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 PETITIONER

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QUESTION PRESENTED

Should *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, a Plaintiff-Appellant in the court below, is Mark Janus.

Respondents, Defendants-Appellees in the court below, are American Federation of State, County, and Municipal Employees, Council 31; Michael Hoffman, in his official capacity as Acting Director of the Illinois Department of Central Management Services; and Illinois Attorney General Lisa Madigan.

Parties to the original proceedings below who are not Petitioners or Respondents include plaintiffs Illinois Governor Bruce Rauner, Brian Trygg, and Marie Quigley, and defendant General Teamsters/Professional & Technical Employees Local Union No. 916.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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The Seventh Circuit's decision is reproduced in the Petition Appendix (Pet.App.1), as is the district court's order dismissing Petitioner's complaint (Pet.App.6).

JURISDICTION

The Seventh Circuit entered judgment on March 21, 2017. Pet.App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at Pet.App.43.

STATEMENT OF THE CASE

A. Legal Background

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." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Yet, agency fee requirements are not rare. Approximately five million public employees are required, as a condition of their employment, to subsidize the speech of a third party that they may not support, namely a government-appointed exclusive representative. Pet. 9 n.3.

The legal sanction for these forced speech regimes is *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). *Abood* approved the government forcing its employees to pay an exclusive representative for bargaining with the government and administering the resulting contract, *id.* at 232, but not for activities deemed political or ideological, *id.* at 236.

The *Abood* Court predicted that "[t]here will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id*. *Abood* was prescient on that score. "In the years since *Abood*, the Court has struggled repeatedly with this issue." *Harris*, 134 S. Ct. at 2633 (citing cases).

In the years since *Abood*, the Court also has done something else: applied strict and exacting First Amendment scrutiny to instances of compelled speech and association outside of the agency fee context. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000); *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). In fact, the Court applied those levels of scrutiny to compelled speech and association prior to *Abood* as well. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977); *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion). *Abood*, however, conspicuously failed to apply either level of scrutiny to agency fees. *See Abood*, 431 U.S. at 262–64 (Powell, J., concurring in the judgment).

In 2012, these lines of precedent intersected in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), which applied *Abood*'s framework to a union assessment for opposing ballot initiatives. *Id*. at 315. *Knox* held that agency fee provisions are subject to at least "exacting First Amendment scrutiny," which requires

that the mandatory association "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 310 (quoting *Roberts*, 468 U.S. at 623). *Knox* also recognized that *Abood*'s "[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly," given that "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Id.* at 311.

Two years later, the Court in *Harris* applied exacting scrutiny to an agency fee requirement afflicting personal care attendants and found it "arguable" that even that "standard is too permissive." 134 S. Ct. at 2639. The Court also gave six reasons why "[t]he *Abood* Court's analysis is questionable." *Id.* at 2632. Specifically, *Abood*: (1) "fundamentally misunderstood" earlier cases concerning laws authorizing private sector compulsory fees; (2) failed to appreciate the difference between private and public sector bargaining; (3) failed to appreciate the difficulty in distinguishing between collective bargaining and politics in the public sector; (4) did not foresee the difficulty in classifying union expenditures as "chargeable" or "nonchargeable"; (5) "did not foresee the practical problems that would face objecting nonmembers"; and (6) wrongly assumed forced fees are necessary for exclusive representation. *Id.* at 2632-34. The Court stopped short of overruling *Abood*, however,

because doing so was unnecessary to resolve the question presented in *Harris*. *See id*. at 2638 & n.19.

B. Illinois' Agency Fee Requirement

1. On February 9, 2015, in the wake of *Harris*, Illinois Governor Bruce Rauner filed a lawsuit seeking to overrule *Abood* and have the agency fee requirement found in the Illinois Public Labor Relations Act ("IPLRA"), 5 ILL. COMP. STAT. 315/1 *et seq*., declared unconstitutional. Pet.App.2.

The IPLRA, like other labor laws, grants unions an extraordinary power: the authority to act as "the exclusive representative for the employees of [a bargaining] unit for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment . . . ." 5 ILL. COMP. STAT. 315/6(c). This status vests a union with agency authority to speak and contract for all employees in the unit, including those who want nothing to do with the union and who oppose its advocacy. *See NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 180 (1967).[1] The status also vests a union with authority to compel policymakers to bargain in good faith with the union, 5 ILL. COMP. STAT. 315/7, and to change certain policies only after first bargaining to impasse.

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[1] Case law concerning the National Labor Relations Act is apposite because Illinois' "legislature, in discussing the *IPLRA*, expressly stated that it intended to follow the [NLRA] to the extent feasible." Sally J. Whiteside, Robert P. Vogt & Sherryl R. Scott, *Illinois Public Labor Relations Laws: A Commentary & Analysis*, 60 Chi.-Kent L. Rev. 883, 883 (1984).

Vienna Sch. Dist. No. 55 v. IELRB, 515 N.E.2d 476, 479 (Ill. App. Ct. 1987). These powers are "exclusive" in the sense that the State is precluded from dealing with individual employees or other associations. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944).

The IPLRA empowers an exclusive representative not only to speak for nonconsenting employees in their relations with the government, but also to force those employees to subsidize its advocacy. The Act does so by authorizing agency fee arrangements in which employees are required, as a condition of employment, 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" to an exclusive representative. 5 ILL. COMP. STAT. 315/6(e).

The agency fee amount is calculated by the exclusive representative. *Id.* Under *Chicago Teachers Union v. Hudson*, a union calculates its mandatory fees based on an audit of its prior fiscal year and provides nonmembers with a financial notice explaining its fee calculation. 475 U.S. 292, 304–10 (1986).

2. AFSCME Council 31 is the designated exclusive representative of over 35,000 employees who work in dozens of agencies, departments, and commissions under the authority of Illinois' governor. Pet.App.10. This includes Petitioner Mark Janus, a child support specialist. *Id.* Janus is not an AFSCME member, but

is forced to pay agency fees to that advocacy organization. *Id.* at 10, 14.

In February 2015, AFSCME began bargaining with newly elected Governor Rauner, who acts through Illinois' Department of Central Management Services ("CMS"), over policies that affect state employees. The negotiations through January 2016 are detailed in an Illinois Labor Relations Board ("Board") decision. *Ill. Dep't of CMS v. AFSCME, Council 31*, 33 PERI ¶ 67, 2016 WL 7645201 (ILRB Dec. 12, 2016). Illinois' dire budgetary and pension-deficit situation formed the negotiations' backdrop. *Id.*, ALJD at 12–13.[2] The parties bargained over twelve disputed "packages" of issues: wages, health insurance, subcontracting, layoff policies, outstanding economic issues (mainly holiday pay, overtime, and retiree health care), scheduling, bumping rights, health and safety, mandatory overtime, filling of vacancies, union dues deduction, and semi-automatic promotions. *Id.* at 37–97.

Among other things, the Governor sought "contract changes that [would] provide[ ] additional efficiency and flexibility," link pay increases to merit, and "obtain significant savings (in the proximity of $700 million) from the healthcare program." *Id.* at 19. AF-

[2] "ALJD" refers to the Administrative Law Judge's Recommended Decision, and "Bd." to the Board's Decision, available at https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf.

SCME balked, leading to a bargaining impasse. *Ill. Dep't of CMS*, Bd. at 24.

The Governor has since been attempting to implement, over AFSCME's objections, policies that include "$1,000 merit pay for employees who missed less than 5% of assigned work days during the fiscal year; overtime after 40 hours; bereavement leave; the use of volunteers; the beginning of a merit raise system; [and] drug testing of employees suspected of working impaired." *AFSCME, Council 31 v. Ill. Dep't of CMS,* 2016 IL App (5th) 160510-U, ¶ 7, 2016 WL 7399614 (Ill. App. Ct. Dec. 16, 2016). AFSCME, however, has resorted to litigation to thwart the Governor's desired reforms. *Id.* at ¶ 2.

Regardless of their personal views concerning these policies and AFSCME's conduct, Janus and other employees subject to AFSCME's representation are required to subsidize the advocacy group's efforts to compel the State to bend to its will. Pet.App.14–15. Janus, for example, had $44.58 in compulsory fees seized from his paycheck each month as of July 2016. *Id*. at 14. AFSCME's *Hudson* notice indicates that its agency fee is 78.06% of full union dues, and was calculated based on union expenditures made in calendar year 2009. *Id*. at 16, 34.

C. Proceedings Below

Shortly after Governor Rauner filed his lawsuit challenging Illinois' agency fee requirement, three Illinois state employees—Mark Janus, Brian Trygg, and Marie Quigley—moved either to intervene or file

a complaint in intervention. *Id.* at 3. The district court granted the employees' motion to file their complaint in intervention and, in the same order, dismissed Governor Rauner from the case on jurisdictional and standing grounds. *Id.* This left the employees as the only plaintiffs in the case.

Janus and Trygg—without Quigley, who withdrew from the case—filed a Second Amended Complaint alleging that forcing them to pay fees violates their First Amendment rights. *Id.* at 9. Defendants moved to dismiss, arguing, among other things, that *Abood* precluded Plaintiffs' claim. *Id.* at 7. On September 13, 2016, the district court granted the motion to dismiss based on *Abood*. *Id.*

Janus and Trygg appealed to the United States Court of Appeals for the Seventh Circuit. On March 21, 2017, the Seventh Circuit, relying on *Abood*, affirmed the dismissal of Janus' claim, but dismissed Trygg's claim on an alternative ground. *Id.* at 4–5. Janus, but not Trygg, then petitioned this Court for certiorari.

SUMMARY OF ARGUMENT

The "'Court has not hesitated to overrule decisions offensive to the First Amendment.'" *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)). *Abood* is offensive to the First Amendment. It permits the government to compel employees to subsidize an advocacy group's political

activity: namely, speaking to the government to influence governmental policies.

Abood should be overruled for the reasons stated in *Harris*, 134 S. Ct. at 2632–34. *Abood* was wrongly decided because bargaining with the government is political speech indistinguishable from lobbying the government; *Abood* is inconsistent with this Court's precedents that subject instances of compelled speech and association to heightened constitutional scrutiny; *Abood*'s framework is unworkable and does not protect employee rights; and no reliance interests justify retaining *Abood*. The Court should abandon *Abood* and instead follow its precedents that subject compelled speech and association to heightened First Amendment scrutiny.

Agency fee requirements cannot survive that scrutiny because they are not the least restrictive means to achieve any compelling government interest. Even if the government had a compelling need to bargain with unions—which it does not—the government does not need to force employees to subsidize those unions to engage in that bargaining. The valuable powers, privileges, and membership-recruitment advantages that come with exclusive representative status are more than sufficient to induce unions to seek and retain the exclusive representative mantle. This especially is true given that any unwanted obligations that come with that status are minimal. And far from being a least restrictive means, agency fees exacerbate the injury nonconsenting employees suffer from being forced to accept an unwanted bargain-

ing agent whose advocacy may be both contrary and harmful to the employees' interests.

Abood's "free rider" rationale for agency fees gets it backwards by presuming that exclusive representation burdens unions and benefits nonmembers. The opposite is true. Consequently, *Abood*'s rationale falls short of what the First Amendment demands. The Court should hold the First Amendment prohibits the government from taking agency fees from public employees without their consent.

ARGUMENT

I. The Court Should Overrule *Abood*.

Stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The Court will overturn a constitutional decision if it is badly reasoned and wrongly decided, conflicts with other precedents, has proven unworkable, or is not supported by valid reliance interests. *See Citizens United*, 558 U.S. at 362–65; *Montejo v. Louisiana,* 556 U.S. 778, 792–93 (2009). *Abood* should be overruled for all of these reasons.

A. *Abood* Was Wrongly Decided Because There Is No Distinction Between Bargaining with the Government and Lobbying the Government: Both Are Political Speech.

1. *Harris* pinpointed the principal reason *Abood* was wrongly decided: bargaining with the government is political speech indistinguishable from lobby-

ing the government.[3] "[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government," and bargaining subjects, "such as wages, pensions, and benefits are important political issues." 134 S. Ct. at 2632–33.

The Court recognized even prior to *Harris* that "[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion). Justice Marshall saw no distinction at all. *Id.* at 537 (Marshall, J., dissenting). And there is no distinction. An exclusive representative's function under the IPLRA and other public sector labor statutes is quintessential lobbying: meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those parties.[4]

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[3] *Abood* also is poorly reasoned because it failed to apply the requisite level of scrutiny and its justifications for agency fees are inadequate. Those flaws are discussed below in Sections I.B and II, respectively.

[4] *See Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials"; and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"); 25 ILL. COMP. STAT. 170/2 (defining "lobbying" as "any communication with an official of the executive or legislative branch of State government . . . for the ultimate purpose of influencing any executive, legislative, or administrative action" and defining "executive action" to include, among other

Agency fees thus inflict the same grievous First Amendment injury as would the government forcing individuals to support a mandatory lobbyist or political advocacy group. "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . 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 (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 455 (1984)).

2. AFSCME's negotiations with Governor Rauner illustrate the political nature of bargaining with the government. During the negotiations, "[t]he State consistently indicated its need to save hundreds of millions of dollars in health insurance costs" and "that it could not afford to pay step increases or across the board wage increases and was opposed to increases that were unrelated to performance." *Ill. Dep't of CMS*, ALJD at 154. AFSCME took opposite positions. *Id.* For example, "the Union had, over two proposals, offered [health insurance] savings that essentially had a net savings of zero dollars due to the increased benefits it still sought." *Id.* at 224. This

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things, "consideration, amendment, adoption, [or] approval . . . of a . . . contractual arrangement"); 2 U.S.C. § 1602(8)(A) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

dispute, among others,[5] evinces that "unlike in a labor dispute between a private company and its unionized workforce, the issues being negotiated are matters of an inherently public and political nature." *Id*. at 172.

AFSCME's conduct during bargaining illustrates the same point, as its advocacy extended to the legislature, the public, and the courts. AFSCME proposed, during bargaining, that the state executive branch commit to "jointly advocate for amending the pension code" and increasing state taxes. *Id*. at 26–27. "AFSCME sponsored rallies in various regions of the state" that "were organized to educate the public and to put pressure on the Governor to change his position at the bargaining table." *Id*. at 135. AFSCME used similar tactics "[d]uring the course of the 2012-2013 negotiations," in which "the Union communicated its displeasure in the State's proposals and bargaining positions in a very public manner." *Id*. at 14. This included having union agents "appear [at] and disrupt [former] Governor Quinn's public speaking engagements, political events, and even his private birthday party/fundraiser." *Id.* AFSCME is petitioning state courts to stop Governor Rauner from implementing his desired reforms, contending

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[5] Other examples include the State's claim that its preferred holiday and overtime policies would save taxpayers an estimated $180 and $80 million, respectively, *Ill. Dep't of CMS,* ALJD at 63-64, and that AFSCME's semi-automatic promotion demand would cost taxpayers $20-30 million, *id*. at 97.

that the Governor failed to adequately bargain with the union. *AFSCME, Council 31,* 2016 WL 7399614.

The political nature of bargaining in Illinois is not unusual. In 2016, the nationwide cost of state and local workers' wages and benefits was over $1.4 trillion, which was more than half of state and local governments' $2.7 trillion in total expenditures.[6] It is clear that "payments made to public-sector bargaining units may have massive implications for government spending" and "affect[ ] statewide budgeting decisions." *Harris*, 134 S. Ct. at 2642 n.28.

Bargaining with the government over non-financial policies is equally political. Union demands for policies that restrict how the government can retain, place, manage, promote, and discipline employees can affect the quality of services the government provides to the public.[7]

3. Enforcement of a collective bargaining agreement, such as through the grievance process, is just as political an act as bargaining for that deal. There is no difference between petitioning the government to adopt a policy and petitioning the government to follow that policy. The actions are complementary

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[6] U.S. Bureau of Econ. Analysis, Nat'l Data, GDP & Pers. Income, tbl. 6.2D, line 92 & tbl. 3.3, line 37, https://www.bea.gov/iTable/index_nipa.cfm (last visited Nov. 15, 2017).

[7] *See* Terry M. Moe, *Special Interest: Teacher Unions and America's Public Schools*, 181–92 (2011) (discussing how union leave, absence, tenure, discipline, and seniority policies affect public school operations).

aspects of the same expressive conduct. *Cf. ALPA v. O'Neill,* 499 U.S. 65, 77 (1991) ("doubt[ing] . . . that a bright line could be drawn between contract administration and contract negotiation").

A grievance resolution can also have a broad effect by setting a precedent applicable to other employees. If a union grievance establishes that one employee is contractually entitled to a particular benefit, then similarly situated employees will be entitled to that same benefit.

4. *Abood* itself recognized that "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political." 431 U.S. at 231. *Abood* also acknowledged the unconstitutionality of forcing employees to subsidize advocacy that is political and ideological in nature. *Id*. at 235. Taken together, these incontrovertible premises should have led the *Abood* Court to one conclusion: it is unconstitutional to force employees to subsidize bargaining with the government.

The *Abood* majority avoided that conclusion in two ways. *First*, the majority reasoned that, even though political in many ways, public sector bargaining also shares similarities with private sector bargaining. *Id*. at 229–32. That is a non sequitur because, once it is recognized that bargaining with government is political advocacy, it does not matter what similarities it may share with other types of speech. Agency fees have touched the third rail of the First Amendment.

Abood's heavy reliance on two cases addressing private sector union fees—*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961)—was misplaced for the same reason, and for others. "*Street* was not a constitutional decision at all." *Harris*, 134 S. Ct. 2632. *Hanson* barely addressed the constitutional issue. *Id*. Neither case concerned government imposed compulsory fees. *Id*. Neither case applied heightened First Amendment scrutiny to a compulsory fee. "The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union." *Id*.

Second, the *Abood* majority asserted that the political nature of bargaining with the government is not dispositive because the First Amendment protects both political and non-political speech. 431 U.S. at 231–32. That also is a non sequitur; if anything, it suggests compelled support for union speech should be subjected to First Amendment scrutiny irrespective of whether it is political in nature. *See United States v. United Foods, Inc.,* 533 U.S. 405, 410–11 (2001). The assertion is also inconsistent with the next three pages of the decision, which expound on how freedom to associate for political purposes is "at the heart of the First Amendment" and conclude that it is unconstitutional to compel a teacher "to contribute to the support of an ideological cause he may oppose." *Abood*, 431 U.S. at 233–35.

The political nature of bargaining with the government is constitutionally significant. "'[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983)). The reason is that such speech constitutes "'more than self-expression; it is the essence of self-government.'" *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). Compelling employees to subsidize union political expression not only impinges on their individual liberties, *see Knox*, 567 U.S. at 310–11, but also interferes with the political process that the First Amendment protects.

Mandatory advocacy groups that individuals are forced to subsidize, and that enjoy special privileges in dealing with the government enjoyed by no others, will have political influence far exceeding citizens' actual support for those groups and their agendas. Agency fees transform employee advocacy groups into artificially powerful factions, skewing the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981). This distorting effect is why "First Amendment values are at serious risk [when] the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United Foods*, 533 U.S. at 411.

Abood's lack of concern over the political nature of public sector bargaining is untenable, even under the opinion's own logic. *See* 431 U.S. at 235. The political nature of bargaining with the government dictates that compulsory fees to subsidize that speech should have been subjected to the highest form of First Amendment scrutiny.

B. *Abood* Conflicts with *Harris*, *Knox*, and Other Precedents That Subject Compelled Association and Speech to Heightened Scrutiny.

1. *Abood* is remarkable in that it did not subject a compulsory fee for speech to influence governmental policies—i.e., an agency fee—to heightened First Amendment scrutiny. Most notably, *Abood* never considered whether agency fees are a narrowly tailored or least restrictive means to achieve any compelling state interest. Rather, the Court declared that its "province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment." 431 U.S. at 224–25. This lack of judicial scrutiny was sharply criticized at the time, and rightfully so. *See id.* at 259–64 (Powell, J., concurring in the judgment).

Abood's failure to apply heightened scrutiny to agency fees places it at odds with *Harris* and *Knox*. The Court "explained in *Knox* that an agency-fee provision imposes 'a significant impingement on First Amendment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scru-

tiny.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310–11). This requires that the agency fee provision "serve a 'compelling state interest[ ] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Knox*, 567 U.S. at 310). The *Harris* Court found it "arguable" that even that "standard is too permissive" for agency fees. *Id.*

Harris and *Knox* rest on a solid jurisprudential foundation. Their holdings are consistent with lines of constitutional precedent that apply exacting scrutiny to instances of compelled expressive and political association, and apply strict scrutiny to instances of compelled speech and regulations of expenditures for political speech. *Abood*, in contrast, is inconsistent with these lines of precedent.

Compelled association. The Court has long held that infringements on the "right to associate for expressive purposes" must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts,* 468 U.S. at 623 (citing seven cases). This standard applies where the government compels expressive organizations to associate with unwanted individuals. *See id.*; *Dale*, 530 U.S. at 658–59; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 577–78 (1995). Logically, at least the same standard should apply to the converse situation: where, as here, the government forces individuals to associate with unwanted expressive organizations.

Compelled political association. Exacting scrutiny also governs state requirements that public employees contribute money to, or otherwise associate with, political parties. *Rutan*, 497 U.S. at 74; *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980); *Elrod*, 427 U.S. at 362–63. The same standard should govern requirements that public employees contribute money to union advocates. Apart from its relative novelty,[8] a "public-sector union is indistinguishable from the traditional political party in this country," for "[t]he ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership." *Abood,* 431 U.S. at 256–57 (Powell, J., concurring in the judgment).

Compelled speech. The Court subjects government-compelled speech to strict scrutiny, under which the "government [can]not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 800. In other words, the state action must be "narrowly tailored" to serve a compelling state interest. *Id.*[9]; *see*

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[8] Unlike political patronage requirements, which existed before and after the First Amendment's adoption and thus arguably might be sanctioned by historical practice, the vast majority of public sector labor laws were enacted in the 1960s and 1970s. *See* Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 Cato J. 87, 96–99 (2010).

[9] The Court called the scrutiny it applied in *Riley* "exacting," 487 U.S. at 798, but narrow tailoring is consistent with strict scrutiny. *See Citizens United,* 558 U.S. at 340.

Wooley, 430 U.S. at 716–17 (requiring a "compelling" interest and "less drastic means"). Compelled subsidization of speech deserves the same scrutiny, for "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 309).

Expenditures for speech. Laws regulating expenditures and contributions for political speech are subject to heightened First Amendment scrutiny. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444–46 (2014). This includes laws that restrict union and corporate expenditures for political speech. Such laws 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.'" *Citizens United,* 558 U.S. at 340 (quoting *Wis. Right to Life*, 551 U.S. at 464). It also includes laws that restrict expenditures for "issue advocacy," speech concerning public issues that does not mention a political candidate. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976). The same scrutiny should apply to agency fee laws, which compel employees to pay for union expenditures for issue advocacy. "[T]hat [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Abood*, 431 U.S. at 234 (footnote omitted).

Harris and *Knox* are consistent with these interrelated lines of precedent. So too is *Abood*'s analysis of compulsory fees for union political and ideological activities. *Id.* at 233-35. The *Abood* Court relied on cases from all four lines of precedent when holding that fees for such activities fail First Amendment scrutiny. *Id.* The Court, however, erred by not treating bargaining with the government as a political and ideological activity. *See supra* Section I(A). Absent that critical error, agency fees would be subject to heightened scrutiny even under *Abood*.

2. Respondents argue that *Abood* is consistent with *Pickering v. Board of Education*, 391 U.S. 563 (1968), and subsequent cases evaluating when government employers can discipline employees for engaging in speech.[10] "[T]he 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 [has the Court] seen *Abood* as based on *Pickering* balancing." *Harris*, 134 S. Ct. at 2641. A new purported justification for *Abood* diminishes any *stare decisis* value in adhering to that case. *See Citizens United*, 558 U.S. at 362–63. "*Stare decisis* is a doctrine of preservation, not transformation." *Id.* at 384 (Roberts, C.J., concurring).

This Court's decisions foreclose the contention that agency fee requirements are subject to the *Pickering* test. The Court rejected this same argument in *Har-*

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[10] State Opp. to Cert. 12–13; AFSCME Opp. to Cert. 18.

ris and held that agency fee requirements are subject to at least exacting scrutiny. 134 S. Ct. at 2639. In *O'Hare Truck Service, Inc. v. City of Northlake*, the Court similarly held that exacting scrutiny, and not the *Pickering* test, governs instances of compelled association. 518 U.S. 712, 719–20 (1996).

The *Pickering* test was developed to evaluate an issue not presented here: "the constitutionality of restrictions on speech by public employees." *Harris*, 134 S. Ct. at 2642. The test weighs the employee's interest in speaking against the government's managerial interests in restricting that speech. *Id*. Importantly, the test is premised on the government having an interest, sufficient to override employees' First Amendment rights, in restricting employee speech that interferes with government operations. *See Connick*, 461 U.S. at 151.

That premise is absent here. The threshold question is *whether* the government has an interest that could justify forcing unwilling employees to subsidize a union advocate. If it does not, there is nothing to balance. That question calls for at least an exacting scrutiny analysis, just as it did in *Elrod*. There, the Court used exacting scrutiny to determine whether the government's managerial interests could justify forcing employees to subsidize or affiliate with a political party. 427 U.S. at 362–67. With one exception inapplicable here, the Court held those interests to be insufficient. *Id.*; *see Rutan*, 497 U.S. at 69–71. The same analysis is appropriate here.

So is the same result. The government's interest as an employer in *preventing* employee expressive activities from interfering with workplace operations cannot justify forcing employees to *support* expressive activities. The proposition would turn *Pickering* on its head.

In other words, the governmental interest that underlies the *Pickering* test weighs against punishing employees who do not want to subsidize union advocacy, but rather just want to do their jobs. The "demonstrated interest in this country [is] that government service should depend upon meritorious performance rather than political service." *Connick*, 461 U.S. at 149. Consistent with that interest, the Court upheld the Hatch Act's restrictions on federal employee political activities because they "aimed to *protect* employees' rights, notably their right to free expression, rather than to restrict those rights," by: (1) insulating employees from work place pressure to support partisan activities, and (2) ensuring "'that the rapidly expanding Government workforce should not be employed to build a powerful, invincible, and perhaps corrupt political machine.'" *United States v. NTEU*, 513 U.S. 454, 470–71 (1995) (quoting *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)). The government acts *contrary* to both interests when it requires employees to subsidize a political organization to keep their jobs, *see Elrod*, 427 U.S. at 369, whether it be a political party, *id.*, or an advocacy group like AFSCME. No *Pickering* balanc-

ing can take place where, as here, both weights are on the same side of the scale.[11]

3. The Court was thus correct to hold in *Harris* and *Knox* that agency fee requirements are subject to at least exacting scrutiny. That holding is consistent with four lines of precedent. *Abood* is not. *Abood*'s failure to properly scrutinize agency fees cannot be reconciled with those precedents, and directly conflicts with *Harris* and *Knox*.

This is a situation where, as in *Agostini* and cases it discussed, a decision should be overruled because it conflicts with subsequent constitutional decisions. 521 U.S. at 235–36; *see also Hudgens v. NLRB*, 424 U.S. 507, 517–19 (1976). It is also a situation where,

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[11] For this reason, even if the *Pickering* test applied, agency-fee requirements would fail it. AFSCME's bargaining with the State addresses matters of public concern. *See supra* Section I(A). Turning to the balancing test, "[a]gency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees." *Harris*, 134 S. Ct. at 2643. There is nothing to balance against employees' First Amendment interests in this instance because the State lacks an interest sufficient to justify the constitutional injury that agency fees inflict. As discussed, the government interest in protecting its operations from employees' expressive activities argues against forcing employees to support union expressive activities. And as will be discussed below, the State's ostensible interests in avoiding free-riders and labor peace cannot justify the First Amendment injury agency fees inflict. *See infra* Sections II & III. As in *Harris*, Illinois' agency fee requirement would be unconstitutional under *Pickering*. 134 S. Ct. at 2642–43.

as in *Citizens United*, a decision should be overruled because it departed from preexisting constitutional precedents. 558 U.S. at 319. As in those cases, "[a]brogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects." *Id.* at 921 (Roberts, C.J., concurring). *Abood* should be overruled, and agency fees subjected to the First Amendment scrutiny required by this Court's jurisprudence.

C. *Abood* Is Unworkable.

1. *Abood*'s "practical administrative problems" stem from its conceptual flaw: it is difficult to distinguish chargeable from nonchargeable expenses under the *Abood* framework. *Harris,* 134 S. Ct. at 2633. The three-prong test a plurality of this Court adopted for that task in *Lehnert,* 500 U.S. at 522, is as subjective as it is vague.

The same is true of the additional test formulated in *Locke v. Karass*, 555 U.S. 207 (2009), under which extra-unit union affiliate expenses are chargeable to nonmembers if (1) they "bear[ ] an appropriate relation to collective bargaining, and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 218 (quoting *Lehnert*, 500 U.S. at 524). The Court did not "address what [it] meant by a charge being 'reciprocal in nature,' or what show-

ing is required to establish that services 'may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 221 (Alito, J., concurring). Nor did *Locke* resolve what accounting method could calculate the percentage of each affiliate's services that are available to each local union in a given year.

Unsurprisingly, "[i]n the years since *Abood*, the Court has struggled repeatedly with" classifying union expenditures under *Abood*'s framework. *Harris,* 134 S. Ct. at 2633 (citing examples); *see Bd. of Regents v. Southworth*, 529 U.S. 217, 231-32 (2000) (recognizing the Court "ha[s] encountered difficulties in deciding what is germane and what is not" under *Abood*). So too have the lower courts.[12]

2. The problems *Abood* causes for employees are worse. The amorphous *Lehnert* and *Locke* tests invite abuse of employee First Amendment rights by granting unions wide discretion to determine the fees that nonmembers must pay. AFSCME's use of the *Lehnert* agency fee test is illustrative. AFSCME's "Fair Share Notice" states:

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[12] *E.g., Knox*, 567 U.S. at 319-21 (reversing appellate court decision that union could charge nonmembers for "lobbying . . . the electorate"); *Scheffer v. Civil Serv. Emps. Ass'n*, 610 F.3d 782, 790–91 (2d Cir. 2010) (dispute concerning union charge for organizing expenses); *Miller v. ALPA*, 108 F.3d 1415, 1422–23 (D.C. Cir. 1997) (dispute concerning union charge for lobbying expenses).

> In addition your Fair Share fee includes your pro rata share of the expenses associated with the following activities which are chargeable to the extent that they are germane to collective bargaining activity, are justified by the government's vital policy interest in labor peace and avoiding free-riders, and do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Pet.App.30-31. The listed "activities" include, among other things, affiliate activities, membership meetings, internal communications, organizing, litigation, lobbying, recreational activities, and benefits for union officers and employees. *Id*. AFSCME can charge nonmembers for almost anything it wants under this nebulous standard.[13]

This particularly is true given that, like most unions, the bulk of AFSCME's expenditures are for its officers and employees' salaries and benefits (71% in 2009). *Id*. at 35–36. Agency fee amounts thus turn, to a large degree, on self-interested judgments by union officials about how they and other union employees spend their time.

The required audit of union financial notices places no restraint on union discretion, as the auditors "do not themselves review the correctness of a union's

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[13] AFSCME's use of this standard is not unusual. Teamsters Local 916 uses a similar standard. J.A. 338–41.

categorization" of expenses. *Harris*, 134 S. Ct. at 2633. The auditors "take the union's characterization for granted and perform the simple accounting function of ensur[ing] that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Knox*, 567 U.S. at 318.

Nor is union discretion constrained by the prospect of employee fee challenges. It is difficult for employees to determine whether they are being overcharged because a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but only "the major categories of expenses." *Hudson*, 475 U.S. at 307 n.18. AFSCME's notice, for example, states that $11,830,230 of its $14,718,708 in expenditures for "salary and benefits" is chargeable, and that $4,487,581 of AFSCME International's $8,265,699 in expenditures for "Public Affairs" is chargeable. Pet.App.35,37. Such broad descriptions, coupled with a vague chargeability test, provide nonmembers with little understanding about what they are being forced to subsidize.

Nonmembers who suspect they are being overcharged have little financial incentive to challenge a fee because the amount of money at stake for each employee is comparatively low, while the time and expense of litigation is high. Employees "bear a heavy burden if they wish to challenge" union fee determinations. *Harris*, 134 S. Ct. at 2633. This is true whether that challenge is done through arbitration, which is a "painful burden," *Knox*, 567 U.S. at 319 n.8, or litigation. "[L]itigating such cases is expen-

sive" because whether an expense is chargeable "may not be straightforward." *Harris*, 134 S. Ct. at 2633. In one such case, there were more than "six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions" in the district court alone. *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1194 (1985), *aff'd on reh'g*, 800 F.2d 1280 (4th Cir. 1986), *aff'd,* 487 U.S. 735 (1988). And the "onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion." *Knox*, 567 U.S. at 319.

That some employees may nevertheless step forward to protect their rights is insufficient to police the situation given its scale. There are thousands of public sector unions. AFSCME International "has approximately 3,400 local unions and 58 councils and affiliates in 46 states, the District of Columbia and Puerto Rico"; and, "[e]very local writes its own constitution, designs its own structure, elects its own officers and sets its own dues."[14] The National Education Association (NEA) has "affiliate organizations in every state and in more than 14,000 communities across the United States."[15] The American Federation of Teachers claims "more than 3,000 local affiliates nationwide."[16] Every union that receives agency

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[14] *About AFSCME*, http://www.afscme.org/union/about.

[15] *About NEA*, http://www.nea.org/home/2580.htm.

[16] *About Us*, https://www.aft.org/about.

fees is supposed to recalculate its fee amount every fiscal year. *See Hudson*, 475 U.S. at 307 n.18. It would be naïve to believe that individual employee challenges could keep honest thousands of union fee calculations generated each year.

The problem with unions having broad discretion under *Abood* to determine how much money they seize from nonmembers is self-evident: unions have strong incentives to push the envelope on chargeability to charge the highest fee possible. A higher fee not only results in greater revenues from nonmembers, but also incentivizes employees to be full dues-paying union members.

A system that entrusts the proverbial foxes with guarding the henhouses cannot adequately protect the latter. *Abood* establishes such a system, as it entrusts self-interested union officials to determine, under a vague and subjective standard, the fees their unions constitutionally can seize from nonmembers.

No amount of tinkering with *Abood* can fix this fundamental flaw. As Justice Black prophetically warned in his dissent in *Street* when addressing the futility of trying to separate union bargaining expenses from political expenses, this remedy "promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated." 367 U.S. at 796 (Black, J., dissenting).

Abood is thus unworkable in the sense that matters most: in safeguarding employee First Amend-

ment rights. And "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo*, 556 U.S. at 792 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

D. Reliance Interests Do Not Justify Retaining *Abood*.

1. Overruling *Abood* and holding agency fee provisions unconstitutional will end some "union[s'] extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 187 (2007). That will not upset anyone's valid reliance interests.

A "union has no constitutional right to receive any payment from . . . [nonmember] employees." *Knox*, 567 U.S. at 321. And ending mandatory union fees will not deprive the government of anything: the fees are not the government's money. Overruling *Abood* will make agency fee clauses unenforceable, but will otherwise not affect government collective bargaining agreements.

Employees will benefit. The First Amendment right of *all* employees to choose which advocacy groups to support will be honored. Those who believe a union is unworthy of their support will get to keep, and spend as they see fit, wages that would otherwise be seized from them. Moreover, unions' newfound need to earn employees' financial support, as opposed to being able to compel it, may make unions more responsive to employees' needs.

2. Overruling *Abood* will not undermine other lines of precedent for the reasons stated in *Harris*, 134 S. Ct. at 2643. The Court's bar association and student activities fee precedents do not depend on *Abood*; they can stand on their own. *Id*. In fact, the Court declined to apply *Abood* to activity fees partially because *Abood* was so difficult to administer. *See Southworth*, 529 U.S. at 231–32. The Court also declined to apply *Abood* to agricultural subsidy schemes in both *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559–62 (2005), and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 n.14 (1997). *Abood* is "an anomaly," *Knox*, 567 U.S. at 311, that can safely be excised from the body of this Court's jurisprudence.

Excision will be consistent with private sector agency fee cases. To avoid First Amendment problems, the Court construed the agency fee provisions of the Railway Labor Act and National Labor Relations Act to preclude unions from charging employees for activities not germane to bargaining with private employers, including advocacy to influence the government (*i.e.*, lobbying and express advocacy). *See Harris,* 134 S. Ct. at 2629–30; *Beck*, 487 U.S. at 740-41, 745–46; *Street*, 367 U.S. at 768–69 & n.17. Holding it unconstitutional to compel public employees to subsidize union advocacy to influence governmental affairs will be consistent with those precedents. The cohesive result will be that no employee—whether private or public—can be forced to pay for union advocacy to influence governmental policies.

E. *Abood* Should Be Overruled.

The foregoing demonstrates that *stare decisis* principles do not require retaining *Abood*. The case should be overruled for the same reason the Court usually overrules a case: when it cannot be reconciled with other precedents. *See Citizens United*, 558 U.S. at 319; *Agostini,* 521 U.S. at 235–36 (citing cases). *Abood's* failure to apply heightened First Amendment scrutiny to compulsory fees for advocacy directed at the government cannot be reconciled with the scrutiny required under *Harris*, 134 S. Ct. at 2639, *Knox*, 567 U.S. at 310–11, and four other lines of precedent. *See supra* Section I(B).

Abood's reasons for not applying First Amendment scrutiny were recognized to be errors in *Harris*. There, the Court found that *Abood* "failed to appreciate" the significance of public sector bargaining being political in nature and "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; *see* Section I(A). Once these errors are corrected, agency fees should be subject to heightened scrutiny even under *Abood's* analysis of forced fees for union political and ideological activities, 431 U.S. at 233–35.

The implications of *Abood*'s failure to apply the proper scrutiny have been momentous because agency fee laws cannot survive strict or exacting scrutiny. *See infra* Section II. *Abood*'s error has permitted state and local governments to violate millions of

public employees' constitutional rights. *Abood* continues to sanction pervasive First Amendment violations to this day. This warrants overruling *Abood*, for "[t]he doctrine of *stare decisis* does not require [the Court] to approve routine constitutional violations." *Arizona v. Gant*, 556 U.S. 332, 349 (2009).

No prudential concerns require retaining *Abood* notwithstanding its infirmities. *Abood*'s framework is unworkable because it is difficult to differentiate chargeable from nonchargeable union expenditures, and it is imprudent to entrust self-interested unions with that task. *See supra* Section I(C). No party has a legitimate interest in continuing to deprive employees of their First Amendment rights. *See supra* Section I(D). "If it is clear that a practice is unlawful," as it is here, "individuals' interest in its discontinuance clearly outweighs any . . . 'entitlement' to its persistence." *Gant*, 556 U.S. at 349.

"This Court has not hesitated to overrule decisions offensive to the First Amendment . . . and to do so promptly where fundamental error was apparent." *Wis. Right to Life,* 551 U.S. at 500 (opinion of Scalia, J.); *see Payne*, 501 U.S. at 828 n.1 (listing 33 constitutional decisions overruled between 1971 and 1991). The Court should overrule *Abood*, and subject agency fee requirements to the heightened scrutiny required under *Harris*, *Knox*, and other compelled speech and association precedents.

II. Agency Fee Requirements Fail Heightened Constitutional Scrutiny Because They Are Not Necessary for Exclusive Representation.

Illinois' agency fee law is unconstitutional unless Respondents can prove it is a narrowly tailored means (strict scrutiny), or alternatively the least restrictive means (exacting scrutiny), to achieve a compelling state interest. *See supra* pp. 19–21 (citing authorities). Agency fee laws should be subject to strict scrutiny, as opposed to exacting scrutiny, because the laws compel employees to pay for union political speech, in addition to forcibly associating employees with unions and their advocacy. Either analysis, however, leads to the same result.

In applying heightened scrutiny, "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." *Elrod*, 427 U.S. at 362. Respondents thus cannot meet their burden by showing that compulsory fees serve union interests, or even employee interests. *See Harris*, 134 S. Ct. at 2636 ("The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee . . . ."). Respondents must prove compulsory fees are necessary to achieve a compelling state interest.

Abood's justification for agency fees was that (1) the government has "labor peace" interests in bargaining with exclusive representatives, and (2) agency fees to fund that representative are permissible due to a so-called "free rider" problem. 431

U.S. at 220–21, 224. The Court need not consider the first proposition because the second is erroneous. Agency fees are not a narrowly tailored or least restrictive means for the government to engage in collective bargaining because exclusive representation: (A) is valuable to unions; (B) carries with it only limited obligations; and (C) impinges on nonmembers' constitutional rights and often harms their interests.

A. Exclusive Representatives Do Not Need Agency Fees Because the Status Provides Unions with Valuable Powers, Benefits, and Membership Recruitment Advantages.

"[A] critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 134 S. Ct. at 2634. Even a cursory review of the nation's labor laws makes clear that this assumption is false.

Exclusive representation functions without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, in the postal service, 39 U.S.C. § 1209(c), and in the private and/or public sectors in the twenty-seven states that have right to work laws in effect.[17] Exclusive representation regimes applicable to non-employee Medicaid providers and daycare providers also persist after *Harris* held it unconstitu-

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[17] *Right to Work States*, Nat'l Right to Work Legal Def. Found., http://www.nrtw.org/rtws.htm (last visited Nov. 22, 2017).

tional to force those individuals to pay agency fees, 134 S. Ct. at 2644. In fact, "unions continue to thrive and assert significant influence in several right-to-work states . . . where provisions [prohibiting forced fees] have been in effect for *more than sixty-five years*." *Sweeney v. Pence*, 767 F.3d 654, 664–65 (7th Cir. 2014) (emphasis added).

It is apparent that a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* at 2640. The reason the former exists without the latter is simple: the valuable powers, benefits, and membership recruitment advantages that come with exclusive representative status are more than sufficient to induce unions to seek and retain that status.

1. The state-conferred powers that come with exclusive representative authority are extraordinarily valuable. The State gives a union the exclusive power to speak and contract for all employees in a unit, irrespective of whether individual employees desire that representation. *See* 5 ILL. COMP. STAT. 315/6(c-d); *Allis-Chalmers*, 388 U.S. at 180. These "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944).

The State also gives exclusive representatives authority to compel state policymakers to listen and bargain in good faith with that representative. 5 ILL. COMP. STAT. 315/7. The State is prohibited from deal-

ing with employees and other employee associations over policies deemed mandatory subjects of bargaining. J.A. 120; s*ee Medo Photo*, 321 U.S. at 683–84. The State is also precluded from changing its policies unless it bargains to impasse with an exclusive representative. *Ill. Dep't of CMS,* Bd. at 15–23; *see Litton Fin. Printing v. NLRB*, 501 U.S. 190, 203 (1991).

The power to speak for all employees in a unit, coupled with authority to compel policymakers to listen to its speech, dramatically increases a union's ability to further its policy agenda. "The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

Compulsory fees are not necessary to induce unions to assume and exercise these valuable powers. Any union vested with exclusive representative authority is already "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table." *Sweeney*, 767 F.3d at 666; *see Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (similar).

2. With power come privileges. This includes, among other things, so-called "official time" or "union business leave" privileges. This is where the government pays its employees to engage in union activities or grants its employees unpaid leave to engage in union activities, during which they continue to accrue seniority and creditable service. *See* J.A. 138–40, 278-79; 5 U.S.C. § 7131 (official time for federal em-

ployees); Thom Reilly and Akheil Singla, *Union Business Leave Practices in Large U.S. Municipalities: An Exploratory Study*, 46(4) Pub. Personnel Mgmt. 342, 359 (2017) (finding that 72% of large municipalities offered union business leave and 84% of those municipalities paid for that leave in whole or in part), https://goo.gl/dMZxQo.

These government conferred benefits can be considerable. In fiscal year 2014, the federal government granted union agents 3,468,170 hours of paid time to perform union business, which cost taxpayers $162,522,763.[18] Notably, the federal government sees no need for agency fee requirements. 5 U.S.C. § 7102.

3. Exclusive representative status "assists unions with recruiting and retaining members," for "employees are more likely to join and support a union that has authority over their terms of employment, as opposed to a union that does not." Pet.App.12. This especially is true given that only union members can vote on collective bargaining agreements. *See*, *e.g.*, *Kidwell v. Transp. Commc'ns Int'l Union*, 946 F.2d 283, 294–97 (4th Cir. 1991).[19]

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[18] U.S. Office of Pers. Mgmt., *Official Time Usage in the Federal Government, Fiscal Year 2014*, at 3, 12 (Mar. 2017), https://goo.gl/Qt4R1c.

[19] AFSCME's own experience is illustrative. In 2014, AFSCME International initiated a membership campaign among represented workers that it claimed resulted in 140,000 new members by July 2015. Lydia DePillis, *The Supreme Court's Threat to Gut Unions Is Giving the Labor Movement New Lif*e, Wash. Post. (July 1, 2015), https://goo.gl/d8b6RY.

Empirical evidence confirms this. Union membership among public employees skyrocketed after states passed laws authorizing their exclusive representation. *See* Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 Cato J. 87, 96–99 (2010), https://goo.gl/kXCg8Y. Union membership rates are far higher in states that authorize exclusive representation than in states that do not. *Id.* at 106–07. The difference is considerable even where forced fees are banned.[20]

Exclusive representatives are often granted special "union rights" that facilitate recruiting members. This includes: (1) information about employees; (2) rights to use workplace property and communication systems; and (3) rights to conduct union orientations for employees. *See* Pet.App.12; J.A. 139–43; ILL. COMP. STAT. 315/6(c) (information requirement); *cf.* Bureau of Nat'l Affairs, *Basic Patterns in Union Contracts* 82 (14th ed. 1995) (finding that 94% of sampled private sector contracts have "union rights" provisions). In fact, California recently enacted a law mandating that public employers provide exclusive representatives with access to employee orientations and with the "name, job title, department, work loca-

[20] In 2008, public sector union membership rates were 37.9% in Nevada, 31.6% in Iowa, 27.9% in Florida, and 27.2% in Nebraska, s*ee* Edwards, *supra*, at 106, each of which allows exclusive representation but bans agency fees. By contrast, public sector union membership rates were far lower in states that ban exclusive representation: 4.2% in Georgia, 5.2% in Virginia, 6.0% in Mississippi, and 8.2% in South and North Carolina. *Id.*

tion, work, home, and personal cellular telephone numbers, personal email addresses . . . and home address" of all represented employees. Cal. Gov. Code §§ 3555–58.

The government often also assists exclusive representatives with collecting money from employees. Illinois, like most government employers, deducts union membership dues and political contributions directly from employees' paychecks upon their authorization. 5 ILL. COMP. STAT. 315/6(f); J.A. 122–23. This is a valuable benefit because unions "'face substantial difficulties in collecting funds for political speech without using payroll deductions.'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (quoting *Pocatello Educ. Ass'n v. Heideman,* 504 F.3d 1053, 1058 (9th Cir. 2007)). It is an even more valuable benefit where the deduction is made irrevocable for one year, as with unionized federal employees. 5 U.S.C. § 7115(a). "At bottom, the use of the state payroll system to collect union dues is a state subsidy of speech." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013). And it is a subsidy that only exclusive representatives enjoy under the IPLRA. *See* 5 ILL. COMP. STAT. 315/6(f).

These types of government assistance with recruitment and dues collection are alternatives to agency fees that are "'significantly less restrictive of associational freedoms.'" *Harris,* 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). And they are alternatives that unions plan to utilize. The NEA, for example, recently released a document entitled "8 es-

sentials to a strong union contract without fair-share fees," which advises unions to seek the following provisions:

1. Access to New-Hire Orientations
2. Access to Unit member Information
3. Access to Work Sites and Communication with Members
4. Release Time for Leaders & Activists
5. Payroll Deduction of Dues
6. Maintenance-of-Dues Payments
7. Payroll Deduction of PAC Contributions
8. Saving (Severability) Clause.[21]

These and other special government privileges, coupled with the valuable powers of exclusive representative authority, are the reasons why agency fees are not necessary to induce unions to become or remain exclusive representatives.

B. Agency Fees Are Unneeded Because the Obligations That Come with Exclusive Representative Authority Are Voluntarily Assumed and Are Limited.

1. *Abood* ignored the powers, benefits, and membership-recruitment advantages inherent in exclusive representative authority, and instead cast that privilege as a burden imposed on unions that "carries

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[21] Mike Antonucci, *Union Report: 8 Ways the NEA Plans to Keep Power, Money, Members If SCOTUS Ends Mandatory Dues*, The 74 (Oct. 25, 2017), https://goo.gl/c9X8WY (NEA document is available at https://goo.gl/pkqjtY).

with it great responsibilities." 431 U.S. at 221. This inverts reality, as unions voluntarily seek exclusive representative status because of the benefits that come with it. "[I]t is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation." Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol. & Econ. Stud. 163, 179 (1995). Union complaints about the heaviness of the crown they seized, and now jealously guard, cannot be taken seriously.

The actual burdens of exclusive representative status are slight to nonexistent because only actions that unions are compelled to engage in against their will constitute a burden or cost. As the Court explained in *Harris*, to show a "free rider" cost, a union must show it "is required by law to engage in certain activities that benefit nonmembers and that the union would not undertake if it did not have a legal obligation to do so." 134 S. Ct. at 2637 n.18.

Unions bear no such costs because they choose to become and remain exclusive representatives and thus voluntarily assume the powers and corresponding duties that entails. Nothing in the law requires a union to do so. If the argument for "[w]hat justifies the agency fee . . . is the fact that the State compels the union to promote and protect the interests of nonmembers," *id.* at 2636, there is no justification for agency fees. The State does not "compel" unions to be exclusive representatives.

Even if one ignores the union's free choice, any additional cost of representing nonmembers in addition to union members is minor. There is no reason why the expense of negotiating a contract for all employees should exceed the cost of negotiating a contract just for union members. If anything, the former is cheaper because it is simpler to negotiate for everyone and the union has greater bargaining leverage.

The duty of fair representation, which comes with exclusive representative authority, does not raise the cost of bargaining. "[T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Unions have wide latitude to agree to contract terms that favor some employees and disadvantage others. *See id.* at 79–81; *Huffman*, 345 U.S. at 338-39. Although unions cannot agree to contract terms that discriminate against employees solely based on their nonmembership in the union, that hardly is a significant restriction on a union's bargaining discretion. Indeed, it would be unconstitutional for a government employer to discriminate against employees based on their union membership status. *See State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 133 (2d Cir. 2013).

2. Unions sometimes complain of the ostensible burden of representing nonmembers in grievances. This complaint is hypocritical; unions generally com-

pel employees to have the union represent them in grievances, and not the other way around. Unions do so by contractually requiring that only the union, and not individual employees, can pursue a grievance to a formal adjustment or arbitration. *E.g.*, J.A. 127–30; *see* Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 62 (1998). "The individual is not only barred from bargaining for better terms, but enforcement of the terms bargained by the union on his or her own behalf is only through the grievance procedure and arbitration which the union controls." Summers, *supra*, 20 Comp. Lab. L. & Pol'y J. at 68–69. "No other system so subordinates the individual worker's rights to collective control." *Id*. at 69.

"Unions want unchallenged control over all aspects of the contract, including its grievance procedure and arbitration which they created," and "prefer that the individual employee has no independent rights." *Id*. at 63. The reason is that this grants the union singular control over the employer's policies. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69–70 (1975). This control is a valuable power to a union, not an imposed burden.

Unions have wide discretion over whether to pursue grievances. *See Vaca v. Sipes*, 386 U.S. 171, 191 (1967). "Nothing" in the IPLRA "limit[s] an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious." 5 ILL. COMP. STAT. 315/6(d).

Exclusive representatives have discretion not to pursue even meritorious grievances. *See Humphrey v. Moore,* 375 U.S. 335, 348–49 (1964). When evaluating a grievance, a union can consider "such factors as the wise allocation of its own resources, its relationship with other employees, and its relationship with the employer." *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). A union can decline to pursue meritorious grievances if it believes that doing so serves greater interests. *See Humphrey,* 375 U.S. at 349–50 (holding a union could favor one employee group over another in a grievance). Due to a "union's exclusive control over the manner and extent to which an individual grievance is presented . . . the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

All told, unions are seldom, if ever, "required by law to engage in certain activities that benefit nonmembers . . . that the union would not undertake if it did not have a legal obligation to do so." *Harris*, 134 S. Ct. at 2637 n.18. To the extent unions are required to act, those minor obligations pale in comparison to the valuable powers and benefits that come with exclusive representative authority. Consequently, agency fees are not necessary to induce unions to become or remain exclusive representatives.

C. Agency Fees Force Nonmembers to Pay for Compulsory Representation That Infringes on Their Rights and Often Harms Their Interests.

There is another reason compulsory fees cannot be a "'means significantly less restrictive of associational freedoms'" for the government to engage in collective bargaining. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). Compelled fees exacerbate the constitutional and other harms that employees suffer as a result of the government forcing them to accept an unwanted representative.

1. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Regimes of exclusive representation violate this right, as they strip unconsenting employees of their right to choose who speaks on their behalf and force those employees to accept a mandatory agent for speaking and contracting with the government. This, in turn, "extinguishes the individual employee's power to order his own relations with his employer." *Allis-Chalmers*, 388 U.S. at 180.

Because "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives can (and do) engage in advocacy as the employees' proxy that employees oppose. *See Knox*, 567 U.S. 310. *Abood* itself acknowledged that "[a]n em-

ployee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative" and cited several examples. 431 U.S. at 222.

Exclusive representatives also can (and do) enter into binding contracts as employees' proxy that may harm some employees' interests. *E.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (union waived employees' right to bring discrimination claims against their employer by agreeing that employees must submit such claims to arbitration). Even in private sector bargaining, "[t]he complete satisfaction of all who are represented is hardly to be expected" because "inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Huffman*, 345 U.S. at 338. "Conflict between employees represented by the same union is a recurring fact." *Humphrey*, 375 U.S. at 349–50. Even though a represented employee "may disagree with many of the union decisions," he or she "is bound by them." *Allis-Chalmers,* 388 U.S. at 180.

Unsurprisingly, given an exclusive representative's power to speak and contract for nonconsenting individuals, the Court has long recognized "the sacrifice of individual liberty that this system necessarily demands," *Pyett*, 556 U.S. at 271; that "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, *Douds*, 339 U.S. at 401; that exclusive representation results in a "corresponding re-

duction in the individual rights of the employees so represented," *Vaca*, 386 U.S. at 182; and that "[t]he collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Id.*

This subordination of individual rights to a collective implicates First Amendment rights in the public sector because the individuals are being collectivized for a political purpose: petitioning the government to influence its policies. *See supra* 11-12. An exclusive representative, in this context, is indistinguishable from a government-appointed lobbyist or mandatory faction. *Id.* Such political collectivization is antithetical to the First Amendment, which exists to protect individual speech and association rights from majority rule. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

2. Three conclusions flow from the fact that exclusive representatives engage in unwanted advocacy and contracting as the agents of nonconsenting employees. *First*, agency fees compound the First Amendment injury that being forced to associate with an unwanted representative already inflicts on employees. Nonconsenting employees are forced to pay a union for suppressing their own rights to speak for themselves. The employees are also forced to subsidize advocacy that they have not authorized and that may harm their interests. Consequently, agency fees cannot be considered a "'means significantly less restrictive of associational freedoms.'" *Harris*, 134 S.

Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). One constitutional injury cannot justify yet another.

Second, agency fee requirements violate the equitable principle that individuals do not have to pay for services they are forced to accept against their will. *See* Restatement (Third) of Restitution & Unjust Enrichment, § 2(4) ("Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse."); *Force v. Haines*, 17 N.J.L. 385, 386–87 (N.J. 1840) ("Now the great and leading rule of law is, to deem an act done for the benefit of another, without his request, as a voluntary courtesy, for which, no action can be sustained."). Employees should not be forced to pay for advocacy they are not free to refuse.

Third, *Abood*'s free rider rationale for agency fees rests on a false premise: that agency fees "distribute fairly the cost of [union] activities among those who *benefit*, and . . . counteract[ ] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining *benefits* of union representation that necessarily accrue to all employees." 431 U.S. at 222 (emphasis added). This incorrectly presumes that nonmember employees benefit from their representative's advocacy. To the contrary, nonmembers suffer an associational injury by being forced to accept an unwanted representative, may oppose their representative's advocacy, and may find themselves on the

short end of the deals their representative strikes with the government. *See supra* 48–50.

Nonmembers' beliefs that they do not benefit from a union's advocacy cannot be second guessed, for "one's beliefs and allegiances ought not to be subject to probing or testing by the government." *O'Hare*, 518 U.S. at 719. "The First Amendment mandate[s] that . . . speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 799–91. Consequently, and contrary to *Abood*'s free rider rationale, the government cannot force nonmembers to pay for union advocacy based on the "paternalistic premise" that it is "for their own benefit." *Riley*, 487 U.S. at 790.[22]

D. *Abood*'s Free Rider Rationale Inverts Reality by Presuming That Exclusive Representation Burdens Unions and Benefits Nonmembers.

Taken together, the foregoing demonstrates that *Abood* got it backwards in finding that exclusive representation burdens unions and benefits nonmember employees. 431 U.S. at 222. Far from being a burden, exclusive representation provides unions with valuable powers, benefits, and advantages with recruiting

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[22] To be clear, even if nonmembers benefitted from their exclusive representative's advocacy, that would not justify agency fees. *Harris*, 134 S. Ct. at 2636. The point is that, contrary to the premise of *Abood*'s free rider rationale, the Court cannot presume nonmembers benefit from union advocacy.

and retaining members. *See supra* Section II(A). Any costs incident to this power are voluntarily assumed and negligible in any case. *Id*. at II(B). And far from benefitting nonmember employees, exclusive representation forces them to accept an agent, advocacy, and contractual terms that they may oppose and that may not benefit them. *Id.* at III(C).

Abood's "free rider" epithet for nonmembers is doublespeak for the same reasons. 431 U.S. at 221. An accurate term would be "forced riders," as nonmembers are being forced by the government to travel with a mandatory union advocate to policy destinations they may not wish to reach.

Abood's rationale for agency fees "falls far short of what the First Amendment demands." *Harris*, 134 S. Ct. at 2641. Agency fee requirements are nowhere close to being narrowly tailored or the least restrictive means for collective bargaining. Hence, the requirements fail heightened scrutiny.

E. Alternatively, No Compelling State Interest Justifies Agency Fee Requirements.

1. The Court need not determine whether Illinois has a compelling interest in bargaining with exclusive representatives if the Court decides that agency fee provisions fail First Amendment scrutiny because the fees are not needed that purpose. If the Court does reach the issue, however, it will find that Illinois lacks a compelling interest that justifies the First Amendment injury that agency fees inflict on employees.

That it might be rational for Illinois to engage in collective bargaining is insufficient to demonstrate a compelling state interest. An "encroachment" on First Amendment rights "cannot be justified upon a mere showing of a legitimate state interest. . . . The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod*, 427 U.S. at 362 (internal marks and citation omitted). Even strong state interests, such as in remedying discrimination, can prove insufficient. *See Dale*, 530 U.S. at 658-59. Therefore, to prevail in this case, Illinois must prove it has such a compelling need to bargain with exclusive representatives that the need overrides employees' First Amendment right not to subsidize those representatives' advocacy.

Illinois cannot meet this daunting burden. Collective bargaining in the public sector is a relatively new phenomenon. In the first half of the twentieth century, President Franklin Roosevelt and AFL President George Meany considered it antithetical to representative government.[23] Not until the late 1950's did some states begin to enact statutes authorizing collective bargaining with the government. *See* Edwards, Cato J. at 97–98.

Whatever the wisdom of this policy, it cannot be said that states have a paramount need to engage in

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[23] *See* Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teachers Ass'n, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341, 373 (2016).

it. Illinois and other governmental bodies can promulgate and enforce employment policies without haggling with union officials. That is the usual state of affairs, as 62% of government workers in 2016 were not subject to union representation.[24]

Public officials necessarily have greater flexibility to operate their workplaces when not bound to the strictures of union contracts or required to bargain with unions. This includes greater flexibility to set compensation, adjust work rules, reward competent employees, discipline underperforming employees, and take other actions that the officials believe will improve public services. Unless the government has a compelling need to protect its operations from the public officials who manage them—which is absurd—the government cannot have a compelling need to restrict its own freedom of action.

Nor does the government have a compelling need to restrict its employees' freedoms. Forcing employees to accept and support a union *against their will* is unlikely to make them better employees. The political patronage cases are instructive. The Court held that the government's "interest in ensuring that it has effective and efficient employees" cannot justify forcing employees to contribute to or affiliate with political parties because it is doubtful the "'mere difference of political persuasion motivates poor performance'" and, "in any case, the government can en-

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[24] U.S. Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 3, http://www.bls.gov/news.release/union2.t03.htm.

sure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate." *Rutan*, 497 U.S. at 69–70 (quoting *Elrod*, 427 U.S. at 365–66). So too here, employees' desires not to support union advocacy have no bearing on employees' work performance. Even if it did, government employers can deal with any workplace issues simply by enforcing employee codes of conduct. Pet.App.11.

2. *Abood* found exclusive representation to be "presumptively" justified by the "labor peace" interest the Court cited in *Hanson* to support a private sector labor statute, the Railway Labor Act, 431 U.S. at 224–25. But that interest merely is a rational-basis justification for a regulation of interstate commerce under the Commerce Clause. *See Harris*, 134 S. Ct. at 2627-29. It was not a compelling interest found to justify First Amendment infringements. *Id.* at 2629, 2632. "The [*Hanson*] Court did not suggest that 'industrial peace' could justify a law that 'forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought.'" *Id.* at 2629 (quoting *Hanson*, 351 U.S. at 236–37).

Nor could the interest justify such a law. As shown below, *Abood*'s three conceptions of the labor peace interest are not compelling interests that could justify public sector agency fees.

a. *Abood* framed the labor peace interest as one in "free[ing] the employer from the possibility of facing

conflicting demands from different unions," 431 U.S. at 221, and avoiding "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views . . . each sought to obtain the employer's agreement," *id*. at 224. Whatever its merits in the private sector, there is no legitimate interest in suppressing diverse expression to influence the government. That is the very essence of democratic pluralism. As Justice Powell stated in *Abood*: "I would have thought the 'conflict' in ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Id*. at 261.

Justice Powell was right. "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." *Knox*, 567 U.S. at 309 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). The First Amendment also guarantees freedom to associate to influence governmental policies. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–09 (1982). Consequently, the proposition that multiple employee advocacy groups may petition the government for different employment policies is not a "problem" to be solved. It exemplifies the pluralism and diverse expression the First Amendment protects.

Even if it were a problem, forced fees are not its solution. "State officials must deal on a daily basis with conflicting pleas for funding in many contexts." *Har-*

ris, 134 S.Ct. at 2640. If state officials only want to listen to the pleas of one union on certain issues, then, at most, that justifies them only listening to that union. It does not require that the state compel nonconsenting employees to associate with that interest group and pay for its advocacy.

b. *Abood* stated that, in the private sector, "[t]he designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment." 431 U.S. at 220. The government does not need to set and enforce its employment policies pursuant to union agreements. Nor does the government need to force its employees into unions to pay them the same wages and benefits. The government can set uniform employment terms irrespective of whether it formulates those terms based on inputs from one, two, several, or no unions. The reason, quite simply, is that the government *controls* its employment terms.

c. *Abood* averred that exclusive representation in the private sector "prevents inter-union rivalries from creating dissension within the work force and eliminating *the advantages to the employee* of collectivization." 431 U.S. at 220–21 (emphasis added). But collectivization does not necessarily benefit employees. *See supra* pp. 48-50. And even if it did, that is not a "governmental interest," which is what exacting scrutiny requires. *Elrod*, 427 U.S. at 362.

This rationale makes no sense when the government is the employer because the government can change its employment terms without a union petitioning it to do so. For example, if Illinois believes its employees should have higher wages, Illinois simply can pay higher wages. It does not need to force employees to subsidize AFSCME to ask the State to implement policies the State believes should be implemented. The proposition that a state must collectivize its employees in order for that state to provide them with greater benefits is logically untenable.

The Court rejected a similar proposition in *Harris*. 134 S. Ct. at 2640–41. There, Illinois and a union argued that the union's alleged prowess in securing more state benefits for personal assistants justified compulsory fees. *Id*. The Court held that "in order to pass exacting scrutiny, more must be shown," namely that the State could not provide those benefits without agency fees. *Id*. at 2641. No such showing was made there. *Id*. Nor could it be made here.

3. While not stated in *Abood*, AFSCME suggests that bargaining with an exclusive representative leads to better public policies. Opp. to Cert. 23. That argument is counterintuitive, as "[t]he First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

The argument is also at odds with the fact that an exclusive representative's role is to represent not public interests, but employee interests, *see* 5 ILL. COMP. STAT. 315/7; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984) ("A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit."). Collective bargaining thus "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one." *NLRB v. Ins. Agents' Int'l Union,* 361 U.S. 477, 488 (1960). It is, rather, a process that pits a union, representing what it perceives to be employee self-interests, against the government, representing the public's interests.

In any case, government officials certainly do not have such a compelling need for union policy advice that it could override employees' First Amendment rights. That particularly is true given those officials can obtain that advice through means other than collective bargaining. In fact, government officials are likely to receive union input on employment related policies whether they desire it or not.

4. The *Harris* dissent posited that there is a governmental "interest in bargaining with an adequately funded exclusive bargaining agent." 134 S. Ct. at 2648 (Kagan, J., dissenting). Even if the government had a compelling interest in bargaining with unions—which it does not—it certainly does not have an interest in having to deal with well-funded negotiating opponents. As AFSCME's contentious bar-

gaining with Governor Rauner illustrates, collective bargaining is an adversarial process that "proceed[s] from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Ins. Agents' Int'l Union,* 361 U.S. at 488. No rational actor wants to deal with a powerful negotiating opponent. To the extent government has any interest in dealing with a designated employee representative, it would be with a weak and submissive one.

In summary, any interest Illinois may have in bargaining with exclusive representatives cannot justify its agency fee requirement. That is not to say it is unlawful or irrational for Illinois to bargain with unions. Rather, the point is that Illinois lacks a *compelling* interest sufficient to override employees' First Amendment rights not to subsidize advocacy that they may oppose. Agency fee requirements, if not struck down on other grounds, fail heightened scrutiny for this reason.

III. The Court Should Hold That No Union Fees Can Be Seized from Nonmembers Without Their Consent.

If the Court overrules *Abood* and finds that agency fees fail First Amendment scrutiny, the Court should hold that the First Amendment prohibits unions from seizing any fees from public employees without their consent.

First, the Court's holding should make explicit that public employees cannot be forced to pay any union fees whatsoever. Allowing unions to compel employ-

ees to subsidize any union activity will lead to the same workability problems that bedevil *Abood*—policing the proper calculation of the compulsory fee and union methods for exacting it—and to the same abuses of employee rights.

Second, the Court's holding should make clear that unions "may not exact any funds from nonmembers without their affirmative consent." *Knox*, 567 U.S. at 322 (footnote omitted). The First Amendment guarantees "each person" the right to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted). That right is infringed upon if the government requires an individual to subsidize speech without his or her consent.

That is true irrespective of whether that individual opposes the content of that speech. As Justice Scalia recognized during oral argument in *Friedrichs v. California Teachers Ass'n*, it would be wrongful for the government to "force somebody to contribute to a cause that he does believe in." Transcript of Oral Arg. at 4–5, *Friedrichs*, No. 14-915 (U.S. Jan. 11, 2016). For example, it would be just as unconstitutional for the government to seize money from Republicans for the Republican Party as it would be to seize money from Democrats for that cause. In either case, the government is depriving individuals of their right to choose whether, and to what degree, they financially support an expressive organization and its

message. A nonconsensual agency fee seizure works the same First Amendment injury.

CONCLUSION

Thomas Jefferson believed that to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, *James Madison: The Nationalist* 354 (1948). Jefferson was right. *Abood* was wrong. *Abood* should be overruled and public employees freed from compulsory union fee requirements.

The judgment below should be reversed.

Respectfully submitted,

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November 29, 2017