY FEE TO OVERRIDE THE FIRST AMENDMENT.

A. *Abood* Failed to Properly Apply the Required First Amendment Scrutiny to Coerced Agency Fees.

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) has two discordant parts. On the one hand, *Abood* appropriately drew constitutional limits on an agency fee to support political advocacy. Yet, *Abood* forewent any constitutional scrutiny for an agency fee to support collective bargaining in the public sector. In reality, the two uses of the agency fee are both in support of political and ideological speech in the realm of public-sector collective bargaining.

Abood should have applied "exacting First Amendment scrutiny" to collective bargaining uses of an agency fee, as union negotiation with the government necessarily impacts free-speech and association rights of fee payers because of the political nature of collective bargaining. *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012) ("compulsory subsidies for private speech are subject to exacting First Amendment scrutiny"); *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014) ("an agency-fee provision * * * cannot be tolerated unless it passes 'exacting First Amendment scrutiny'") (quoting *Knox*, 567 U.S. at 310). *Abood* never explained why it did not apply exacting scrutiny to forced association and agency fee subsidies for the purposes of collective bargaining.

Exacting scrutiny in *Abood* would have required the following:

> [I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end.

Elrod v. *Burns*, 427 U.S. 347, 363 (1976) (applying exacting scrutiny in case of non-civil-service employees who were discharged or threatened with discharge for not affiliating with the Democratic Party); see also *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 798 (1988) (applying exacting scrutiny and finding the State's "interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored" for state law that forced fundraisers to make certain disclosures to potential donors).

Abood did not apply exacting scrutiny, and Respondents still eschew it, because of two fallacies committed by *Abood*. These flaws undermine any assertion of a government interest compelling enough to infringe on public employees' free speech and association rights.

First, *Abood* assumed that the government acts simply as an employer in mandating an agency fee for collective bargaining — notably without putting any weight on the differences between public and private employment. 431 U.S. at 224–26; see also AFSCME Br. in Opp. 18 ("*Abood*'s authorization of fair-share agreements falls safely within the government's broader authority to regulate speech when it acts as an employer."). This assumption ignores the central role of the government in authorizing and executing an agency fee for collective bargaining.

Illinois' role in this case is illustrative. The Illinois' Public Labor Relations Act not only establishes the agency fee, but also defines specific matters the fee supports:

- The Legislature authorizes an agency fee, and then by agreement, a government agency requires that fee from its employees as a condition of employment. 5 ILCS 315/6(e).[2]
- The statute mandates the government deduct the agency fee from a non-member employee's paycheck and pay it to the union. *Id.*[3]
- The statute mandates continued payment of the fee. 5 ILCS 315/6(f).[4]
- The statute obligates the government to bargain over what the law itself declares to be "policy matters." 5 ILCS 315/4.[5]

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[2] A collective bargaining agreement between an exclusive representative, or union, and a government employer may include "a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment."

[3] "[T]he proportionate share payment in this Section shall be deducted by the employer from the earnings of the nonmember employees and paid to the employee organization."

[4] Even when a collective bargaining agreement is terminated, "the employer shall continue to honor and abide by any dues deduction or fair share clause contained therein until a new agreement is reached including dues deduction or a fair share clause."

[5] The government employer "shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon."

- And the statute directs the government to collectively bargain over specific public policy matters of wages and benefits. 5 ILCS 315/7.[6]

These are not merely discretionary acts of individual government agencies setting employment terms. If there was any doubt of governmental action triggering First Amendment rights, the Illinois statute excepts religious objections. 5 ILCS 315/6(f).[7] The religious exception acts as a concession by Illinois[8] that it would otherwise prevent public employees' free exercise of religion through the agency fee. If the free exercise of religion clause of the First Amendment is implicated by the government's agency fee statute, the free speech and association clauses are as well.

In sum, the government action at issue is the law itself, seizing an agency fee from public employees and determining its use by the union. This is undoubtedly the act of a sovereign as the "union's collection of fees from nonmembers is authorized by an act of legislative grace." *Knox*, 567 U.S. at 313

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[6] The government must "negotiate in good faith with respect to wages, hours, and other conditions of employment."

[7] "Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teaching of a church or religious body of which such employees are members."

[8] A religious exemption is quite common in states that force non-members to pay agency fees to a union. See, *e.g.*, Alaska Stat. § 23.40.225 (2017); Cal. Gov. Code § 3584(a) (1999); Haw. Rev. Stat. §89-3.5 (1983); Mont. Code § 39-31-204(1) (2009); Ohio Rev. Code § 4117.09 (C); Or. Rev. Stat. § 243.666(1) (1983); 71 Pa. Cons. Stat. §575(h) (1988); Wash. Rev. Code. § 41.80.100(2) (2002).

(citation omitted). Moreover, despite the unions and their allies consistently making the argument that the government is merely acting as an employer to uphold agency fees under *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968) (where the Court gives more deference to the government as employer where it does not involve a matter of public concern), the Court has already rejected that argument. *See Harris*, 134 S. Ct. at 2642–43 ("This argument flies in the face of reality. * * * [I]t is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.").

Abood's second fallacy was allowing the government to compel an agency fee when simply "germane" to collective bargaining. 431 U.S. at 235–36; see also AFSCME Br. in Opp. 19. (arguing that the government may require non-union public employees to pay a fee for activities "germane to collective bargaining and thus chargeable consistent with the First Amendment"). However, *Abood* applied a cursory germaneness test with no further inquiry into whether the substance of collective bargaining — *with the government* — is inherently political or ideological.

Abood skipped a thorough analysis of germaneness because it relied on *Ry. Emps.' Dept.* v. *Hanson*, 351 U.S. 225 (1956). However, *Hanson* noted no evidence of the fee being used for ideological purposes, and the Court stated that if a fee had been for activities not germane to collective bargaining, "a different problem would be presented." *Abood*, 431 U.S. at 219 (quoting *Hanson*, 351 U.S. at 235). "But the [*Hanson*] Court squarely held," *Abood* concluded, an agency fee supporting collective bargaining does not infringe the First Amendment. *Abood*, 431 U.S.

at 219. *Abood* plainly neglected the First Amendment implications of an agency fee that furthers political or ideological goals when done in the public sector.[9]

Hanson upheld a statute authorizing an agency fee on a rational basis of labor peace, and subsequently the Court in *Street* found political campaign activities funded by an agency fee "violated the Act itself." *Abood*, 431 U.S. at 220 (citing *Machinists* v. *Street*, 367 U.S. 740, 768 (1961)). *Hanson*'s, and *Street*'s, precedential value ends where there is no government-compelled speech for constitutional review — neither case elevates labor peace from a sufficient rational basis to a compelling government interest under exacting scrutiny. In fact, *Hanson* conceded that labor peace did not support an agency fee that "'forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought.'" *Harris*, 134 S. Ct. at 2629 (quoting *Hanson*, 351 U.S. at 236).

There are three possible ways to think about a public-sector unions' two types of speech as shown in the three figures below.

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[9] *Hanson* at least cautioned that if an agency fee "is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." *Hanson*, 351 U.S. at 238.

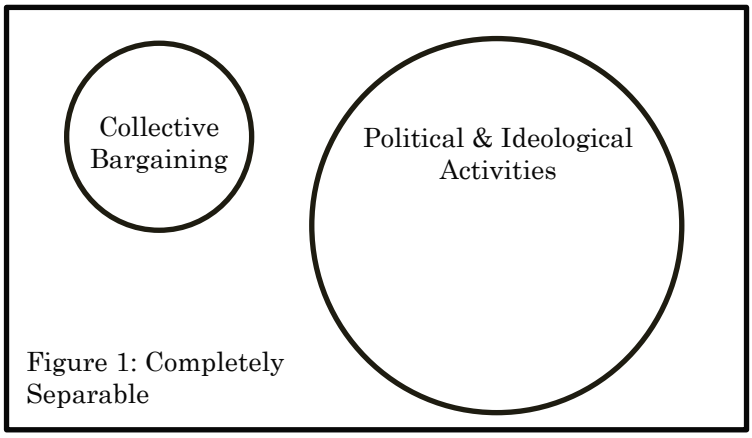

Figure 1: Completely Separable

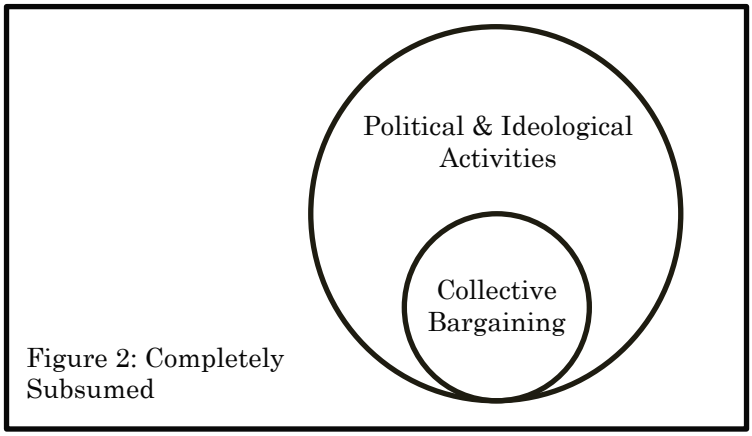

Figure 2: Completely Subsumed

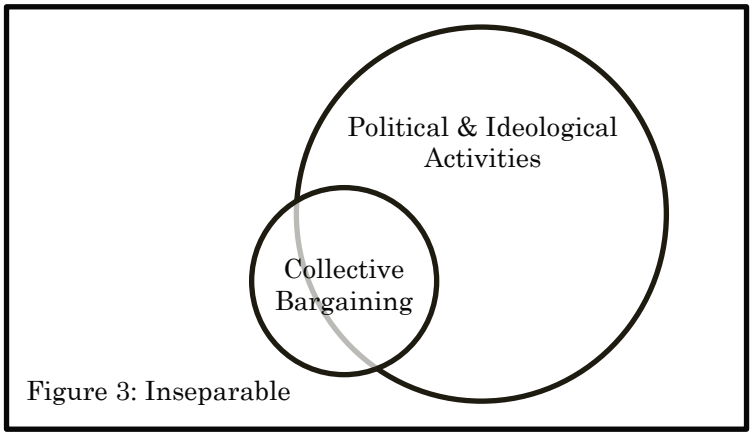

Figure 3: Inseparable

Abood assumed that the collective bargaining speech of a public-sector union is completely separable from the political and ideological speech of a union as shown in Figure 1. *Abood* is deeply flawed in simultaneously recognizing the ideological concerns of public employees, yet stopping short of the necessary constitutional inquiry of a compelled agency fee itself.[10] *Abood* inexplicably fails to probe the ideological content advocated by the union within collective bargaining supported by an agency fee.

In reality, public-sector collective bargaining is completely subsumed in the realm of political and ideological speech, as shown in Figure 2. There is no non-political collective bargaining speech because all collective bargaining issues affect either the service the public receives from public employees or the amount of money the public spends on public employees.

The Court has already recognized that, to the extent collective bargaining affects government spending, it is political and ideological. *Harris*, 134 S. Ct. at 2642–43. There is not much left for the union to bargain for after items that affect the budget are removed from the agenda. But even budget-neutral items in public-sector collective bargaining are political and ideological.

For example, it might be argued that negotiating flexible hours for employees is budget neutral —

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[10] "To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." *Abood*, 431 U.S. at 222.

same amount of hours per employee, just coming in at different times. However, flexible hours affects the service the government provides through its employees, which is political in nature. To illustrate the point, the line at the local department of motor vehicles during peak hours is not alleviated by an employee coming in at 7:00 AM.

Public service is also implicated by unions bargaining over disciplinary procedures. See, *e.g.*, Pet. App. 146–52 (setting forth AFSCME's agreed to disciplinary process, which only allows disciplinary action to be imposed for "just cause"). But, union input into employee discipline is a highly-charged political issue, with some people blaming it for saddling the public with underperforming public employees. See, *e.g.*, David Alpert, *Public unions need to stop defending the bad apples* (Dec. 3, 2010), GREATER GREATER WASH., ("But at Metro, like in many public agencies, even a small minority of poor employees gives the entire agency a bad reputation, and union rules make it remarkably difficult to fire them.").

Another service-related example is conforming public work places to published standards, for example, the staffing level of firefighters at a fire station. Br. of the Int'l Ass'n of Fire Fighters as *Amicus Curiae* in Supp. of Resp'ts at 11, *Friedrichs* v. *Cal. Teachers Ass'n.*, 578 U.S. ___ (2016) (No. 14-915). Assuming the union negotiates that more firefighters should be staffed at a station than the city currently provides, and the number of overall firefighters remains the same to maintain the budget-neutral assumption, then the number of fire stations or hours of operation is necessarily decreased. The capabilities of the fire department are obviously important to

the public at large. *Cf.* AM. NURSING ASS'N, *Nurse Staffing* (Dec. 2015), (reviewing federal and state regulations related to minimum nursing ratios and stating "[w]hen health care employers fail to recognize the association between RN staffing and patient outcomes, laws and regulations become necessary").

Even if the Court ignores the service point, there is inseparable overlap between collective bargaining and political and ideological speech, as shown in Figure 3. Non-ideological collective bargaining is inseparable from the political and ideological because a public-sector union must negotiate ideological policies during collective bargaining. The First Amendment concern is what the union actually advocates, supported as it is by an agency fee coerced by the hand of the government. *Abood* is woefully blind to the policy matters at stake in collective bargaining that the Court has already recognized.

Abood's own rule on union dues funding political advocacy applies to agency fees supporting the political and ideological speech inherent in public-sector collective bargaining. Instead, *Abood* does not complete the requisite analysis under exacting scrutiny, and it must now be overruled.

B. The Court Has Already Provided the Basis for Overruling *Abood*.

In this case, Petitioner pointed to the limited role of *stare decisis* in the area of constitutional interpretation (Pet. Br. 10), as opposed to statutory interpretation where the force of *stare decisis* is stronger. See, *e.g.*, *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991) ("a pure question of statutory construction, where the doctrine of *stare decisis* is most compelling"). Even if the Court were to consider the

Abood rule while fully deferential to *stare decisis*, the compelling justification to overrule *Abood* lies in this Court's recent criticism of the case. Now that the issue is squarely before the Court, *Abood* must fall.

In *Knox*, for example, while addressing the opt-out requirement in *Street*, the Court stated that the "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Knox*, 567 U.S. at 312. The Court noted that it "did not pause to consider the broader constitutional implications of an affirmative opt-out requirement." *Id.* at 313.

The Court indicated that its analysis in *Abood* and *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986), was lacking, because it had "assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter." *Knox*, 567 U.S. at 313. The Court also remarked that "[a] union's collection of fees from nonmembers is authorized by an act of legislative grace * * * one that we have termed 'unusual' and 'extraordinary.'" *Knox*, 567 U.S. at 313 (citation omitted). Indeed the Court stated: "Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all." *Knox*, 567 U.S. at 317; see also *Ellis* v. *Ry. Clerks*, 466 U.S. 435, 455 (1984).

Similarly in *Harris*, the Court reiterated that "[*Knox*] pointed out that *Abood* is 'something of an anomaly.'" *Harris*, 134 S. Ct. at 2627. The Court stated that it had "dismissed the objecting employees' First Amendment argument with a single sentence" in *Hanson*, a "remarkable" explanation because "the

Court had never previously held that compulsory membership in and the payment of dues to an integrated bar was constitutional, and the constitutionality of such a requirement was hardly a foregone conclusion." *Id.* at 2629. The Court referred to its First Amendment analysis in *Hanson* as "thin." *Harris*, 134 S. Ct. at 2629.

The Court recognized that *Street* "presented constitutional questions of the utmost gravity * * * but the Court found it unnecessary to reach those questions." *Harris*, 134 S. Ct. at 2630 (citation omitted). Despite threadbare First Amendment analysis in *Hanson* and *Street*, the *Abood*, "Court treated the First Amendment issue as largely settled by *Hanson* and *Street*." *Id.* at 2631. The Court remarked in *Harris* that "[the] *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then." 134 S. Ct. at 2632. The Court found that "[t]he *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. * * * Surely a First Amendment issue of this importance deserved better treatment." *Harris*, 134 S. Ct. at 2632.

After *Knox* and *Harris*, with detailed exposition of *Abood*'s flaws, the agency fee arrangement for public-sector employees is revealed to be constitutionally unsound.

II. THE ARGUMENTS IN FAVOR OF THE AGENCY FEE ARE INVALID.

A. Plenty of Would-Be "Free Riders" Do Not Benefit From the Unions' Collective Bargaining Efforts.

The free-rider rationale was never supported in the context of public-sector unions before the Court relied on it in *Abood*, and evidence since 1977 has shown that it is wholly unsupportable. Despite such lack of support, unions are still able to wield what the Court refers to as an "extraordinary power" by forcing public employees to associate with unions and pay dues. *Harris*, 134 S. Ct. at 2636; *Davenport* v. *Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007); see also *Abood*, 431 U.S. at 252–53 (Powell, J., concurring) ("collective-bargaining agreement to which a public agency is a party * * * has all of the attributes of legislation"). The insufficient basis for the free-rider rationale is especially problematic considering the exacting scrutiny standard that coerced agency fees must satisfy that *Abood* did not consider as discussed above.

However, even apart from a heightened scrutiny, the free-rider rationale still fails. Some "free riders" are better off without the union. See, *e.g.*, *J.I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 338 (1944) ("The practice and philosophy of collective bargaining looks with suspicion on such individual advantages."). For example, most teachers' unions advocate against merit pay, preferring lock-step promotions. 2016-2017 NEA Resolutions at 285–86, https://goo.gl/JvNKFM (advocating as a standard contractual concept, "[s]alary schedules that are equitable * * * and that exclude any form of merit").

However, top-performing teachers are obviously better off without the "benefits" of collective bargaining through pay that encourages teachers to perform well and discourages low-performing teachers to stay in the profession.

The facts of this case also bear out the truism that some employees are better off without their forced agent. Respondent AFSCME rejected a merit pay offer from Governor Rauner, instead demanding benefits with an estimated cost of $3 billion over four years. Kim Geiger, *Rauner scores big win over union on contract talks*, CHI. TRIB. (Nov. 16, 2016) https://goo.gl/Pm2A4D. Governor Rauner drew the line at no guaranteed salary increases, allowing for bonuses linked to attendance, health care premiums ranging from $188 to $427 a month, and no overtime before an employee works 40 hours a week, however, the union would not relent. *Id.* Undoubtedly some employees would do better under a merit pay system, especially assuming a fixed budget available for state-employee pay that would allocate more money to them.

Merit pay for public employees is an ideological debate with public policy considerations. In the case of teachers, some see merit pay as a way to improve public education in general and the best way to motivate teachers to provide a better product. In Illinois, the potential increase in the state budget of $3 billion while eschewing performance-enhancing reforms would seem to matter to the electorate at large. In both cases, employees on the other side of the debate as their union are compelled at the threat of losing their jobs to pay tribute to the union's position with monthly agency fees on core political speech.

Nor is merit-pay the only issue where employees can be better off without the union. Employees who only serve a brief stint in public service, intending on finishing before they vest in a pension, would prefer higher pay or a portable 401(k) retirement plan versus a defined benefit pension plan that unions almost uniformly prefer. See, *e.g.*, NAT'L EDUC. ASS'N, *Pensions*, https://goo.gl/jNrZ71. Healthier employees, or those without families, are better off with a high-deductible catastrophic cap health plan and corresponding higher pay versus a "Cadillac" health plan that unions almost uniformly prefer.[11] A newer non-tenured teacher would prefer to have all employees forego union-advocated pay raises that end up costing teachers with less seniority like her a job, even though she paid the agency fee for the time she was a teacher. *Abood* did not consider the public employees who do not wish to associate with the union, and are better off without the union's efforts, before labeling them "free riders."

B. The Free-Rider Rationale is Inherently Contradictory.

The free-rider rationale contradicts itself for two reasons. First, the labor peace rationale implicitly acknowledges that employees' interests vary from their forced agent, thus, employees cannot be considered to free ride on the union's efforts to advocate positions they oppose. Second, the free-rider ra-

[11] Kate Taylor, *Health Care Law Raises Pressure on Public Unions*, N.Y. TIMES (Aug. 4, 2013) https://goo.gl/6hxJ1H (detailing effect of Affordable Care Act ("ACA") tax on high-cost health benefits common for public employees and difficulties in getting public-sector unions to accept curtailed health care benefits). The implementation of the ACA tax has since been delayed.

tionale presupposes failure of the union without forced agency fees, amounting to government subsidization of certain viewpoints — making forced agency fees antithetical to the core of the First Amendment.

1. Labor peace acknowledges differing employee viewpoints. The free-rider rationale is a consequence of the perceived need for the employer to negotiate with an exclusive representative. The Court recognized the labor peace benefit of the exclusive representative as easing the negotiating effort of the employer by avoiding competing demands from employees. *Abood*, 431 U.S. at 220 ("avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"); see also *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944) (noting exclusive representative's bargained for contract "may have unfavorable effects on some of the members of the craft represented"). The free-rider rationale comes into play because with only one union for the employer to negotiate with, all employees receive the "benefit" of the union's bargaining effort.

However, relying on the labor peace rationale as the basis for an exclusive representative acknowledges that there are employees with views different from their coerced union association — even on the issues confined to collective bargaining. Forcing an employee to pay for a union that advocates positions he does not support is not free riding, whether or not the

employee is better off with the union's preferred policy position.[12]

2. Agency fees interfere with the market place of ideas. The free-rider rationale also contradicts the marketplace of ideas because it forces people into a group to support certain positions. See *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *United States* v. *Rumely*, 345 U.S. 41, 56 (1953) (noting that "bid[ding] for the minds of men in the market place of ideas * * * is the tradition behind the First Amendment"); *Knox*, 567 U.S. at 309 ("The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.") (citation omitted). Agency fees distort the political process because they use the power of government compulsion to override individual choices related to speech and association.

Compulsory agency fees distort the marketplace of ideas in two ways. First, compulsory agency fees force an individual, who may be indifferent or may

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[12] Indeed, *Abood* itself listed many different examples where an employee can disagree with his employer on issues germane to collective bargaining, but that still encompass public policy preferences, such as whether striking would be allowed by the contract, how union wage policy affects inflation, whether the contract addresses racial discrimination, and how medical benefits may affect issues such as abortion. *Abood*, 431 U.S. at 222-23. But then *Abood* approved coerced agency fees on the "judgment clearly made in *Hanson* and *Street*," without at all considering that the government was now the employer coercing these political positions. *Id.* at 222; *Harris*, 134 S. Ct. at 2632.

vehemently object to the union's message, to nevertheless support that message. "When a State establishes an 'agency shop' that exacts compulsory union fees as a condition of public employment, '[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.'" *Knox*, 567 U.S. at 310–11 (quoting *Ellis*, 466 U.S. at 455). Furthermore, "[b]ecause a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 567 U.S. at 310–11 (citations omitted).

Second, compulsory fees subsidize the unions' existence — organizations whose sole purpose is advocacy. If the free-rider rationale is to be believed, absent coerced agency fees, unions would fail. *Harris*, 134 S. Ct. at 2657 (Kagan, J., dissenting) ("the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions"). But if that is true,[13] failure is exactly what is supposed to happen

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[13] The failure assumption is likely incorrect in any case. The Court has recognized that those jurisdictions that do not allow for agency fees still have unions. *Harris*, 134 S. Ct. at 2640 (exclusive bargaining agent and agency fee "are not inextricably linked."). Indeed, the losing union in *Harris* goes on without agency fees compelled under color of law. When this Court invalidated the coerced agency fees for the home healthcare personal assistants in Illinois, the union claimed representation of 25,000 personal assistants. Deana Rutherford, *Our statement in response to U.S. Supreme Court's ruling in* Harris v. Quinn (June 30, 2014), https://goo.gl/nTcqv8 (responding to the *Harris* decision with SEIU President Mary Kay Henry stating

in a marketplace of ideas: bad ideas fall by the wayside. There are a multitude of organizations that thrive without relying on government action to coerce membership fees. For example, AARP, a social welfare organization with a membership of nearly 38 million;[14] AAA, a federation of affiliated motor clubs with over 56 million members and 40,000 full-time employees;[15] and the National Rifle Association ("NRA"), with over five million members.[16] As a point of comparison, there were over seven million public-sector union members in 2016,[17] five million of whom are subject to coerced agency fees. Pet. Br. 16.

Moreover, these organizations lobby[18] public policy issues important to them — as groups of people are wont to do. For example, AAA "led the state-by-

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"[n]o court case is going to stand in the way of home care workers coming together to have a strong voice for good jobs and quality home care"). Now over three years later, the union claims *membership* of more than 50,000 home care workers. SEIU HEALTHCARE ILL., IND., MO., KAN., *Home Care*, https://goo.gl/T5W8EM. Despite the necessity arguments in favor of the agency fee, failure does not seem imminent.

[14] AARP, *About AARP* , https://goo.gl/ii8yXb.

[15] AAA, AAA Fact Sheet, https://goo.gl/iKNwVQ.

[16] NRA, *About the NRA*, https://goo.gl/dwKkoG.

[17] BUREAU OF LABOR STATISTICS, *Union Members Summary* (Jan. 26, 2017), https://goo.gl/5j3cqP.

[18] The Court has distinguished between union lobbying and union collective bargaining. See, *e.g.*, *Knox*, 567 U.S. at 324 (Sotomayor, J., concurring). The two are really the same for a public-sector union as the topic of discussion does not change the fact that a paid representative is meeting with the government to advocate certain positions, the very essence of lobbying. However, this brief maintains the Court's distinction for purposes of this discussion.

state push to expand [driver's license policy] nationwide." In the case of AARP, when it supported the ACA, it lost about 300,000 members, while competing organizations saw their membership increase.[19] Nobody would seriously claim that free-riders are threatening the very existence of these organizations, much less that the government would be empowered to force dues payments to save these organizations. An individual can enjoy the right to bear arms and not be a member of the NRA; the NRA goes on as an effective advocate for all who believe in a strong Second Amendment. On the other hand, when it ceases to effectively advocate issues its members care about, membership declines. In the meantime, every person in the sphere of influence of these organization "benefits" from the particular policy preferences advocated through the collective strength of its members that voluntarily choose to associate for entirely selfish reasons, such as senior discounts, road-side assistance, or affinity with like-minded individuals.

The same is true in the employee-employer context. This Court recognized the persuasive force of other employee advocacy organizations that do not rely on coerced agency fees. *Knox*, 567 U.S. at 311 (noting no compelled membership in community associations, parent-teacher associations, faculty associations, or medical associations); *Harris*, 134 S. Ct. at 2641 (noting that a "host of organizations advocate on behalf of the interests of persons falling within an occupational group" with voluntary contri-

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[19] Laura Johannes, *AARP Faces Competition From Conservative-Leaning Groups*, WALL ST. J. (Mar. 30, 2014), https://goo.gl/AcoS8p.

butions). The government can no more mandate that democrats financially support the Democratic National Committee than it can force its employees to support unions for the stated purpose of preventing "free riders."

If forced to compete in a marketplace of ideas, unions would presumably find ways to benefit their members apart from what they collectively bargain for.[20] If the only benefit of a union is the collective bargaining, but too few employees are willing to pay for that benefit, especially year after year, then association with the union and its positions on issues is not meritorious enough in the marketplace of ideas. When labor conditions reach the point where people are willing to pay for a representative to collectively bargain for them, the problem of funding the efforts of the union takes care of itself in the marketplace.

Indeed, the union in *Friedrichs*, anticipating an eventual loss in that case, published a presentation where they researched "prospective members to learn what might incent them to want to join the [union] voluntarily" and "[h]ow to package what [union] membership offers in a way that appeals to them."

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[20] Unions have raised such an argument as part of a post-hoc justification for the rule in *Abood*, pointing to the unions' efforts to provide training or purchase equipment. See, *e.g.*, Br. of the N.Y.C. Mun. Labor Comm. as *Amicus Curiae* in Supp. of Resp'ts at 33–36, *Friedrichs*, (No. 14-915) (discussing training efforts). However, those are not objectionable uses of coerced fees from employees, nor is it why agency fees exist. Agency fees are coerced payments to have a union be your agent in collective bargaining. If the government, or any employer for that matter, wants to force employees to buy their own equipment or pay for their own training, that is not a free-speech concern.

CAL. TEACHERS ASS'N, *Not if, but when: Living in a world without Fair Share* (July 2014), https://goo.gl/Brvggj. Such statements amount to a remarkable concession from the union that it did not have to worry about member satisfaction under the *Abood* regime because dues were always paid on time, thanks to the government's forceful help. The First Amendment prevents the government from distorting the associational rights of public employees by forcing them into a union totally deaf to their wants and needs.

One may assume, based on the gradual but steady decline in union membership over the years, that most employees feel that a union does not provide enough service for the cost of the dues. See generally BUREAU OF LABOR STATISTICS, *supra*, note 16 (showing decline in the union membership rate from 20.1 percent in 1983 to 10.7 percent in 2016). The whole point of the First Amendment is to allow meritorious ideas and association with those ideas to rise and fall without the government placing its thumb on the scale in favor of one idea or another.

C. The Free-Rider Rationale Fails to Account for the Realities of Public-Sector Collective Bargaining.

The realities of public-sector collective bargaining reflect several troubling practices that would undermine the free-rider rationale even if it was meritorious. These practices include the following: (1) no input into union policies by non-members forced to pay the agency fee and no practical input even from lower-level members; (2) no market restraints on what unions obtain through public-sector collective bargaining combined with a strong voice in choosing

their employer negotiating partner; (3) no real checks on the chargeability determinations that unions perform; (4) public-sector collective bargaining locks out other advocacy groups, like the James Madison Institute, who would otherwise advocate positions related to public employment; and (5) nothing really stops public-sector collective bargaining from exploiting the associational power of unions and their political allies from placing shamelessly political provisions in the collective bargaining agreement.

1. No input. Not only are significant public policy positions inherent in public-sector collective bargaining, and not only do the unions contradict their own fee-payers' wishes as shown above, every union collective bargaining position is taken by the union without any input from fee-paying non-members. Travis Keels, *Florida's Public Sector Labor Unions*, J. JAMES MADISON INST. (Spring 2015), at 27, available at https://goo.gl/8xiXho ("[M]any public employees are faced with an unavoidable quandary: join a union and pay dues, or choose not to join the union and have no voice in the union that will still be representing you regardless of your individual opinion.").

2. No constraints. Private-sector unions are constrained by economic realities. They cannot demand more than the company can afford, or the company goes bankrupt and the union members lose their jobs. See generally James Sherk, *What Unions Do: How Labor Unions Affect Jobs and the Economy* (May 21, 2009), https://goo.gl/qrASUH. However, in public-sector unions, if the pay and benefits agreed to in the collective bargaining contract causes the state's budget to exceed revenues, the state has to simply borrow or tax to make up the difference. The Court recognized this practical problem in *Abood* itself,

noting that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases," and a "public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment." *Abood*, 431 U.S. at 228; see also *Harris*, 134 S. Ct. at 2631 (commenting on this contradiction from *Abood*).

Experience in particularly unrestrained public-sector unions since *Abood* has borne out the harsh realities of the lack of competitive-market checks on collective bargaining. Cert. Br. of *Amici Curiae* State of Mich. & Eighteen Other States in Supp. of Pet'r at 10–18 (detailing the role of public-sector collective bargaining in the bankruptcies of Detroit, Stockton, and San Bernardino); see also *Harris*, 134 S. Ct. at 2632 n.7 (noting Illinois' pension liability of $100 billion with an estimated 50 percent unfunded).

Also, in private-sector bargaining, the union is constrained by a truly arm's length negotiating partner. In public-sector collective bargaining, the union can choose its counterparty. Keels, *supra* at 29 ("However, because of the union's political power — not only derived from campaign contributions but also from 'boots on the ground' activities such as rides to the polls — elected officials, especially at the local level, owe a debt of gratitude to the unions that got them elected."). Unions spend considerable money to have their preferred politician elected. OPENSECRETS.ORG, *Public Sector Unions: Long-Term Contribution Trends*, https://goo.gl/rC6vDH (showing public-sector union contributions back to 1990 that typically favor Democrats 90% of the time); see also *Knox*, 567 U.S. at 304 (noting over $10 million raised by mostly public-sector unions to defeat ballot initia-

tive). While not always successful, such arrangements seriously undermine the collective bargaining process funded by government-mandated agency fees.

One example is the former head of the teachers' union being hand-picked by the superintendent to become head of the school district's human resources department. Mailee Smith, *Palatine-Area District 15's New 10-Year Contract 'Unprecedented'* (Apr. 25, 2016), https://goo.gl/sG5Syh. The former union boss negotiated an unprecedented 10-year contract with the union allowing annual salary increases for the teachers. *Id.* It is difficult to imagine a former union boss becoming the lead negotiator for a privately-held company or a private company agreeing to 10 straight years of automatic pay increases, but even if it did happen, it is clear that negotiation would not be in the best interest of the employer. In the case of the public employer, union-picked negotiators for the employer are not in the best interest of the taxpayer, who pays for everything the employer agrees to and might want to interject at some point.

In another example before the Court in a recent case, Governor Rod Blagojevich circumvented the restriction against personal assistants unionizing by issuing an executive order shortly after taking office. *Harris*, 134 S. Ct. at 2626. The executive order noted it was "essential for the State to receive feedback from personal assistants." Ill. Exec. Order No. 8 (2003), available at https://goo.gl/wDEz38. Of course, Governor Blagojevich had received substantial support from Service Employees International Union ("SEIU"), the respondent union in *Harris*, that was the ultimate beneficiary of Governor Blagojevich's order. Sean Higgins, *Illinois politicians forced home care workers into union that donates heavily to them*,

WASH. EXAMINER (May 1, 2014), https://goo.gl/aCGo7h (noting $800,000 in donations from SEIU to candidate Blagojevich).

After Governor Blagojevich was arrested on corruption charges, his successor in office, who received over $5 million in support from the SEIU, picked up where Governor Blagojevich left off and issued another executive order allowing Medicaid-funded home caretakers to unionize. *Id.* Had the effort been successful, it would have resulted in an estimated $2 million annual agency-fee boon to the SEIU, but AFSCME challenged SEIU's certification and the subsequent mail-in election resulted in only 40% support for unionization. *Id.*

Even without agency fees, Florida has seen the unique problems that can be created with the inherent conflict of interest in public-sector unions. Jacksonville set up a Police and Fire Pension Fund and a former firefighter became the administrator. David Bauerlein, *Times-Union Investigation: Jacksonville Pension Crisis, Part 3*, THE FLA. TIMES-UNION, https://goo.gl/y1j4iY. Because the city wanted to ease negotiations, the head of the Police and Fire Pension Fund became the negotiator with the city for the police union, the fire union, and the pension fund, resulting in a 30-year agreement with the city that created annual three percent cost-of-living adjustments in public pensions. *Id.* This huge expansion in pensions moved the city from a pension fund that was 86% funded to one that was 43% funded. *Id.*

3. No checks. Unions ultimately determine which of their expenses are chargeable. The Court has already noted the numerous problems with this arrangement, such as the lack of a true audit on what

is chargeable and the fact that employees face an uphill battle for challenging whether the union's characterizations were proper. *Harris*, 134 S. Ct. at 2633–34. Thus, in *Hudson*, the union requested a facially implausible 95% of their expenses as chargeable to those that decided to opt out of membership. *Hudson*, 475 U.S. at 295 ("Union determined that the 'proportionate share' assessed on nonmembers was 95% of union dues"). Also, in *Knox*, the Court noted that "the SEIU's understanding of the breadth of chargeable expenses is so expansive" that it covers "lobbying the electorate" and the Court did not place much reliance on the union's attempted post-hoc justification of the special assessment by claiming more expenses were actually chargeable. *Knox*, 567 U.S. at 319–20.

4. No others. There is no opportunity for an objecting nonmember who is coerced into paying her "fair share" to bargain for her own benefits or input into government employment policy when there is a union in place. Once the government agrees to the collective bargaining contract that it forced its employees to support, all employees are bound by it without any chance for input from the non-member to counter the position of their forced agent (i.e., nonmembers have no voice in the union they paid for and no voice with their employer who forced them to pay the union). In this way, forcing an employee to support collective bargaining is actually more detrimental to free speech than forcing them to support overt political activity, because at least with the latter, the employee has the opportunity to counter the political speech.

Not only are non-member employees locked out of the negotiation room where public employment

policies are set, all other advocacy groups are as well. Collective bargaining keeps important public policy issues confined to negotiations between union representatives and public employers that should be subject to open debate and deliberation.

For example, the Illinois' Public Labor Relations Act elevates a collective bargaining agreement to trump the State's public policies to the contrary. See 5 ILCS 315/7. Indeed, in this case, the union sued the Illinois Governor to halt his executive authority affecting the salaries of public employees. *AFSCME, Council 31* v. *Dept. of CMS*, 2016 IL App (5th) 160510-U at 3 ("[unions] alleged that under their collective bargaining agreements and extension of those agreements, the State is required to pay" despite a lack of budgetary appropriations). It is hard to imagine the State has a compelling interest to foreclose its own authority and policy-making in back room deals with a few union bosses, yet collective bargaining agreements are consistently used to do just that. See *Bd. of Airport Comm'rs of City of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (holding a ban on all First Amendment speech invalid "because no conceivable governmental interest would justify such an absolute prohibition of speech"). Collective bargaining agreements should not give unions such a hard lock on ideological issues, because this distorts the political process in a way that it antagonistic to the foundations of the First Amendment.

5. No stopping. Beyond the measures that one would think are typical in a collective bargaining contract, public-sector unions cannot help but push their political preferences into the collective bargaining contracts they negotiate. For example, the cur-

rent Chicago Teachers Union contract contains provisions for a "net zero increase in the number of board authorized charter schools over the term of this agreement," "The BOARD shall not close any schools for under-enrollment," and "The Board and Union shall collaborate to support mutually agreeable legislation that calls for a sustainable state tax that is levied on a progressive basis." Agreement Between the Bd. of Educ. & the Chi. Teachers Union (Oct. 2016), https://goo.gl /vVcSzB. Such provisions in a collective bargaining contract obviously go beyond "public employees' wages, benefits, and such — that is, the prosaic stuff of collective bargaining." *Harris*, 134 S. Ct. at 2655 (Kagan, J. dissenting).

For all of the above reasons, public-sector collective bargaining is faced with real challenges to fairness to both the taxpayer and the non-member that the rule in *Abood* does not address. Thus, there is no government interest strong enough for the First Amendment to tolerate forced agency fees.

D. While Unions Profess Concerns with Free Riders, They Free Ride on Taxpayers and Government Grace.

Not only are non-members forced to subsidize union activities, unions collect off the taxpayers and benefit financially from favorable government policy. Unions negotiate paid leave for members who are supposed to be working for the public to instead work on behalf of the union. Thus, the non-member public employee gets less time off from work than his unionized colleague so that the union member can go assist the union further policies the non-member does not support, but still pays for, in states like Illinois. Of course, this arrangement is all negotiated with the

help of the non-members' chargeable union dues, or "fair share fee" as the unions insist on calling it.

The James Madison Institute has recently studied taxpayer subsidization of union work in Florida, which unions refer to as "release time." Trey Kovacs & Sal Nuzzo, *Union Time on the Taxpayer Dime* (Aug. 31, 2017), https://goo.gl/ykjW33. Release time is a substantial windfall for public-sector unions, with approximately $3 million a year the taxpayer paid for in just Miami-Dade County.[21] Even with such large amounts at stake, the studied Florida public-sector unions provide no accountability for what the release time is used for. *Id.* at 4–5. Moreover, not all of the activities authorized for release time would include non-members. *Id.* (citing authorized uses of release time as meetings, conventions, and contract negotiations).

Petitioner also noted several other freebies for public-sector unions. Public-sector unions are given "union rights" which eases their burden to recruit and retain members. Pet. Br. 40–42; see also Pet. App. 141–43 (setting forth AFSCME's union rights in this case including use of State premises for union meetings). The government often collects union dues for the union — a substantial burden in most unions' accounts receivable departments alleviated by the government. Pet. Br. 42. Finally, exclusive representation itself boosts membership even if agency fees are not allowed in the jurisdiction. Pet. Br. 40–41.

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[21] Petitioner also noted the substantial amount of release time used by federal government public employees who are union members, amounting to over $160 million in 2014. Pet. Br. 40.

These subsidies of release time, employer resources, and collection duties also improperly put the government's thumb on the scale in favor of the unions' political and ideological speech. Agency fees would stack on top of all of these other benefits by having the government force non-consenting employees to pay for the unions' operations — a direct and enormous subsidy. A simplified dues calculation shows the benefit unions receive through agency fees.

Assume a 25,000 member union representing 50,000 employees with a $15 million annual budget, $5 million for overt political activity and $10 million for collective bargaining. If the union were a members-only union, the 25,000 members would have to pay $600 each for the union to achieve its goals for the year. However, if the union is able to force non-member employees to subsidize its operations, then the members only have to pay $400 per year with the non-members contributing $200 each.

What this example shows is that the dollars from the union's perspective are fungible as far as the union achieving its objectives, but the union is much better off if it can split the cost among more dues payers. Now if the union wants to increase its political budget — say for a political fight back fund as in *Knox* — it can increase membership fees to $600 and amplify by 100% the voice of the members and they are no worse off thanks to the government's forcing the non-members to pay their "fair share." Viewed another way, the members are achieving their political preferences at a savings of $200 while the non-members have to contribute $200 to an organization they could fundamentally disagree with at risk of losing their job. The union can also offer full-fledged membership to a non-member for only $200 differen-

tial, whereas it would have cost $600 to become a member in a members-only union (ignoring the incremental calculation of an additional member), inflating the union's membership rolls and increasing its clout and influence.

This example leads to the inescapable conclusion that non-members are subsidizing the political preferences of members, even if collective bargaining is viewed as wholly separable from political activity, as *Abood* mistakenly assumed. Someone who wishes to join a union likely has one or more of three goals: (1) help the collective bargaining effort, (2) associate with like-minded individuals, or (3) further the political agenda of the union. The non-member has none of these goals, but contributes to the member's enjoyment of all of them. The First Amendment does not tolerate the government compelling individuals to speak in support of a union's political speech.

CONCLUSION

The Court should overrule *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), invalidate public-sector agency fees, and reverse and remand the judgment of the Court of Appeals.

Respectfully submitted,

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