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 FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND CENTER OF THE AMERICAN EXPERIMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Twice in the past five years this Court has explicitly questioned its holding in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012). Two terms ago, this Court split 4-4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016).

This case presents the same question presented in *Friedrichs*: Should *Abood* be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment?

Amici focus on the embedded issue of whether *stare decisis* mandates upholding the widespread infringement of non-unionized public-sector employees' rights under the government's purported interest in maintaining "labor peace."

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[1] Rule 37 statement: All parties filed blanket consents and were timely notified of our intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

This case concerns *amici* because it implicates the government's ability to burden private citizens' First Amendment rights. Specifically, all aspects of public-employee union activity are inherently political, with necessary ramifications on basic questions of public policy and state budgets. Workers—let alone non-union members—do not all agree on these issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

Illinois law permits so-called "fair share agreements" that require public-sector workers like Mark Janus to pay money for union collective-bargaining activities that they do not support. 5 Ill. Comp. Stat. 315/1 et seq. These exactions—also known as "agency fees"—provide workers with a Hobson's choice: Either sacrifice your First Amendment rights and fund political advocacy you may not like, or find another job. This Court allowed that practice in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), but has since recognized the problems inherent in *Abood*, highlighting the case's constitutional dubiousness. *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

This brief addresses one alleged impediment to this Court finally correcting the *Abood* mistake: whether the doctrine of *stare decisis* mandates the continued abridgement of public-sector workers' First Amendment rights. It does not. When constitutional rights are violated, *stare decisis* is at its weakest.

Moreover, the prudential policy factors and special justifications the Court considers when applying the doctrine weigh heavily in favor of overturning *Abood*.

This is particularly true with regard to *Abood*'s unsupportable introduction of the "labor peace" doctrine into the First Amendment context. Labor peace is simply not a sufficiently compelling governmental interest to justify the continued toleration of compelled speech and association. The Court should recognize *Abood* for the jurisprudential anomaly that it is and restore the constitutional protections it undermined.

ARGUMENT

I. *STARE DECISIS* IS AT ITS LOWEST EBB WHEN CONSTITUTIONAL RIGHTS ARE AT STAKE

Stare decisis "keep[s] the scale of justice even and steady." 1 Wm. Blackstone, Commentaries 69 (Univ. of Chicago Press 1979) (1765). It is a "principle of policy" that promotes prudential considerations such as the "evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). The doctrine can be traced back to the earliest foundations of English common law, including Henry de Bracton's recommendation in the 13th century that "[i]f like matters arise let them be decided by like, since the occasion is a good one for proceeding *a similibus ad similia*." 2 Bracton, On the Laws and Customs of England 21 (G. Woodbine ed. 1968).

But for all of its rich history and noble purposes, *stare decisis* is neither an "inexorable command" to be blindly followed, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor a "mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). These admonitions hold especially true in constitutional cases. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). In contrast

to common-law or statutory cases where "stability may trump perfect correctness" due to "the importance of preserving settled expectations," "in constitutional cases, the value of correct reasoning may trump stability given the difficulty of making changes to a constitutional precedent." Bryan A. Garner *et al.*, *The Law of Judicial Precedent* 352 (2016). Put succinctly, "*stare decisis* does not require [this Court] to approve routine constitutional violations." *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

A. Because Constitutional Amendment Is Unlikely, The Court Has Historically Been Willing to Overrule Erroneous Decisions in Cases Involving Constitutional Rights

It has long been observed that "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result). This Court has previously held that its interest in adhering to *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The doctrine understandably "carries enhanced force when a decision . . . interprets a statute" because, "*unlike in a constitutional case*," those critical of a statutory ruling "can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015) (emphasis added). By contrast, as Justice Louis Brandeis noted, "in cases involving the Federal Constitution . . . correction through legislative action is practically impossible." *Burnett v. Coronado Oil & Gas Co.*, 285 U.S.

393, 406–08 (1932) (Brandeis J. dissenting) (footnotes omitted).

In particular, this Court "has not hesitated to overrule decisions offensive to the First Amendment." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and in judgment) (citation omitted). Indeed, in the last 50 years, the Court has overturned no fewer than seven precedents in the free-speech context alone:

- *Brandenburg v. Ohio*, 395 U.S. 444 (1969), overruling *Whitney v. Calif.*, 274 U.S. 357 (1927);
- *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940);
- *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), overruling *Valentine v. Chrestensen*, 316 U.S. 52 (1942);
- *Miller v. California*, 413 U.S. 15 (1973), overruling *Roth v. United States*, 354 U.S. 476 (1957);
- *Hudgens v. NLRB*, 424 U.S. 507 (1976), overruling *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); and
- *Citizens United*, 558 U.S. at 365, overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and, in part, *McConnell v. FEC*, 540 U.S. 93 (2003).

This willingness to fix errant First Amendment rulings is supported by an especially compelling consideration: "If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. *Abood* is not aligned with this piloting principle of constitutional navigation.

B. Judges Have a Duty to Correct Legal Misinterpretations, Especially in Constitutional Cases

Historically, the common law consistently recognized a core principle underlying *stare decisis* to be that "it is the function of a judge not to make, but to declare the law." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 51 (London, E. & R. Brooke 1797) (1642). Since judges did not make the law, judicial precedent, while important as an explanatory tool, was not to be slavishly followed if it was found to be in conflict with the actual substance of the law itself. *See* Matthew Hale, *The History of the Common Law of England* 45 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713) ("the Decisions of Courts of Justice . . . do not make a Law . . . yet they have a great Weight and Authority in Expounding, Publishing, and Declaring what the Law of this Kingdom is."); *see also Jones v. Randall*, 98 Eng. Rep. 706, 707 (1774) ("But precedent, though it be evidence of law, is not law in itself; much less the whole of law."). Far from a jurisprudential relic, this understanding of the proper role of judges in applying *stare decisis* has been adopted and adapted to the modern realities of rendering judicial decisions. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning

what the law is, rather than decreeing what it is today *changed* to, or what it will tomorrow be.").

This conception of the proper role of *stare decisis* is important because, as the Court has humbly acknowledged, "[a]ll judges make mistakes." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1896 (2016). That prudent realization was imbedded in the common law as well, as Blackstone recognized "that the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." 1 Commentaries 71. Much like the idea that judges "find" the law rather than making it, this common-law insight as to the sometimes fallible nature of judges also survived the American Revolution and adoption of the Constitution. *See* 1 James Kent, *Commentaries on American Law* 477 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) ("I wish not to be understood to press too strongly the doctrine of *stare decisis* . . . . It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear; and revised without reluctance.").

Because attempts by judges to discern the law may occasionally miss their mark, the Constitution itself—not prior pronouncements from the bench—must remain the ultimate source of constitutional law. As Justice Stanley Reed explained before taking his seat on the Court, a judge applying a constitutional provision "must always measure the decisions of his predecessors against the document which they were interpreting. However high the authority of the prior decisions, they remain inferior to the law itself." Address by Solicitor General Stanley Reed at the Meeting of the

Penn. Bar Ass'n, transcript at 133 (Jan. 7, 1938) (on file with Cornell L. Rev.). Justice William O. Douglas would echo this view years later, referring to *stare decisis* in constitutional cases as "tenuous": "[A judge] may have compulsions to revere past history and accept what was once written. But he remembers above all that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." William O. Douglas, "Stare Decisis" (1949), in *Essays on Jurisprudence from the Columbia Law Review* 18-19 (1963).[2]

While it would be unwise for any court to decide *every* legal issue anew, when past errors reach the very core of our constitutional system, it is incumbent upon the heirs of this Court's noble legacy to correct the errant path of their predecessors. As Blackstone wrote, "if it be found that the former decision is manifestly

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[2] This point was also forcefully made by the Pennsylvania Supreme Court in 1787:

> A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.

Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786); *see also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988).

absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law." 1 Commentaries 69–70. Accordingly, "when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, [this Court] must be more willing to depart from that precedent." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

C. In Deciding Whether to Overturn Precedent, This Court Weighs Many Competing Considerations

In considering whether to uphold or overturn precedent, this Court's analysis is "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 854 (1992). Determining that a court would decide a case differently now than it was decided before is normally insufficient to overturn precedent absent some "special justification." *Kimble*, 135 S. Ct. at 2409.

A court's overarching consideration must be striking the correct balance between "the importance of having constitutional questions *decided* [and] the importance of having them *decided right*." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring). Such balancing necessitates a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." *Id.* (quoting Robert H. Jackson, *Decisional Law and* Stare Decisis, 30 A.B.A.J. 334 (1944)). Applying these considerations often requires a court to keep one eye on the past and one on the future.

For example, a court may look back on the period of time since the precedent was established and inquire "whether facts have so changed . . . as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. This is evident when the "underlying reasoning has become so discredited" that new rationales must be invented if the precedent is to survive. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). Another relevant consideration is whether the decision appears to be an anomaly when compared to a wider sampling of related case law. This can occur either "if the precedent under consideration itself departed from the Court's jurisprudence," *id.* at 378, or if the law has afterward "so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

In addition to evaluating these preceding legal and factual developments, a court must also consider the practical consequences of either upholding or overturning the precedent at issue. *See Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring) ("[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, *stare decisis* effect is also diminished."). This too requires a sort of balancing, particularly when considering derivative reliance interests. On the one hand, if the prior "rationale threatens to upend our settled jurisprudence in related areas of law," *id.*, society's reliance on these related principles of law may outweigh any reliance on the principle under review. Conversely, if a rule is "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," *Casey*, 505 U.S. at 854, perhaps the precedent should not be upset.

One final consideration involves "whether the rule has proven to be intolerable simply in defying practical workability." *Id.* This can occur, for example, when a precedent "has proved to be the consistent subject of dispute among Members of this Court" since being issued. *Citizens United*, 558 U.S. at 380 (Roberts, C.J., concurring). In such an instance, "the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases." *Id.* at 379.

The mere fact that *Abood* "was badly reasoned and produces erroneous results" is arguably sufficient to justify overturning it as precedent. *See Gant*, 556 U.S. at 353 (Scalia, J., concurring) (overturning a nearly 30-year-old precedent concerning the warrantless search of a vehicle incident to arrest). However, to the extent that this Court has adopted the "special justifications" for abandoning precedent referenced above—which should matter less in constitutional cases—those factors also weigh heavily in favor of overturning *Abood*.

II. *ABOOD* MISAPPLIED THE "LABOR PEACE" RATIONALE AND IS A JURISPRUDENTIAL ANOMALY

A. *Abood* Carries Less Precedential Weight Because the Labor-Peace Rationale is a Commerce Clause Jurisdictional Hook, Not a First Amendment Doctrine

Prior to *Abood*, the labor-peace rationale had always been invoked as the jurisdictional hook for Congress's power to regulate labor relations under the Commerce Clause. But just because the Constitution provides Congress with authority to regulate an activity, it does not necessarily follow that Congress's par-

ticular exercise of that power does not violate fundamental constitutional rights. *See Reid v. Covert*, 354 U.S. 1, 16 (1957) (holding that even valid "treaties and laws enacted pursuant to them" could not "confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution," particularly due process rights under the Fifth Amendment and the right a jury trial under the Sixth Amendment); *see also Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring) ("We would not give the Government's support of the *Holland* principle the time of day were we confronted with 'treaty-implementing' legislation that abrogated the freedom of speech or some other constitutionally protected individual right."). The two analyses—constitutional jurisdiction and constitutional prohibition—are completely separate and distinct from one another; a fact woefully underappreciated in the *Abood* decision.

1. The concept of labor peace was completely unrelated to the First Amendment before *Abood*.

The labor-peace concept first appeared a century ago in *Wilson v. New*, 243 U.S. 332, 342, 348 (1917), a case about Congress's authority to set hours and wages for railroad employees so as to settle a nationwide strike that threatened to "interrupt, if not destroy, interstate commerce." In those circumstances—"that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent"—the Court found that Congress's exercise of power was appropriate. *Id.* at 347–48.

Twenty years later, *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515 (1937), extended that holding more generally to the regulation of railroads' labor relations. There a railroad refused to recognize the union that craft-shop employees had chosen in a government-supervised election under the Railway Labor Act (RLA). It argued that the RLA, "in so far as it attempts to regulate labor relations between [the railroad] and its 'back shop' employees, is not a regulation of interstate commerce authorized by the commerce clause because . . . they are engaged solely in intrastate activities." *Id.* at 541. Citing evidence of disruptive strikes and "industrial warfare" between the railroads and their employees, the Court found the RLA to be appropriate for "settl[ing] industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement." *Id.* at 553.[3]

That same year, the Court upheld the National Labor Relations Act (NLRA) on "industrial peace" grounds. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The respondent in that case, a major iron and steel manufacturer, challenged both the scope of the NLRA and its application to the company's operations. This attack on federal authority was quite broad, as the respondent contested the government's general power to regulate labor relations by advancing the argument that its manufacturing business was not part of the "stream of commerce" and was thus beyond

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[3] *See also id.* at 556 ("Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation.").

Congress's reach. *Id.* at 41. This Court disagreed, focusing on the "effects" that labor discord at respondent's business would have on interstate commerce:

> [T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. Congress had therefore acted appropriately to facilitate employee representation, the Court held, because "collective bargaining is often an essential condition of industrial peace." *Id.* at 42.

In the wake of that ruling, the Court came to view "industrial peace" or "labor peace" as the NLRA's fundamental purpose, applying the Act in dozens of cases with that goal in mind. *See, e.g.*, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939) ("[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove ob-

structions to the free flow of commerce."); *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 476 (1953) (rejecting application of the Act contrary to its "declared purpose of promoting industrial peace and stability"). Notably, none of these cases involved workers' First Amendment rights.

Finally, this Court issued what would prove to be two enormously consequential opinions involving union shop agreements, both of which managed to avoid rendering a decision on First Amendment grounds: *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740 (1961). Much like the cases that preceded it, *Hanson* used labor peace strictly as the justification for Congress's jurisdiction under the Commerce Clause. *See* 351 U.S. at 234–35 (stating that the primary issue of the case was "germane to the exercise of power under the Commerce Clause"). A threshold issue in the case was whether the RLA could preempt a conflicting provision of the Nebraska constitution that barred union-shop arrangements. *Id.* at 233. Citing *Jones & Laughlin Steel*, the Court found the question an easy one: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Id.*

As for the First Amendment, the Court in *Hanson* sidestepped the issue through a combination of two factors: first, the employees brought a First Amendment challenge that was contingent on specific facts and, second, the record was bereft of any factual evidence that would support the challenge. Rather than arguing that Congress's authorization of union-shop agreements was a *per se* First Amendment violation, the employees instead claimed specifically that the

RLA infringed on their rights by compelling them "not only to become members of the union but to contribute their money *to be used . . . for propaganda for economic or political programs* which may be abhorrent to them." Br. of Appellees Robert L. Hanson, et al., at 25, *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (No. 451) (filed April 18, 1956) (emphasis added); *see also Street*, 367 U.S. at 747 (describing *Hanson* as challenging the constitutionality of "compelling an individual to become a member of an organization with political aspects [as] an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory financial support of group activities outside the political process").

The nature of the employees' challenge opened the door for the Court to rule that "*[o]n the present record*, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238 (emphasis added). This reference to "the present record" is crucial, as the case was brought before the union-shop agreement actually went into effect and so there was no evidence in the record that the union had expended funds for political purposes. *Id.* at 230; *Street*, 367 U.S. at 747–48 ("the action in *Hanson* was brought before the union-shop agreement became effective").[4] The

[4] *Street*'s statement that *Hanson* held the RLA "constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents" is not to the contrary, taken in context. *See* 367 U.S. at 749. As the preceding sentence describes, *Hanson* held that the Act was "within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* (quoting *Hanson*, 351 U.S. at 238).

Court explicitly noted how narrow its decision was, and how, if a case came with clear First Amendment problems, it would not be covered by *Hanson*:

> [I]f the exaction of dues, initiation fees, or assessments 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. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.

Hanson, 351 U.S. at 238 (emphasis added). The unique circumstances of *Hanson* led to a decision only on the narrower question of political expenditures, not the broader question of the RLA's general validity under the First Amendment—which of course would not depend on record evidence.

Five years later, *Street* came before the Court posing the question of whether "First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes." 367 U.S. at 747. While this Court recognized the question to be "of the

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But that goes only so far: *Hanson* ruled on the narrower claim regarding political expenditures, but did not address the waterfront of possible First Amendment claims—including that the Act infringes employee rights irrespective of union political spending.

utmost gravity," it was again able to avoid the key constitutional question by interpreting the Act to "den[y] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 749–50. Using this statutory construction, the Court held such expenditures to "fall[] clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union shop agreements was justified" and thus fell outside the Act's authorization. *Id.* at 768. This meant that the Court based its ruling on the proper interpretation of the statute itself, making it unnecessary to reach the larger constitutional question that had been presented. In other words, "*Street* was not a constitutional decision at all." *Harris v. Quinn*, 134 S. Ct. at 2632.

2. *Abood's* reasoning shows a mistaken reliance on *Hanson* and *Street*.

Hanson and *Street* suggested that serious constitutional concerns arise when Congress authorizes agreements that require employees to monetarily support a labor union's political actions. But, as explained above, neither case resolved the broader question of whether such a law intrinsically infringes on employees' fundamental First Amendment rights regardless of such union political expenditures. Unfortunately, however, the Court in *Abood* "seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union." *Harris*, 134 S. Ct. at 2632. The Court's fundamental error was the mistaken assumption that *Hanson* and *Street* already established that interference with employee free-speech rights "is constitutionally justified

by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood*, 431 U.S. at 222.

Abood also incorrectly characterized those cases' First Amendment holdings as resting on the state interest in maintaining labor peace. Mixing and matching different parts of the *Hanson* opinion—and paraphrasing when even that was insufficient—*Abood* proceeded to cobble together an entirely new doctrine:

> Acknowledging that "(m)uch might be said pro and con" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "(t)he ingredients of industrial peace and stabilized labor-management relations." Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one.

Id. at 219 (citations omitted) (quoting *Hanson*, 351 U.S. at 233–34). As this Court later recognized, *Hanson* was "a case in which the First Amendment was barely mentioned." *Harris*, 134 S. Ct. at 2627. Accordingly, *Abood*'s reliance on *Hanson* for the proposition that infringement of speech and associational rights may be justified by an invocation of labor peace was completely misplaced.

3. Conflating *Abood* with *Pickering* is an attempt to jury-rig a new justification to shore up *Abood*'s mistake.

Respondents here attempt to conflate the *Abood* precedent with that of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *See* Br. in Opp'n for Resp't AFSCME, at 18, *Janus v. AFSCME, Council 31* (No. 16-1466) (filed Aug. 11, 2017) ("The constitutional balance struck in *Abood* accords with the balancing test for considering the employment-related First Amendment claims of public employees that was established in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)."). The attempt to draw this parallel is by no means original to this case, however. For example, in *Harris*, Justice Kagan found that *Abood*'s "core analysis mirrors *Pickering*'s," going on to explain that in *Abood* "[t]he Court struck the appropriate balance by drawing a line, corresponding to *Pickering*'s, between fees for collective bargaining and those for political activities." 134 S. Ct. at 2654 (Kagan, J., dissenting).

The invocation of *Pickering* in this context is completely foreign to the reasoning that *Abood* originally rested upon. *Harris*, 134 S. Ct. at 2641 ("This argument represents an effort to find a new justification for the decision in *Abood*, because neither in that case nor in any subsequent related case have we seen *Abood* as based on *Pickering* balancing.") This attempt to prop up the poorly-reasoned *Abood* precedent is itself strong evidence that the "underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." *See Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring).

In his *Citizens United* concurrence, Chief Justice Roberts found that the government's invocation of "new and potentially expansive rationales" in attempting to defend a precedential case "underscore[d] its weakness as a precedent," *id*. at 382–83. He explained:

> *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited. Doing so would undermine the rule-of-law values that justify *stare decisis* in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own.

Id. at 384. The same reasoning is applicable here: while *Pickering* "may or may not support the *result*" in *Abood*, its rule was "plainly not part of the *reasoning* on which" *Abood* was originally decided. *See id*. at 383.

B. *Abood* Is an Anomaly of First Amendment Jurisprudence

As this Court recognized in *Knox*, *Abood's* "justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly." 567 U.S. at 311. Authorizing a private entity to impose

mandatory fees on government employees is both "unusual" and "extraordinary." *Davenport v. Wash. Educ. Ass'n*, 551 U.S.177, 184 (2007). While some of the problems inherent in the *Abood* decision were "noted or apparent at or before the time of the decision," several other grounds for questioning the decision have "become more evident and troubling in the years since then." *Harris*, 134 S. Ct. at 2632.

1. *Abood's* confusion of powers and rights marked a significant departure from the Court's prior jurisprudence.

Abood departed spectacularly from settled First Amendment law. As discussed above, *Hanson* and *Street* both held only that the existence or lack of labor peace had an effect on interstate commerce sufficient to support the exercise of Congress's Commerce Clause power—an exceedingly low bar. To uphold such an exercise, the Court considers only "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 557 (1995). Essentially this same highly deferential standard applies to due-process claims concerning the regulation of economic activity. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955). But Congress's power to approve union-shop agreements is logically irrelevant to whether such actions survive the exacting scrutiny courts apply to First Amendment claims—a decidedly higher bar. *Abood*'s bait-and-switch on this point—substituting a Commerce Clause doctrine for any reasoned First Amendment analysis—is unsupportable.

So too is its bottom-line holding that the government's interest in promoting labor peace is substantial

or compelling. Under an agency-shop agreement, a union "is designated the exclusive representative of those employees" who are compelled to support it. *Abood*, 431 U.S. at 224. As *Abood* recognized, the very purpose of forcing employees to support a union is to facilitate the union's speech on their behalf—while suppressing individual dissenting views—thereby achieving labor peace. *Id*. *Abood* regarded this suppression of employee speech as a *virtue* of compelled association with a union. The First Amendment does not.

When placed into the proper historical context, the purported labor-peace rationale pales in comparison to other interests previously advanced to justify an encroachment on First Amendment freedoms. For example, the government's interest in promoting "public safety"—that is, domestic peace—is no doubt compelling, but this Court ruled that even this interest only allows for the regulation of speech that presents a "clear and present danger." *Cantwell v. State of Conn.*, 310 U.S. 296, 308 (1940). In addition, the federal government's interest in the "common Defence" reflects its constitutional responsibility, U.S. Const. art. I, § 8, cl. 1, but this legitimate concern for national security still does not allow for an overly broad regulation of expressive association. *United States v. Robel*, 389 U.S. 258, 265–66 (1967). Finally, the government's interests in encouraging citizens' allegiance to our constitutional principles and their respect for national symbols fall far short of overcoming First Amendment protections. *See Barnette*, 319 U.S. at 640–42; *see also Texas v. Johnson*, 491 U.S. 397 (1989).

In comparison to these previously advanced interests, the government's interest in forcing workers to support and adhere to certain opinions regarding their

wages and working conditions under the guise of so-called "labor peace" is trifling. The *Abood* Court utterly failed to apply the heightened scrutiny required for a rationale to overcome the individual right to be free from compelled speech and association. *Abood*, 431 U.S. at 262–264 (Powell, J., concurring in the judgement); *accord id.* at 242–44 (Rehnquist, J., concurring). The Court should now rectify this monumental mistake by applying the proper level of scrutiny and ruling that labor peace is insufficient to justify violations of the First Amendment.

2. *Abood* is now no more than a remnant of an abandoned doctrine.

Not only did *Abood* depart from this Court's prior decisions, but it has been rendered even more of an outlier in the years since. For example, in *Riley v. Nat'l Fed'n of the Blind*, the Court recognized that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." 487 U.S. 781, 790–91 (1988). Government "may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791. Nor does the First Amendment permit government to "sacrifice speech for efficiency," *id.* at 795, but instead protects "the decision of both what to say and what not to say," *id.* at 797.

Riley was not unique in advancing such principles. The Court has also explicitly declared that the First Amendment does not allow the government to require subsidization of political speech absent some narrowly tailored compelling interest. *Harris*, 134 S. Ct. at 2644 (It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that

he or she does not wish to support."); *see also Citizens United*, 558 U.S. at 340 ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (citation omitted). Straightforward application of these basic principles disposes of any argument that the government's claimed interest in furthering peace in the workplace justifies the infringement of employees' free speech rights.

In the related realm of free association, the Court has admirably tried to harmonize *Abood*'s conclusions with a more accurate understanding of First Amendment rights by recognizing that the freedom of association "plainly presupposes a freedom not to associate." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood*, 431 U.S. at 234–35). Much like speech, associational freedom may only be infringed by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*; *Knox*, 567 U.S. at 310 (same); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (same); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) ("exacting scrutiny"). This is a balancing test: "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658–59.

Even indisputably important state interests—like eradicating discrimination or assuring equal access to public accommodations—are outweighed by the burden of government intrusion on associations that are

themselves expressive. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574–75 (1995); *Boy Scouts*, 530 U.S. at 559. By contrast, where there is no "serious burden" on expressive association, this Court has consistency upheld the constitutionality of such laws. *See Boy Scouts*, 530 U.S. at 658–59 (discussing cases); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (challenged antidiscrimination law "no obstacle" to club excluding "individuals who do not share the views that the club's members wish to promote"); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (challenged law "does not force a law school 'to accept members it does not desire'"). Because public-sector unions are inherently expressive associations, allowing nonmembers to be charged agency fees forces these nonconsenting workers to subsidize the union's political viewpoint. The proper application of *stare decisis* should not prevent the Court from overturning such a blatant and continuous violation of the speech and associational rights of millions of workers.

III. THERE IS NO VALID RELIANCE ON *ABOOD*, WHICH HAS PROVEN TO BE UNWORKABLE

No one relies on having less freedom under the First Amendment. *See* Ilya Shapiro & Nicholas Mosvick, Stare Decisis *after* Citizens United*: When Should Courts Overturn Precedent*, 16 Nexus: Chap. J.L. & Pol'y 121, 135 (2010/2011). *Abood* simply does not involve the type of reliance interests that would "lend a special hardship to the consequences of overruling [the case] and add inequity to the cost of repudiation." *See Casey*, 505 U.S. at 854. Instead, *Abood* is an ever-present threat "to upend [this Court's] settled

jurisprudence in related areas of law." *See Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring).

A. There Is No Valid Reliance Interest in the Deprivation of First Amendment Rights

Respondents argue that "significant reliance interests . . . have grown up around *Abood*" that "strongly support adhering to *stare decisis* in this case." Br. in Opp'n for Resp'ts Lisa Madigan & Michael Hoffman, at 17, *Janus v. AFSCME, Council 31* (No. 16-1466) (filed Aug. 10, 2017). But who is it that has so profoundly relied on *Abood*? It certainly is not dissenting employees, as the contention that anyone would possess a reliance interest in being forced to subsidize an organization's advocacy of views with which they vehemently disagree is absurd. Nor do either unions or employers possess any significant reliance interest in *Abood*. After all, unions and employers did not negotiate over the funding of union collective-bargaining activities because this funding came from employees rather than employers. No bargaining position taken by either a union or an employer was affected by the completely separate issue of how the unions are funded.

Contrast this "reliance" with the further warping of First Amendment jurisprudence that *Abood* portends. If allowed to stand, *Abood* will continue to threaten the rights of people throughout the nation. Sometimes state efforts to compel speech and association will fail, such as Illinois's attempt to force family members acting as home health aides for their loved ones to contribute fees to unions. *Harris*, 134 S. Ct. 2618. Other times, such efforts will succeed and further erode essential freedoms, as with New York's imposition of agency fees on home child-care providers. *Jarvis v.*

Cuomo, 660 F. App'x 72 (2d Cir. 2016), cert. denied, 137 S. Ct. 1204 (2017). Regardless, absent a decisive judicial response, the looming threat will persist.

B. Overruling *Abood* Would Impose No Special Hardship on Labor Contracts

While it is true that in "cases involving property and contract rights," *stare decisis* plays an important role, *Payne*, 501 U.S. at 828, those considerations are lacking in the context of public-sector union agency fees. Respondent argues that there are significant reliance interests at stake because "[a]n untold number of employment contracts have been negotiated pursuant to" state laws that allow the collection of agency fees. Br. in Opp'n for Resp'ts Lisa Madigan and Michael Hoffman, at 17. But it is well established that a group's view of a mistaken precedent "as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *See Gant*, 556 U.S. at 349.

If *Abood* is overturned, the contracts currently in force between employers and unions will operate in precisely the same manner as before. All of the benefits that were negotiated will remain intact. The only real detriment to unions would be to deprive them of "the 'extraordinary' benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund." *Knox*, 567 U.S. at 321.

C. *Abood*'s Standard Has Defied Workability

As *Abood* itself admitted, "decisionmaking by a public employer is above all a political process" where

the decision made by political representatives about whether to acquiesce to a union's demands "depend[s] upon a blend of political ingredients." 431 U.S. at 228. However, the Court in *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." *Harris*, 134 S. Ct. at 2632. That difficulty is only compounded when one realizes that the fungibility of money renders the alleged distinction little more than a sham.

1. Because public-sector unions are inherently political, their collective bargaining and political action are practically indistinguishable.

In *Abood*, the Court explicitly recognized the "truism" that "because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political." 431 U.S. at 231. Even activities specifically aimed at collective bargaining necessarily involve taking sides on a wide array of ideological and political issues, including the proper extent of the "right to strike," the desirability of abortion coverage under a union-negotiated medical benefits plan, and whether unionism itself is good policy. *Id.* at 222; *see also Knox*, 567 U.S. at 310 (acknowledging that "a public sector union takes many positions during collective bargaining that have powerful political and civic consequences"). Collective bargaining is clearly "a matter of great public concern" in this context, and any "contrary argument flies in the face of reality." *Harris*, 134 S. Ct. at 2642–43.

Because of the inherently political nature of all actions taken by public-sector unions, it has proven practically impossible for the Court to consistently and accurately draw a line between chargeable and non-chargeable activities. *See id.* at 2633 ("*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' [or not]."). But this sort of arbitrary line-drawing is exactly what *Abood* demands.

2. *Abood* has consistently been a subject of dispute among members of this Court.

When attempting to distinguish between chargeable and non-chargeable union expenditures "in the years since *Abood*, the Court has struggled repeatedly." *Id.* (citing several difficult cases). While the simple fact that a precedent "remains controversial is, of course, insufficient to justify overruling it," *Abood* constitutes a rare circumstance where "the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases." *Citizens United*, 558 U.S. at 379–80 (Roberts, C.J., concurring). Worse still, the Court's subsequent attempts to clarify the parameters and proper application of such line-drawing have only muddied the waters even further.

For example, Justice Scalia observed that the three-part test advanced in *Lehnert* for determining the chargeablity of fees "does not eliminate past confusion" and "provides little if any guidance to parties contemplating litigation or to lower courts." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in judgment in part and dissenting in

part). Justice Thurgood Marshall had similar concerns, identifying one ridiculous potential outcome of a hypothetical application of the plurality's test:

> Presumably. . . the opinion would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but it would not permit lobbying for the same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement. I see no justification for this distinction.

Id. at 537 (Marshall, J., dissenting in part). If it is still true that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions," *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004), the sort of blindfolded judicial dart-throwing demanded by *Abood* and its progeny should be abandoned.

3. Money is fungible, so differentiating political and nonpolitical expenditures is a purely bookkeeping exercise.

Even assuming arguendo that a theoretical distinction can be made between the collective bargaining efforts and political expenditures of public-sector unions, this dichotomy proves meaningless and inherently unworkable in practice. This is simply because "a union's money is fungible." *Knox*, 567 U.S. at 317 n.6. Thus, even if a fee collected from non-members "were spent entirely for nonpolitical activities, it would [still] free up other funds to be spent for political purposes." *Id*. This basic concept is uncontroversial and

has long been recognized by this Court. *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753 (1963) (observing that "even if all collections from nonmembers must be directly committed to paying bargaining costs, this fact is of bookkeeping significance only rather than a matter of real substance.").

Indeed, the fungibility of money seems to be one of the few points related to non-member union fees that has engendered widespread agreement among the members of this Court. *See Knox*, 567 U.S. at 334–35 (Breyer, J., dissenting) ("In any event, we have made clear in other cases that money is fungible."). In *Knox* both Justice Alito for the majority and Justice Breyer in dissent recognized this basic truism in the particular context of judicial unworkability. *Compare id.* at 317 n.6 (advancing the fungibility of money as the first of two reasons for the unworkability of only requiring a new *Hudson* notice when a special assessment is imposed for political purposes), *with id.* at 334–35 (Breyer, J., dissenting) (rejecting the argument that all of the special assessment that was to be used only for political purposes is not chargeable to nonmembers because of the difficulty of applying such a rule in future cases). The inherent fungibility of currency can make even straightforward distinctions irrelevant in practice, so the Court should discard the arbitrary dichotomy between chargeable and non-chargeable expenses in the context of public-sector unions.

CONCLUSION

Abood has spawned extensive and pernicious infringements on the core constitutional rights of millions of people for the last 40 years. In that time, countless millions of dollars have been appropriated from

the pockets of these individuals and funneled into the coffers of organizations they wish not to associate with in order to further causes they wish not to support. *Stare decisis*, properly understood and applied, not only allows for the abandonment of a precedent so thoroughly repugnant to our Constitution, it demands it. The country's public-sector workers deserve, at long last, to have their First Amendment liberties restored.

Respectfully submitted,

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