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 *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF 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?

## RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* states the following:

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus Curiae* Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to scientists, parents, educators, and other individuals and trade associations. The Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. Atlantic Legal Foundation seeks to promote sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, the Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

The Foundation has litigated several "compelled speech" and "compelled association" cases in the Second and Third Circuits as "first chair" trial and appellate counsel for students at public

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[1] The parties have consented to the filing of this brief, which consents have been lodged with the Court.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

universities challenging the use of mandatory student fees to fund political speech of organizations with which they disagreed, and as counsel or co-counsel for *amici*, most recently in *Harris v. Quinn,* 134 S. Ct. 2618 (2014), *Friedrichs v. California Teachers Association,* 136 S. Ct. 1083 (2016), and in this case at the petition stage.

## INTRODUCTORY STATEMENT

Petitioner Mark Janus is an Illinois state employee who objects to paying union fees, which, by state law, are currently a condition of his employment. He is being forced to pay agency fees to the American Federation of State, County and Municipal Employees ("AFSCME"), Council 31. Pet.App.10. AFSCME exclusively represents over 35,000stateemployees who work in numerous departments, agencies, boards, and commissions that are part of the executive branch of the Illinois state government. *Id*.

The Illinois Public Labor Relations Act ("IPLRA"), 5 ILL. COMP. STAT. 315/1, *et seq*., grants public sector unions the power to be "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 (*Id*. 315/6(c) and Illinois compels state employees to pay"agency fees"to an exclusive representative for negotiating with the State over pay, benefits, hours, and other conditions of employment, which directly affect the public fisc and are, therefore, matters of government policy.

Illinois law gives the union authority to speak and contract for all employees in the bargaining unit, including those who do not join the union and oppose its advocacy activities. Government officials are precluded from dealing with individual employees or employee associations other than the union. 5 ILL. COMP. STAT. 315/4.

The IPLRA empowers the union, as exclusive representative to require those non-union member employees to pay for its "bargaining" activity by authorizing "agency fee" arrangements through which employees are forced, as a condition of employment, to "pay to the exclusive representative a proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 ILL. COMP. STAT. 315/6(e). The Illinois agency fee requirement follows the decision in *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977), concerning the compulsory fees that public employees can be required to pay.

Janus and all other employees represented by AFSCME are required, by operation of 5 ILL. COMP. STAT. 315/6(f), to subsidize AFSCME's efforts to advocate for state programs and policies, regardless of their personal views concerning these policies and AFSCME's positions with respect to them, and regardless of whether that a non-consenting state employee opposes the positions the union takes in collective bargaining and regardless of whether the positions the union takes

in collective bargaining are contrary to a state employee's job-related interests.

Janus claims that the compulsory fees force him to speak through his union in ways that violate his First Amendment rights and that this regime of compelled political speech is irreconcilable with this Court's recent recognition of "the critical First Amendment rights at stake in such arrangements. *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012).

The logic and reasoning of this Court's recent decisions have shattered the intellectual foundation of its approval of such compulsory fee-payment regime in *Abood* – a decision that was questionable, and questioned, from the beginning, as Justice Powell argued in his separate opinion, in which he described the majority opinion as "unsupported by either precedent or reason." *Abood* at 245 (Powell, J., concurring in the judgment).

The agency fees Janus and other Illinois public employees who are not members of the union are compelled to pay AFSCME and other exclusive representatives are calculated by the unions themselves. 5 ILL. COMP. STAT. 315/6(e). Under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 304 (1986), unions are supposed to calculate their agency fees based on an audit of their expenditures during the prior fiscal year and to provide non-members with a notice explaining the calculation of the agency fee. AFSCME calculated its 2015 agency fee at a facially incredible 78.06%

of full union dues based on an audit of union expenditures in calendar year 2009, six years earlier. Pet.App.34.

Collective bargaining by public employee unions inherently involves core political speech and the scheme of compelled political speech that *Abood* tolerated is inconsistent with the "critical First Amendment rights at stake." *Knox,*567 U.S. at 311 (2012). *Abood*, the cornerstone of the compelled agency fee regime, is "unsupported by either precedent or reason." *Abood* at 245 (Powell, J., concurring in the judgment) and the reasoning of this Court's recent decisions in *Knox* and *Harris v. Quinn,* 134 S. Ct. 2618 (2014) has further undermined the already weak intellectual foundation of its earlier approval of compulsory union dues or agency fees.

## SUMMARY OF ARGUMENT

Liberty of conscience, protected by the First Amendment, includes the right to be free from compelled support of political activities, including the political activities of public employee labor unions. There is no practical distinction between "bargaining" between public employee unions and government units or agencies as employers and "lobbying" because even "pure" collective bargaining activities involve the essential political enterprise of allocating government resources and shaping government policies. These issues include such matters as pay and benefits, seniority, job security, promotion and discipline, measurement of employee performance and efficiency, and lay-offs.

While each of these matters are related to public employee working conditions and compensation and are legitimate subjects of collective bargaining, they are also of immense bearing on the allocation of public resources, taxes, public debt and unfunded pension liabilities, and similar issues of political moment.

In this time of budget crises for many states, counties and municipalities, and a nationwide crisis in unfunded public employee pension liabilities, it is difficult to imagine more politically charged issues than those directly related to how much money state and local governments should allocate to personnel costs and what policies government should adopt to increase labor efficiency, matters that are traditionally within the realm of collective bargaining. Contrary to a major premise underlying *Abood* and its progeny, it is not possible to neatly separate "chargeable" collective bargaining and contract administration expenses from "non-chargeable" political advocacy by public employee unions.

Illinois compels non-consenting public employees to be represented by – and to fund – labor unions that espouse a very specific point of view on these pressing public questions. More than twenty other states compel millions of public employees[2] to pay hundreds of millions of dollars to

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[2] U.S. Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 5, Union affiliation of employed wage and salary workers by state, *available at* http://www.

public-employee unions regardless of whether those unions advocate policies the employees support and regardless of whether the policies benefit those employees. The constitutionality of such regimes is thus of profound importance.

This scheme was established in a decision that is based on flawed assumptions, questionable reasoning, dubious grounding in current practice, and which is irreconcilable with this Court's more recent opinions, as well as the general principles underlying fundamental First Amendment jurisprudence.[3]

There is no interest, compelling or otherwise, that justifies the interference with fundamental First Amendment liberties that occurs when non-consenting public employees are compelled by law, regulation or contract between government and a union to finance the activities of public employee unions, including labor-management collective bargaining negotiations, because those activities

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bls.gov/news.release/union2.t05.htm (last visited 12-1-2017).

[3] Stare decisis should not prevent the Court from remedying ongoing deprivations of a core constitutional right. Stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) and this Court has"not hesitated to overrule decisions offensive to the First Amendment," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)).

involve essentially political decisions about allocating government resources or affecting other governmental activities of concern to the public generally. Prior decisions granting public employee unions the power to compel financial support from non-consenting employees inhibits those employees' First Amendment rights.

*Abood*, the precedent on which the decision below rests, is four decades old. It does not, conceptually or in practice, protect public employees who do not support unions' political or ideological programs from having their money used to promote policies which they do not wish to support.

After its decision in *Abood*, this Court recognized that agency-shop provisions which compel public employees to subsidize public-sector unions' efforts to achieve the unions' favored programs and to obtain favorable political actions from government officials are a "significant impingement" on employees' First Amendment rights. *See Knox,* 567 U.S. at 310; *see also Harris,* 134 S. Ct. 2618 (2014). In *Harris*, the Court held that "fair share" contract provisions entered into under the IPLRA that required non-union Medicaid-funded home-care personal assistants to pay fees to the union violated the First Amendment, because the provisions served no compelling state interest that could not be achieved through significantly less restrictive means. *See Harris*, 134 S. Ct. at 2640. The Court

should treat state employees no differently with respect to coerced payment of agency fees.

This Court should hold explicitly that the notions of promoting "labor peace" and discouraging "free riders" are insufficient to support infringement of core First Amendment rights, overrule *Abood* and its progeny, and reverse the judgment of the Court of Appeals.

## ARGUMENT

The deduction of money from workers' paychecks by labor unions (or by public employers on behalf of unions) – whether called "dues" or "agency shop fees" – and expenditure of those monies collected from non-consenting government workers on both collective bargaining and patently political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them, but this Court's focus should not be on the difficulties faced by unions when the law compels them to obtain permission before taking non-members' money. Instead, the focus must be on the individual workers' right to choose what to speak and whom to support. See *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007).

The current system of compulsory agency fees collected from public employees who are not union members is based on decisions of this Court that are irreconcilable with principles underlying First

Amendment protections and this Court's more recent First Amendment jurisprudence.

## I. COMPELLED PAYMENT OF MONIES TO A LABOR UNION WITH WHOSE POSITIONS ON PUBLIC POLICY AND WORKPLACE ISSUES THE EMPLOYEE DISAGREES VIOLATES THE FIRST AMENDMENT.

In *Abood*, the Court has quoted with approval Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[4]Abood, 431 U.S. at 234 n.31 and it has recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods*, 533 U.S. 405, 410 (2001) (citations omitted). Because "First Amendment values are at serious risk if 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," schemes that compel such subsidies "must pass First Amendment scrutiny." *Id*. at 411.

More recently, this Court recognized the "bedrock principle that, except perhaps in the

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[4] Quoted in Irving Brant, *James Madison: The Nationalist* 354 (1948).

rarest of circumstances, no person. . .may be compelled to subsidize speech by a third party that he or she does not wish to support," *Harris,* 134 S. Ct. at 2644 (2014), and "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id.* at 2639. In earlier cases this Court recognized that the freedom of expression guaranteed by the First Amendment protects choice in "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988), and for that reason the Court has repeatedly upheld the principle that people have the right to refrain from subsidizing messages with which they disagree. *See*, *e.g.*, *United Foods, Inc.*, 533 U.S. at 410; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court established the principle that the First Amendment protection of the individual's mind, free from compulsion by the state is paramount. *Id.* at 637, 642.[5] In *Wooley*, the Court began "with the proposition from *Barnette* that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to

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[5] The *Barnette* Court concluded that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

refrain from speaking at all," *Wooley* at 714; and it recognized that the New Hampshire law that incorporated a slogan on required license plates "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id*. at 715.[6]

Scrutiny of compelled political speech or restrictions on speech about public-policy choices is especially rigorous, *Citizens United v. Fed. Election Comm'n, supra* at 340 (citation omitted), because speech concerning public affairs is "the essence of self-government." *Snyder v. Phelps,* 131 S.Ct.1207,1215 (2011).Involuntary subsidization of speech must be justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms," *Knox*, 567 U.S. at 310, quoting *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984).

More specifically germane to the issue in this case, the Court has recognized the importance of workers' free speech rights and has held that it would violate the First Amendment for workers' earnings to be taken by the state and transferred to labor unions for use in promoting political

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[6] The *Abood* majority saw little connection between *Wooley* and *Barnette* and the compelled payment of agency fees. *Abood* cited *Wooley* only once, in a footnote string citation for general First Amendment principles, 431 U.S. at 231 n.28, and referred to *Barnette*'s"fixed star"language only to support its conclusion that unions could not compel contributions for "ideological" causes. 431 U.S. at 235.

messages with which the workers disagree. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *Abood*, 431 U.S. at 244.

When a state compels its employees to pay union dues or agency fees that support political activities it is "an infringement of [the workers'] constitutional rights." *Abood*, 431 U.S. at 234.[7] *Abood* applied these principles to invalidate compelled subsidization of ideological or political union speech, but it created an anomalous exception that permits the compelled subsidization of political speech or association in the context of collective bargaining. *Abood*, 431 U.S. at 232. That exception conflicts with other decisions of this Court, is not grounded in sound logic, and tolerates compelled political speech. The exception cannot survive First Amendment scrutiny.

*Abood* can be reconciled with this Court's other First Amendment jurisprudence only if public-sector union speech in collective bargaining is not – contrary to *Abood* itself – "political" or "ideological" speech designed to "influence government decision-making," *Abood,* 431 U.S. at 231;or the governmental interests in promoting "labor peace" and preventing "free-riding" are "compelling" enough to justify compelled financing

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[7] Even the dissent in *Harris* perceived that "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Harris,* 134 S. Ct. at 2656 (Kagan, J. dissenting).

of political speech. The first contention is not only contrary to *Knox, Harris,* and *Abood*, it "flies in the face of reality." *Harris,* 134 S. Ct. at 2642. The second proposition is contradicted by this Court's opinions in *Knox* and *Harris,* and conflicts with this Court's other decisions holding that similar rationales do not justify compelling subsidization of even "mundane commercial" speech. See *United Foods,* 533 U.S. 405 (2001).[8]

**a. Public sector collective bargaining is essentially political advocacy.**

Public employee collective bargaining is, in effect, lobbying carried out in a conference room where labor-management negotiations take place, rather than in "traditional" venues for exercising political "clout," such as public demonstrations, political fund-raising dinners, the corridors of the legislature's chamber, a public official's office, over lunch, or on a golf course.

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[8] The majority in *Abood* acknowledged the "truism" that in the collective-bargaining context, "public employee unions attempt to influence governmental policymaking," and, consequently, "their activities – and the views of members who disagree with them – may be properly termed political." 431 U.S. at 231.

*Abood* held that the First Amendment prohibits the Government from "requiring any [objecting non-member of a union] to contribute to the support of an ideological cause he may oppose." 431 U.S. at 235, because the "central purpose of the First Amendment was to protect the free discussion of governmental affairs," and this "fundamental First Amendment interest" was infringed even when non-members were "compelled to make [pursuant to agency-shop provisions], rather than prohibited from making, contributions." *Abood* at 231, 234. In *Lehnert* the Court held that"the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation."500 U.S.507,522 (1991)(opinion of Blackmun, J.).

*Abood* is consistent with the "bedrock principles" only if there is a constitutionally meaningful difference between a public-sector union's efforts to advance an agenda through collective bargaining, and the same union's efforts to advance its openly political or ideological agenda through lobbying, campaign spending or public advocacy. The context in which a public-sector union advocates the same political and public-policy views should not and does not make a difference for First Amendment analysis.

*Abood* based its distinction between collective bargaining activity and overt political advocacy by analogy to precedent from private-sector collective

bargaining cases. It is telling that no Justice of this Court attempted to defend the distinction in *Harris v. Quinn*, the Court's most recent public employee case.

Moreover, the *Abood* majority failed to apply heightened First Amendment scrutiny to compulsory agency fees that, even putting the best face on it, support public-sector unions' petitioning of the government, perhaps because of the perception that public employee unions were similar to private sector worker unions. *Abood* never considered whether agency fees are narrowly tailored to achieve "labor peace" or other non-political objectives, and it never considered whether "labor peace" and avoidance of "free riding" can be "achieved through means significantly less restrictive of associational freedoms" than compulsory fees. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 567 U.S. at 310). Justice Powell, joined by Chief Justice Burger and Justice Blackmun, criticized the majority for not applying exacting scrutiny, see 431 U.S. at 262-64 (Powell, J., concurring in the judgment). In Justice Powell's view the "public-sector union is indistinguishable from the traditional political party" *id*. at 257 (Powell, J., concurring in the judgment), because "[the ultimate objective of a union in the public sector, like that of a political party, is to influence public decision making in accordance with the

views and perceived interests of its membership." *Id*. at 256.[9]

The *Abood* majority went astray by applying concepts of "labor peace"[10] and "free riding" from private sector labor relations to public employee union bargaining, without recognizing fundamental differences between the two realms. Contracts between private employers and unions representing private sector employees are private decisions usually disciplined by market forces. *See* Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441

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[9] Justice Rehnquist, concurring, was blunter: "I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union." *id*. at 243-44.

[10] In the public employment sector "labor peace"may be significantly less relevant, because many states prohibit public employees from striking. Only 11 states give public employees the right to strike, while the other 39 prohibit it. But even in those 11 states, strikes are rare and alternative dispute resolution methods are used more often. "Why Public-Sector Strikes Are So Rare," in Governing - The States and Localities, available at http://www.governing.com/topics/public-workforce/col-why-public-sector-strikes-are-rare.html (last visited 12-1-2017). In Illinois most "security personnel" are prohibited from striking, and the right of other public employees to strike is severely constrained. See 5 ILL. COMP. STAT. 315/17.

(2003). Errors in financial analysis by the employer regarding the impact of a labor contract, *e.g.*, giving in to expensive union demands, can lead to the employer becoming unprofitable, or even going out of business, but any resulting harm to consumers and society at large is tempered because competitors or new firms will continue to provide goods or services.

As *Abood* itself recognized, a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases," 431 U.S. at 228, and a union's political "clout" is likely to have more bearing on the decision that it would in a private sector negotiation. Justice Blackmun's plurality opinion in *Lehnert* referred to "legislative lobbying" and the "ratification or implementation" of a contract, *Lehnert* at 520-22 (plurality opinion), and his opinion distinguished "collective-bargaining negotiations" from "lobbying, electoral, and other political activities that do not relate to collective-bargaining agreement[s]," *id.* at 521. But the connection between a union's political power – through contributions and "Get out the vote" manpower – and it's ability to "persuade" the public official on the other side of the table does not make a union's claim that political expenditures assist it in bargaining over wages, benefits and working conditions legitimate; rather it serves to show that the two types of expenditures are symbiotic, and any distinction is arbitrary and artificial.

There is no meaningful distinction between a public employee group lobbying for a salary increase, a business lobbying for a tax credit or a taxpayer association lobbying for lower taxes. All of these groups seek to influence the government to adopt their policy preference and advance their financial goals. There is no basis for granting one group the power to compel financial support for its position from citizens who oppose those policy goals. A business corporation's shareholders who dissent from the corporation's lobbying program can disassociate themselves from the company's position by voting for a shareholder resolution expressing disfavor, or, at the end of the day, by liquidating their investment in the firm, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978), but that option is not, under current law, available to public employees with respect to "chargeable" union expenditures.

Public sector collective bargaining is intimately related to the allocation of government resources, and how much governmentwillcompelindividuals and businesses to pay in taxes and what balance of services it will provide are decisions that are fundamentally political. *See* Summers, *supra*, at 443. Public spending choices necessarily require either reducing other public programs or raising additional public revenues – either of which is a core and frequently contentious political issue. Balancing competing interests among different public sector unions (*e.g.,* "parity" among police, fire and sanitation services), among various

government programs, and between personnel costs and other expenditures (*e.g.*, health care, public assistance, infrastructure or other capital spending, and debt service) are all essentially "political" decisions. *See Abood*, 431 U.S. at 258 (Powell, J., concurring).[11]

As this Court in *Harris* acknowledged, "it is impossible to argue that . . . state spending for employee benefits in general is not a matter of great public concern." *Harris*, 134 S. Ct. at 2642-43 am d "[i]n the public sector, core issues such as wages, pensions, and benefits are important

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[11] Moreover, because as *Abood* itself recognized, a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases," 431 U.S. at 228, a union's political "clout" is likely to have more bearing on the decision that it would in a private sector negotiation. Justice Blackmun's plurality opinion in *Lehnert* referred to "legislative lobbying" and the "ratification or implementation" of a contract, *Lehnert* at 520-22 (plurality opinion), and his opinion distinguished "collective-bargaining negotiations" from "lobbying, electoral, and other political activities that do not relate to collective-bargaining agreement[s]," *id.* at 521.

But the connection between a union's political power – through contributions and manpower – and it's ability to "persuade" the public official on the other side of the table does not make legitimate a union's claim that political expenditures assist it in bargaining over wages, benefits and working conditions; rather it serves to show that the two types of expenditures are like symbiotic organisms, and any separation or distinction is arbitrary and largely artificial.

political issues . . . ." *Harris*, 134 S. Ct. at 2632. Consequently, a "public-sector union, often with a more parochial perspective than government officials, takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 567 U.S. at 310.

Public sector labor collective bargaining agreements are not private decisions. The contract between a political subdivision or agency and a union is itself essentially political act. Summers, *supra*, at 442; see also *Abood* at 222. Public employee union collective bargaining is intended "to affect the decisions of government representatives who are engaged in what is "above all a political process," because decisions in bargaining with the union involve "political ingredients" that require balancing public interests such as the importance of the service involved with the resources available. *Id*. at 228-29. And, unlike private sector collective bargaining, much of the public employee unions' "bargaining" activity consist of lobbying and electioneering. Indeed, the public employee unions often classify and justify a large portion of their political contributions, cost of electioneering activities, and lobbying expenditures

as part of collective bargaining.[12] See, *e.g.*, *Seidemann v. Bowen*, 584 F.3d 104 (2d Cir. 2009).

This Court's recent decisions recognize that public-sector collective bargaining constitutes core political speech about governmental affairs that is not materially different from lobbying. As this Court has recognized, a "public-sector union takes many positions during collective bargaining that

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[12] The vast union funding of political campaigns, despite declining union membership (see U.S. Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 5, Union affiliation of employed wage and salary workers by state, *available at* http://www.bls.gov/news.release/union2.t05.htm (last visited 12-1-2017)), is noteworthy. While unionization rates have fallen from 16 percent in 1990 to below 11 percent in 2014 (7 percent for private sector workers and 35 percent for public sector workers), total political spending in constant dollars is nearly 80 times higher. During the 2012 federal election cycle political spending by unions was $711 million. Union spending on federal elections was an inflation-adjusted $9 million during the 1990 cycle. Union Membership Down, Political Spending Up, e21 Staff (August 26, 2014), *available at* https://economics21.org/html/union-membership-down-political-spending-1078.html (last visited 12-1-2017). According to another source, in the 2016 election cycle labor union political spending (including lobbying) exceeded $1.7billion.National Institute for Labor Relations Research, 2016 Election Cycle: Big Labor Exceeds $1.7 Billion Political Spending, *available at* http:// www.nilrr.org/2017/04/17/2016-election-cycle-big-labor-exceeds-1-7-billion-political-spending/ (last visited 12-1-2017).

have powerful political and civic consequences." *Knox*, 567 U.S. at 310; see also *Harris*, 134 S. Ct. at 2655 (Kagan, J., dissenting) (citing *Abood,* 431 U.S. at 263 n.16 (Powell, J., concurring in judgment)). The impact of collective bargaining on matters of public concern has direct and significant effect on the fiscal health of state and local governments. The decision to raise public employee salaries or provide generous benefits – or, as in the recent history of the State of Illinois – attempts to reduce personnel costs of government, is a political decision because it will result in either lower or higher taxes, larger or smaller public debt, repair, improvement or disintegration of infrastructure, and public spending generally because "[p]ublic-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions." *Knox*, 567 U.S. at 320.

When one party in the collective bargaining process is a government entity, negotiations are intrinsically about the use of public resources and thus about how elected or appointed officials will govern. See Rafael Gely, *et al.*, *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"*, 14 Employee Rts. & Emp. Pol'y J. 93 (2010). The *Abood* majority acknowledged that public-sector unions' collective-bargaining constitutes political speech designed to influence governmental decision-making, "[t]here can be no quarrel with the truism" that, in the collective-bargaining

context, "public employee unions attempt to influence governmental policymaking," and, consequently, "their activities – and the views of members who disagree with them – may be properly termed political." 431 U.S. at 231. Nevertheless, under *Abood* government employees who have not joined the union and do not share the union's views on numerous issues have no choice but to finance the very advocacy to which they object. Non-members are compelled by "fair share" arrangements to subsidize the union's collective bargaining activities that directly impact public policy choices as a condition of their public employment.

While *Abood* recognized that core First Amendment principles prohibit compelled funding of union speech directed at "*other* ideological causes not germane to its duties as a collective bargaining representative," it nonetheless allowed compelled funding of union lobbying in the context of "collective bargaining." *Id.* at 235 (emphasis added). But neither *Abood* nor subsequent cases have articulated any principled basis for distinguishing between collective-bargaining lobbying and other union lobbying. Rather, *Abood* justified this artificial distinction solely on the basis that the Court had previously drawn it in the private-sector context in *Rwy Employees v. Hanson,* 351 U.S. 225 (1956), and *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740 (1961). *Abood,* 431 U.S. at 232.

*Street* and *Hanson*, involving private bargaining, do not support *Abood*'s conclusion that compelled subsidization of public-sector collective bargaining is permissible. This Court has since recognized that the "*Abood* court seriously erred" in concluding that *Street*'s and *Hanson*'s authorization of compelled subsidization of private-sector collective bargaining somehow supported such compulsion in the "very different" public-sector context, in which a "state instrumentality"may directly impose subsidization of collective-bargaining speech that is "directed at the Government" and designed to "'influence the decision making process.'" *Harris,* 134 S. Ct. at 2632-33 (citation omitted).[13]

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[13] There is no meaningful distinction between a public employee group lobbying for a salary increase, a business lobbying for a tax credit or a taxpayer association lobbying for lower taxes. All of these groups seek to influence the government to adopt their policy preference and advance their financial goals. There is no basis for granting one group the power to compel financial support for its position from citizens who oppose those policy goals. A business corporation's shareholders who dissent from the corporation's lobbying program can disassociate themselves from the company's position by voting for a shareholder resolution expressing disfavor, or, at the end of the day, by liquidating their investment in the firm, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978), but that option is not, under current law, available to public employees with respect to "chargeable" union expenditures.

These burdens on non-members' speech rights, countenanced in *Abood* and often mandated by state law, should now be rejected by this Court.

**b. The mandatory exaction of dissenters' agency fee money infringes the dissenters' First Amendment rights.**

The "heavy burden" that agency shop arrangements impose on the First Amendment rights of non-member public employees who are compelled to fund bargaining in which unions advocate policies that the non-members may view as detrimental to their own interests is incompatible with this Court's First Amendment jurisprudence. *Harris*, 134 S. Ct. at 2643. The Court has repeatedly underscored the "significant impingement on [the] First Amendment rights" of non-member employees, recognizing that it is equally abhorrent to the First Amendment for the government to "compel the endorsement of ideas" as it is for the government to "prohibit the dissemination of ideas that it disfavors." *Knox,* 567 U.S. at 309.

While *Abood* drew a distinction between union fees used for "political" and "ideological" causes, on the one hand, and "collective bargaining activities," on the other, this Court's more recent decisions have exposed the artificiality and unworkability of that division. Indeed, it is no longer open to dispute that a "public-sector union takes many positions during collective bargaining that have powerful

political and civic consequences. *Knox,* 567 U.S. at 310; *see also Harris,* 134 S. Ct. at 2632.

The objections of non-members to the union's collective bargaining activities with respect to the employer-employee matters that have broader public policy implications are often based on personal political and ideological beliefs, as well as purely professional concerns. The free speech and free association concerns that prompted the *Abood* Court to condemn compelled subsidies for union non-bargaining lobbying activities apply as well to "agency shop" arrangements that compel non-members to fund the union's collective bargaining activities because those arrangements coerce public employees who choose not to join the union to finance the union's collective bargaining activities with which they broadly disagree on matters of great public concern.

The dissenting non-members are compelled to fund advocacy of positions different from those the non-members themselves would articulate – sometimes diametrically oppositeones.*Harris,*134 S. Ct. at 2623, 2640. This is subsidization of "political" speech that affronts the First Amendment.

## II. THE INTERESTS IN MAINTAINING "LABOR PEACE" AND AVOIDING "FREE-RIDING" DO NOT JUSTIFY COMPELLED SUBSIDIZATION OF POLITICAL SPEECH.

In *Abood*, 431 U.S. 209, 224-25, the Court upheld the constitutionality of assessing compulsory dues from public-sector workers to finance the collective bargaining expenditures of a labor union, reasoning that the "important" governmental interest in "labor peace" justified the impingement upon dissenting individuals' associational and expressive freedoms. The *Abood* court recognized that the *entire* agency fee implicates individual speech rights: union dues or agency fee funds are being taken, by law, directly from the non-consenting employee's paycheck to fund a form of lobbying and speech directed at the government.

The interest in "labor peace" cannot justify infringement of individuals' core constitutional rights. "Labor peace" means the prevention of the "confusion and conflict that could arise if rival teachers' unions, holding quite different views . . . sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224.

In *Harris,* the majority noted that "'[the primary purpose' of permitting unions to collect fees from nonmembers . . . is 'to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Harris*, 134 S. Ct. at 2627 (quoting *Knox*, 132 S. Ct. at 2289). The Court continued, however, that "'[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections.'" *Harris*,

134 S. Ct. at 2627 (quoting *Knox*, 132 S. Ct. at 2289).[14,15]

This Court's post-*Abood* decisions in *Knox* and *Harris* undermine the contention that the governmental interests in promoting "labor peace" and preventing "free-riding" override individuals' core First Amendment rights. This Court made it clear that the free-rider justification articulated in *Abood* is "something of an anomaly" and that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *See*

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[14] The "free-rider argument" is an "anomaly" that was previously justified by the interest in furthering "labor peace." *See Knox*, 132 S. Ct. at 2290 (quoting *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 303 (1986)). The interest in preventing "free riders" from taking advantage of the benefits of union representation is really subsidiary to maintaining labor peace or some other legitimate interest, and is not on its own a "compelling interest." *See*, *e.g.*, *International Ass'n of Machinists v. Street,* 367 U.S. 740, 7600-61; *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting) (discussing *Railway Employees v. Hanson,* 351 U.S. 225 (1956)); *Abood*, 431 U.S. at 220-21, 224; *id*. at 229 (for constitutional analysis, the overriding purpose of exclusive representation is "labor stability").

[15] *Abood* created the chargeable/non-chargeable distinction as the "remedy" for compelled speech inherent in union shop or agency shop arrangement to avoid "free riding" by nonmembers. 431 U.S. at 232-36. This dichotomy establishes a regime that incentivizes unions to categorize as much of their activity as possible as "chargeable," through obfuscation or otherwise.

*Harris,* 134 S. Ct. at 2627*; Knox,* 132 S. Ct. at 2289, 2290.

The fact that public *employers* may support the idea of a single union bargaining representative, because they find it convenient to deal with one union rather than many, does not logically support a rule that the government can compel nonmember employees to support that union. Instances in which public employees have withheld support for the exclusive union bargaining representative have not resulted in workplace turmoil or disruption.

As to the supposed deleterious effect on the unions, it is obvious that many groups that depend solely on voluntary contributions, such as charities, are quite successful without compelled financing that infringe First Amendment rights. *See Harris,* 134 S. Ct. at 2641. In *Harris*, the Court, although acknowledging that the union had been an "effective advocate," obtaining "substantially improved" wages and benefits as well as nonfinancial gains for home health care workers, held that "the mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." 134 S. Ct. at 2640-41, 2636.

The Court should now explicitly hold that the "free rider" rationale is not a sound basis for the exaction by law or agreement between a union and a government entity of compulsory agency fees from public employees.

## III. AN OPT-OUT SYSTEM DOES NOT PRESERVE OBJECTORS' FIRST AMENDMENT RIGHTS.

Cases such as *Abood* and *Hudson* "assumed, without any focused analysis, that the dicta from *Machinists v. Street*, 367 U.S. 740, 760 (1961) had authorized the opt-out requirement as a constitutional matter." *Knox*, 132 S. Ct. at 2290. "[A]cceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id*.

The Court in cases after *Street* tried to distinguish between chargeable and non-chargeable union expenditures and to find constitutionally adequate procedures for dissenting employees to object, but did not rule on the constitutionality of opt-out schemes *per se*. In *Hudson*, 475 U.S. 292, 303 (1986) the Court assumed that an opt-out procedure was permissible, and prescribed ways in which those procedures must be "carefully tailored to minimize the infringement" of objecting employees' First Amendment rights, holding that a public-sector employee who chooses to pay an agency fee in lieu of joining a union and paying full dues is entitled to "an adequate explanation of the basis for the [agency] fee" that they are required to pay and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker." *Id*. at 310.

The Court has not considered the more fundamental question whether an opt-out requirement could satisfy First Amendment scrutiny at all until *Knox*: "Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction." 132 S. Ct. at 2290. *Knox* recognized that those prior cases, by implicitly "permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses . . . approach, if they do not cross, the limit of what the First Amendment can tolerate." *Id*. at 2291. *Knox* reviewed the procedures to protect the rights of dissenting public-sector workers who were charged an "Emergency Temporary Assessment." *Id*. at 2285, 2287. Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Id*. at 2291.

Instead, the *Knox* court reiterated that the First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights," *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303). Rather than presume non-members' willingness to fund a union's political or ideological activities, *Knox* requires their affirmative consent because the courts "do not presume acquiescence in the loss of fundamental rights." *Knox* at 2290 (quoting *Coll.*

*Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)) and a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, *even temporarily*, to finance ideological activities unrelated to collective bargaining." *Knox*, 132 S. Ct. at 2290 (quoting *Hudson*, 475 U.S. at 305)(emphasis supplied).[16] It applied these principles, to hold that a public-sector union imposing a special assessment or a dues increase "may not exact any funds from nonmembers without their affirmative consent." *Id*. at 2296. There is simply no "justification for putting the burden on the nonmember to opt out of making such a payment." *Id*. at 2290.

The "taxonomy" of "chargeable" and "non-chargeable" union expenditures and the mechanism for objectors to vindicate their First Amendment rights created by *Abood* and its progeny imposes immense – and unnecessary – burdens on objectors.

The union must provide a "*Hudson* notice" to all nonmembers each fall, stating the amount of the agency fee and providing a breakdown of its

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[16] The court in *Seidemann v. Bowen*, 499 F.3d 119, 125-26 (2nd Cir. 2007) observed that the only countervailing interest proffered by the union was its desire "to take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members."

chargeable and nonchargeable portions. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 304-07 (1986).[17] That notice must include either the union's audited financial report for the year or a certification from the union's independent auditor confirming that the chargeable and nonchargeable expenses have been accurately stated.. However, the independent auditor does not, however, confirm that the union has properly classified its expenditures. *See Knox*, 132 S.Ct. at 2294.

The union must provide adequate "information about the basis for the proportionate share" of union dues to allow fee payers to make an accurate objection to the nonchargeable portions of the dues. *Hudson*, 475 U.S. at 306. The Court in *Lehnert*, 500 U.S. at 519, set out the parameters for deciding what is and is not chargeable and articulated the requirements for evaluating the propriety of a union's determinations with respect to the propriety of a union's chargeability determinations: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech

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[17] Unlike public employee unions in other states, AFSCME Council does not mail individual notices to state employees who pay dues or agency fees, but instead posts that information on union bulletin boards at various worksites. See JA 79.

that is inherent in the allowance of an agency or union shop."

The system created by *Abood* and its progeny is unnecessarily cumbersome and substantially burdens objectors' First Amendment rights. Although nominally the onus is on the union to establish that its allocation of expenditures between chargeable and nonchargeable categories, once the union puts forth its numbers, the burden shifts to the objector to disprove the union's allocation.

In the years following *Abood*, the Court has "struggled repeatedly with" interpreting *Abood* and determining what qualified as a "chargeable" expenditure and what qualified as a "non-chargeable," or political and ideological, expenditure. *Harris v. Quinn*, U.S. , 134 S. Ct. 2618, 2633 (2014) (citing *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984); *Hudson*, 475 U.S. 292 (1986); *Lehnert*, 500 U.S. 507 (1991); and *Locke v. Karass*, 555 U.S. 207 (2009)).

Under the *Abood* regime as applied, disputes between objecting nonmembers and the union often require detailed examination of the union's allocation of expenses between chargeable and nonchargeable categories. In effect, either the objector or the court is required to undertake what amounts to a "forensic audit" of the union's accounts (assuming the trial court allows adequate discovery). If the objector has tenacity and resources, she will have to undertake years of litigation and costly discovery. *See Seidemann v.*

*Bowen*, 499 F.3d 119, 128 (2nd Circuit 2007) and *Seidemann v. Bowen*, 584 F.3d 104 (2d Cir. 2009). In that case, a tenured professor of science at a major public university endured more than seven years of litigation, two appeals and two remands to the district court before achieving partial equitable relief and nominal damages – and only then because he was able to enlist the *pro bono* assistance of major national law firms. The professor had the good fortune that an associate at those firms had been his protégé as an undergraduate student, and the associate was able to convince the firms to take the case *pro bono* after the professor had commenced the case *pro se*. Few objectors, be they civil servants, factory workers, or academics would be able to muster similar resources.

It is hard to imagine an objector who has only $535 annually ($44.58 per month) at stake (see Pet.App. 14) undertaking such Herculean efforts, and it is no surprise that objectors are discouraged from seeking refunds. But to the union, $535 multiplied by potentially thousands of agency fee payers is a substantial sum worth fighting for, and committing substantial resources (which come from members' dues and non-members' agency fees) to preserve the union's access to millions of dollars in agency fees.

A simplified opt-in system would apply only to objectors. If a majority of government workers support the union then it naturally "may be presumed that a high percentage" of those workers

will become union members and "willingly pay[] union dues." *Harris*, 134 S.Ct. at 2641. The harm to the union would be negligible. On the other hand, under the current system the harm to government workers who do not wish to support the union is significant.

After its decision in *Abood*, this Court recognized that agency-shop provisions which compel public employees to subsidize public-sector unions' efforts to achieve the unions' favored programs and to obtain favorable political actions from government officials are a "significant impingement" on employees' First Amendment rights. *See Knox,* 567 U.S. at 310; *see also Harris,* 134 S. Ct. 2618 (2014). While *Knox* did not explicitly address regular agency fees that include non-chargeable expenses from non-members, as opposed to temporary emergency dues, the reasoning of that decision logically compels the conclusion that opt-out schemes are constitutionally untenable.

In *Harris*, the Court held that "fair share" contract provisions entered into under the IPLRA that required non-union Medicaid-funded home-care personal assistants to pay fees to the union violated the First Amendment, because the provisions served no compelling state interest that could not be achieved through significantly less restrictive means. *See Harris*, 134 S. Ct. at 2640. The Court should treat state employees no differently with respect to coerced payment of agency fees.

## CONCLUSION

This Court should overrule *Abood*, hold that compelled payment of agency fees violates the free speech rights of dissenting government employees, and reverse the decision below.

Respectfully submitted,

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