No. 19-___

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 Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY M. SCHWAB
LIBERTY JUSTICE CENTER
190 South LaSalle Street
Suite 1500
Chicago, IL 60603
(312) 263-7668

WILLIAM L. MESSENGER
Counsel of Record
AARON B. SOLEM
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Petitioner

QUESTION PRESENTED

Is there a "good faith defense" to 42 U.S.C. § 1983 that shields a defendant from damages liability for depriving citizens of their constitutional rights if the defendant acted under color of a law before it was held unconstitutional?

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; Simone McNeil, in her official capacity as the Acting Director of the Illinois Department of Central Management Services; and Illinois Attorney General Kwame Raoul.

Other 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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit review of which is sought is reported at 942 F.3d 352 (2019) and reproduced at Pet.App. 1a. The Seventh Circuit's order denying rehearing en banc is reproduced at Pet.App. 138a. The Seventh Circuit's opinion affirmed the United States District Court for the Northern District of Illinois' unreported order granting defendants summary judgment. Pet.App. 31a.

This Court's earlier opinion is reported as *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (Pet.App. 42a). It reversed the Seventh Circuit's opinion reported at 851 F.3d 746 (2017) (Pet.App. 131a), which had affirmed the district court's order dismissing the complaint (Pet.App. 136a).

JURISDICTION

The Seventh Circuit entered judgment on November 5, 2019 (Pet.App. 1a), and denied a petition for rehearing en banc on December 12, 2019 (Pet.App. 138a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1983, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

> proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officers judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Petitioner Mark Janus was an Illinois state employee who was forced to pay agency fees to AFSCME Council 31 against his will. Pet.App. 47a. On June 27, 2018, this Court in *Janus* held these fee seizures violated Janus' First Amendment rights. *Id.* at 48a. The Court overruled its precedent that allowed unions to seize agency fees from employees—*Abood v. Detroit Board of Education,* 431 U.S. 209 (1977)—and found Illinois' agency fee statute unconstitutional. Pet.App. 97a.

In *Janus*, this Court recognized that "unions have been on notice for years regarding this Court's misgiving about *Abood"* and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 94a. The Court also lamented the "considerable windfall" that unions wrongfully received from employees during prior decades: "[i]t is hard to estimate how many billions of dollars have

been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Id.* at 96a.

On remand, Janus sought damages from AFSCME for agency fees it unconstitutionally seized from him. *Id.* at 10a. Janus did so under Section 1983, which provides that "[e]very person who, under color of any statute" deprives citizens of their constitutional rights "shall be liable to the party injured in an action at law[.]" 42 U.S.C. § 1983.

The district court, however, held that a so-called "good faith defense" renders defendants who acted under color of a then thought valid statute *not* liable to injured parties in an action at law. Pet.App. 35a. On that basis, the district court denied Janus damages and granted AFSCME summary judgment. *Id.* at 37a.

The Seventh Circuit affirmed and later denied a petition for rehearing en banc. *Id.* at 28a, 138a. The court held that "under appropriate circumstances, a private party that acts under color of law for purposes of section 1983 may defend on the ground that it proceeded in good faith." *Id.* at 21a. More specifically, the court "recognize[d] a good-faith defense in section 1983 actions when the defendant reasonably relies on established law." *Id.* at 25a. The Seventh Circuit also found that AFSCME's reliance on Illinois' agency fee

statute and *Abood*, when seizing agency fees from Janus, relieved the union from having to return Janus' monies to him. *Id*. at 26a–28a.

The Seventh Circuit identified no basis in Section 1983's text for its new reliance-on-established-law defense. The court claimed the "Supreme Court abandoned . . . long ago" the proposition that courts must strictly abide by Section 1983's text "when [the Court] recognized that liability under section 1983 is subject to common-law immunities that apply to all manner of defendants." *Id*. at 18a.

Nor did the Seventh Circuit identify any historical common law basis for its reliance defense, claiming that inquiry to be a "fool's errand." *Id*. at 24a. The court acknowledged "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." *Id*. at 21a.

The Seventh Circuit instead found a good faith defense to Section 1983 because it believed that this Court's decisions in *Wyatt v. Cole*, 504 U.S. 158 (1992) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) were "a strong signal that the Court intended (when the time was right) to recognize a good faith defense in section 1983 actions when the defendant reasonably relies on established law." Pet.App. 25a. The Seventh Circuit also believed that other courts recognized a good faith defense for this reason. *Id*. at 20a.

Those conclusions are incorrect in many respects. *See infra* 7-11. However, the Seventh Circuit was cor-

rect in observing that, in the wake of *Janus*, many district courts have held "there is a good-faith defense to liability for payments [unions] collected before *Janus II*." Pet.App. 21a. After the Seventh Circuit's decision, the Ninth Circuit similarly held that a reliance defense shields unions from compensating victims of their fee seizures. *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019). Like the Seventh Circuit, the Ninth Circuit believed that this Court's decision in *Wyatt* suggested the lower courts should recognize that defense to Section 1983. *Id.*[1]

REASONS FOR GRANTING THE PETITION

Three times this Court has raised, but then not decided, the question of whether there exists a good faith defense to Section 1983. *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *Wyatt*, 504 U.S. at 169; *Lugar*, 457 U.S. at 942 n.23. The Court should now resolve this important question to disabuse the lower courts of the rapidly spreading notion that a defendant acting under color of a statute before it is held unconstitutional is a defense to Section 1983.

---

[1] Shortly before the filing of this petition, panels of the Sixth Circuit recognized a good faith defense, albeit on different grounds. *See Olge v. Ohio Civil Service Employees Ass'n*, No. 19-3701, ECF No. 41 (6th Cir. Mar. 5, 2020) (per curiam); *Lee v. Ohio Educ. Ass'n*, 2020 WL 881265 (6th Cir. Feb. 24, 2020). Given that a petition for rehearing en banc is likely in *Ogle*, the exact state of the law in this Circuit is unsettled at the time of writing.

This defense is not the defense members of this Court suggested in *Wyatt*. Several Justices in that case wrote that good faith reliance on a statute could defeat the *malice and probable cause elements* of a Section 1983 claim arising from malicious prosecution or an abuse of a judicial process. 504 U.S. at 167 n.2 (majority opinion); *id*. at 172 (Kennedy J., concurring); *id*. at 176 n.1 (Rehnquist C.J., dissenting). Those Justices, however, were not suggesting that a defendant relying on a not yet invalidated statute is a defense to *all* Section 1983 claims for damages.

There is no statutory basis for such a reliance defense. It cannot be reconciled with Section 1983's text, which makes acting "under color of any statute" an element of the statute that renders defendants "liable to the party injured in an action at law." 42 U.S.C. § 1983. Nor can a reliance defense be reconciled with *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995), which held that lower courts cannot frustrate the retroactive effect of this Court's decisions by creating remedies based on a defendant's reliance on a statute before it was held unconstitutional.

The Ninth Circuit in *Danielson* claimed that equity—"principles of equality and fairness," 945 F.3d. at 1101— justifies a reliance defense. But courts cannot create equitable exemptions to congressionally enacted statutes like Section 1983. Even if they could, fairness to victims of constitutional deprivations supports enforcing the statute as written.

The Court should reject the proposition that a defendant relying on a law before it is invalidated exempts a defendant from compensating injured parties under Section 1983. It is important that the Court do so. Unless corrected, the lower courts' misapprehension of *Wyatt* will cause tens of thousands of victims of agency fee seizures to go uncompensated for their injuries. It will also result in victims of other constitutional deprivations not being made whole for their injuries. The petition should be granted.

A. The Seventh and Ninth Circuits Misconstrue This Court's Decision in *Wyatt*.

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The elements of different constitutional deprivations vary considerably. "In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). "Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id*. "But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims." *Id*. at 921.

The claim in *Wyatt* was that a private defendant deprived the plaintiff of due process of law when seizing his property under an *ex parte* replevin statute. 504 U.S. at 161. The Court found the plaintiff's due process claims analogous to "malicious prosecution and

abuse of process," and recognized that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id.* at 164–65; *see id.* at 172–73 (Kennedy. J., concurring) (similar).

The issue in *Wyatt* was whether the defendant was entitled to qualified immunity. *Id.* at 161. The Court determined that "[e]ven if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith *defense*, that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials . . . ." *Id.* at 165. The reason was, the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167.

Wyatt left open whether Section 1983 defendants could raise "an affirmative defense based on good faith and/or probable cause." *Id.* at 168–69. As the Court later explained in *Richardson*, where the Court again declined to decide that question, "*Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special 'good-faith' defense." 521 U.S. at 413.

Contrary to the conclusions of the Seventh Circuit and other courts, the good faith defense suggested in *Wyatt* was *not* a broad statutory reliance defense to all Section 1983 damages claims. Rather, several Justices suggested a defense to the malice and probable

cause elements of Section 1983 claims that are analogous to malicious prosecution and abuse of process claims. This is clear from all three opinions in *Wyatt*.

First, Chief Justice Rehnquist, in his dissenting opinion joined by Justices Thomas and Souter, explained it is a "misnomer" to use the term good faith "defense" because "under the common law, it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice and without probable cause." 504 U.S. at 176 n.1. "Referring to the defendant as having a good faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing either a lack of malice or the presence of probable cause." *Id.*

Second, Justice Kennedy, in his concurring opinion joined by Justice Scalia, agreed that "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Id.* at 172. Justice Kennedy explained that "the common-law tort actions most analogous to the action commenced here are malicious prosecution and abuse of process," and that in both actions "it was essential for the plaintiff to prove the wrongdoer acted with malice and without probable cause." *Id.* Justice Kennedy found that because "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law . . . lack of probable

cause can *only* be shown through proof of subjective bad faith." *Id*. at 174.

Third, Justice O'Connor's majority opinion in *Wyatt* recognized that the good faith defense discussed in the dissenting and concurring opinions was in reality the malice and probable cause elements of claims analogous to malicious prosecution. *Id*. at 166 n.2. The majority opinion found that "[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs bringing an analogous suit under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action." *Id*..

On remand in *Wyatt*, the Fifth Circuit recognized that this Court "focused its inquiry on the *elements* of these torts." *Wyatt v. Cole*, 994 F.2d 1113, 1119 (5th Cir. 1993). It therefore found "that Appellants seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause." *Id*. The Third and Second Circuits followed suit in cases also arising from abuses of judicial processes and held the defendants could defeat the malice and probable cause elements of those claims by showing good faith reliance on a statute. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 & n.31 (3d Cir. 1994); *Pinsky v. Duncan*, 79 F.3d 306, 312–13 (2d Cir. 1996).

The Seventh Circuit was wrong in interpreting *Wyatt* to be "a strong signal that the Court intended

(when the time was right) to recognize a good faith defense in section 1983 actions when the defendant reasonably relies on established law." Pet. App. 25a. The Seventh Circuit was also wrong in believing the Fifth, Third, and Second Circuits had recognized such a defense. *Id*. at 20a. *Wyatt* merely suggested, and those appellate courts later only found, that good faith reliance on existing law can defeat the malice and probable cause elements of certain Section 1983 claims.

That limited defense does not help AFSCME because malice and lack of probable cause are not elements of a First Amendment claim under *Janus*. Under *Janus*, a union deprives public employees of their First Amendment rights by taking their money without affirmative consent. 138 S. Ct. at 2486. A union's intent when so doing is immaterial. The limited good faith defense members of this Court actually suggested in *Wyatt* offers no protection to unions that violated dissenting employees' First Amendment rights by seizing agency fees from them. The Court should grant review to clarify what it intended in *Wyatt*.

B. The Seventh and Ninth Circuits' Reliance Defense Conflicts with Section 1983's Text, Retroactivity Law, and Equitable Principles.

1. A Statutory Reliance Defense Is Incompatible with Section 1983's Text and History.

The Seventh and Ninth Circuits' new defense to Section 1983 not only lacks a basis in this Court's precedents, it conflicts with the statute's text. Section 1983

states, in relevant part, that "*[e]very* person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives a citizen of a constitutional right "*shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added). Section 1983 means what it says. "Under the terms of the statute, '[e]very person who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages.'" *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

The Seventh and Ninth Circuits turn Section 1983 on its head by holding that persons who act under color of a not yet invalidated state law to deprive others of a constitutional right are *not* liable to the injured parties in an action for damages. The courts have effectively declared a statutory *element* of Section 1983—that defendants must act under color of state law—to be a *defense* to Section 1983. Given that defendants generally cannot invoke state laws already declared unconstitutional, defendants in Section 1983 actions will almost always act under color of state laws that had not been held invalid at the time. Under the Seventh and Ninth Circuit decisions, acting under color of a state law yet to be held unconstitutional is now a potential defense to *all* Section 1983 damages claims.

It is telling that the Seventh and Ninth Circuits make no attempt to square their defense with Section

1983's text. The Seventh Circuit claims this Court "abandoned" strictly following Section 1983's language when recognizing immunities. Pet.App. 18a. To the contrary, the Court has held that "[w]e do not simply make our own judgment about the need for immunity," and "do not have a license to create immunities based solely on our view of sound policy." *Rehberg*, 566 U.S. at 363. The Court accords an immunity only when a "'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine' when it enacted Section 1983.'" *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164).

Unlike with qualified immunities, which this Court has found have a statutory basis, there is no statutory basis for the Seventh and Ninth Circuits' reliance defense. "[T]here is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims." Pet.App. 21a. The policy reasons that justify qualified immunities generally do not apply to private defendants. *Wyatt*, 504 U.S. at 165-67. There is nothing in Section 1983's text, or in common-law history, that supports the reliance defense created by the Seventh and Ninth Circuits.

2. The Seventh and Ninth Circuits' Reliance Defense Conflicts with *Reynoldsville Casket*.

This Court's decision in *Janus* is retroactive under the rule announced in *Harper v. Virginia Department*

of Taxation, 509 U.S. 86, 97 (1993). The reliance defense the Seventh and Ninth Circuits fashioned to defeat *Janus'* retroactive effect is indistinguishable from the reliance defense this Court held invalid for violating retroactivity principles in *Reynoldsville Casket*.

Reynoldsville Casket concerned an Ohio statute that effectively granted plaintiffs a longer statute of limitations for suing out-of-state defendants. 514 U.S. at 751. This Court had earlier held the statute unconstitutional. *Id.* An Ohio state court, however, permitted a plaintiff to proceed with a lawsuit that was filed under the statute before this Court invalidated it. *Id.* at 751-52. The plaintiff asserted this was a permissible, equitable remedy because she relied on the statute before it was held unconstitutional. *Id.* at 753 (describing the state court's remedy "as a state law 'equitable' device [based] on reasons of reliance and fairness"). This Court rejected that contention, holding the state court could not do an end run around retroactivity by creating an equitable remedy based on a party's reliance on a statute later held unconstitutional by this Court. *Id.* at 759.

The Seventh and Ninth Circuits engaged in just such an end run. They created an equitable defense based on a defendant's reliance on a statute this Court later deemed unconstitutional. The reliance defense the Seventh and Ninth Circuits created conflicts with this Court's *Reynoldsville Casket* precedent.

3. The Seventh and Ninth Circuits' Reliance Defense Is Inequitable and Inconsistent with Section 1983's Legislative Purposes.

The Seventh Circuit identified no statutory basis for the reliance defense it created. The Ninth Circuit, however, asserts the defense is equitable in nature, and is grounded in "principles of equality and fairness." *Danielson*, 945 F.3d. at 1101.

a. This "fairness" rationale is inadequate on its own terms. Courts cannot refuse to enforce federal statutes because they believe it unfair to do so. "As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). "It is for Congress to determine whether § 1983 litigation has become too burdensome . . . and if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984).

In any event, fairness to *victims* of constitutional deprivations requires enforcing Section 1983's text as written. It is not fair to make Janus and other employees pay for AFSCME's unconstitutional conduct. Nor is it fair to let wrongdoers like AFSCME keep ill-gotten gains. "[E]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980).

The Court wrote those words in *Owen* when holding that Section 1983's legislative purposes did not justify

extending good-faith immunity to municipalities. The Court's reasons for so holding apply here.

First, the Court reasoned that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense," and that "[u]nless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated." *Id.* at 651. So too here. It would be an injustice to leave innocent victims of agency fee seizures and other constitutional violations remediless for their injuries.

Second, the Court recognized that Congress enacted Section 1983 to "serve as a deterrent against future constitutional deprivations." *Id.* at 651. "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52. This deterrence interest also weighs against a reliance defense, which will encourage defendants to risk infringing on constitutional rights by limiting their exposure for so doing.

AFSMCE's conduct illustrates the point. Rather than choose to "err on the side of protecting citizens' constitutional rights," *id.*, AFSCME chose to seize agency fees from Janus and his co-workers after the constitutionality of those seizures was very much in doubt, *see Janus*, 138 S. Ct. at 2484–85 (Pet. App. 94a). AFSCME even rejected a plan to place disputed

fees in escrow after this case was filed, *see* Pet.App. 26a, so it could squeeze out every last dollar from Janus and other dissenting employees before the Court stopped its unconstitutional seizures.

Third, the *Owen* Court reasoned that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate the resulting loss" to the entity that caused the harm "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 654. So too here. It is not fair to have Janus pay for AFSCME's unconstitutional conduct. Equity favors requiring AFSCME to return the monies it unconstitutionally seized from him.

b. As for the Ninth Circuit's conclusion that principles of "equality" justify extending to private defendants a defense similar to the immunity enjoyed by some public defendants, *Danielson*, 945 F.3d. at 1101, that proposition makes little sense. That AFSCME is not entitled to qualified immunity is not reason to create a similar defense for it. Courts do not award defenses to parties as consolation prizes for failing to meet the criteria for an immunity.

Even if principles of equality required treating AFSCME like its closest government counterpart, that still would not entitle AFSCME to an immunity-like defense. A large organization like AFSCME is nothing like individual persons who enjoy qualified immunity. AFSCME is most like a governmental body that lacks qualified immunity—a municipality. *Owen*, 445 U.S.

at 654. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby." *Id.* Nor is it unjust to require a large organization, like AFSCME, to compensate citizens for violating their constitutional rights.

Neither fairness nor equality justify the reliance defense the Seventh and Ninth Circuits recognized. Rather, both principles weigh against carving out this exemption in Section 1983's remedial framework.

C. It Is Important That the Court Finally Resolve Whether Congress Provided a Good Faith Defense to Section 1983.

In at least three prior cases the Court questioned, but then opted not to decide, whether Congress has provided private defendants with a good faith defense. *See Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 169; *Lugar*, 457 U.S. at 942 n.23. It is time for the Court to finally resolve the matter.

The Court should end the growing misconception among lower courts that this Court in *Wyatt* signaled that private defendants should be granted a broad reliance defense to Section 1983 liability akin to qualified immunity. In the wake of *Janus*, a chorus of district courts have interpreted *Wyatt* in that way. *See* Pet.App. 21a–22a. Yet *Wyatt* did not suggest such a defense, but merely suggested that reliance on a statute could defeat the malice and lack-of-probable cause elements of claims analogous to malicious prosecution

and abuse of process claims. *See supra* 7-11. The Court should explain what it meant in *Wyatt*.

It is important that the Court do so quickly because whether tens of thousands of victims of agency fee seizures can receive compensation hangs in the balance. District courts in roughly two dozen cases, most of which were filed as class actions, have held that a good faith defense exempts unions from having to pay damages to employees whose First Amendment rights the unions violated. *See Danielson*, 945 F.3d at 1104 n.7 (collecting most cases). Without this Court's review, the Seventh and Ninth Circuit's decisions in *Janus* and *Danielson* and the uniform decisions of district courts in other circuits are likely to doom all such cases. The Court should grant review so the employees in these suits can recover a portion of the "windfall," *Janus*, 138 S. Ct. at 2486, of compulsory fees unions wrongfully seized from them.

The importance of the question presented extends beyond victims of agency fee seizures to victims of other constitutional deprivations. Under the Seventh and Ninth Circuits' rulings, any defendant lacking immunity could assert as a defense to a Section 1983 claim that it relied on established law. This includes not only all private defendants, but also municipalities. Defendants could raise the defense against any constitutional claim actionable under Section 1983, including discrimination based on race, faith, or political affiliation. The courts would have to adjudicate this defense. More importantly, plaintiffs who would otherwise receive damages for their injuries will be

remediless unless this Court rejects this new judicially created defense to Section 1983 liability.

Doctrinal reasons also counsel granting review. Members of this Court and legal scholars have raised concerns that the Court's qualified immunity jurisprudence has become unmoored from Section 1983's text and from its historical, common law basis. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–73 (2017) (Thomas, J., concurring); William Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018). The Seventh and Ninth Circuits are now further stretching that law beyond its breaking point by creating from whole cloth a defense to Section 1983 for defendants who lack qualified immunity.

When announcing their new defense, both courts disregarded Section 1983's text as if it were irrelevant. Both courts shunned the proposition that they needed to identify a historical common law basis for their defense. The Seventh Circuit called doing so a "fool's errand," Pet.App. 24a, and acknowledged "there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims," *id.* at 21a. The Ninth Circuit asserted that "even qualified immunity law is no longer constrained by a common law tort analogy," and scoffed that "[i]t would be an odd result for an affirmative defense grounded in concerns for equality and fairness to hinge upon historical idiosyncrasies and strained legal analogies for causes of action with no clear parallel

in nineteenth century tort law," *Danielson*, 945 F.3d at 1101.

The Seventh and Ninth Circuits' belief that courts can create defenses to Section 1983 with no basis in its text, its history, or in common law is troubling. "[I]n our constitutional system the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). The Court should grant review to clarify that immunities and defenses to Section 1983 must rest on a firm statutory basis, and that the new reliance defense recognized below lacks any such basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY M. SCHWAB
LIBERTY JUSTICE CENTER
190 South LaSalle Street
Suite 1500
Chicago, IL 60603
(312) 263-7668

March 9, 2020

WILLIAM L. MESSENGER
Counsel of Record
AARON B. SOLEM
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION
8001 Braddock Rd., Suite
Suite 600
Springfield, VA
(703) 321-8510
wlm@nrtw.org

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-1553

MARK JANUS,

Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31; AFL-CIO, *et al.*,

Defendants-Appellees,

and

KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No.1:15-cv-01235 – Robert W. Gettleman, *Judge*.

Argued September 20, 2019
Decided November 5, 2019

Before WOOD, *Chief Judge*, and MANION and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. For 41 years, explicit Supreme Court precedent authorized state-government entities

and unions to enter into agreements under which the unions could receive fair-share fees from nonmembers to cover the costs incurred when the union negotiated or acted on their behalf over terms of employment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). To protect nonmembers' First Amendment rights, fair-share fees could not support any of the union's political or ideological activities. Relying on *Abood*, more than 20 states created statutory schemes that allowed the collection of fair-share fees, and public-sector employers and unions in those jurisdictions entered into collective bargaining agreements pursuant to these laws.

In 2018, the Supreme Court reversed its prior position and held that compulsory fair-share or agency fee arrangements impermissibly infringe on employees' First Amendment rights. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2461 (2018). The question before us now is whether Mark Janus, an employee who paid fair-share fees under protest, is entitled to a refund of some or all of that money. We hold that he is not, and so we affirm the judgment of the district court.

I

A. History of Agency Fees

Before turning to the specifics of the case before us, we think it useful to take a brief tour of the history behind agency fees. This provides useful context for our consideration of Mr. Janus's claim and the system he challenged.

The principle of exclusive union representation lies at the heart of our system of industrial relations; it is reflected in both the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151–165 (first enacted in 1926), and the National Labor Relations Act ("NLRA"), 29 U.S.C.

§§ 151–169 (first enacted in 1935). In its quest to provide for "industrial peace and stabilized labor-management relations," Congress authorized employers and labor organizations to enter into agreements under which employees could be required either to be union members or to contribute to the costs of representation—so-called "agency-shop" arrangements. See 29 U.S.C. §§ 157, 158(a)(3); 45 U.S.C. § 152 Eleventh. Unions designated as exclusive representatives were (and still are) obligated to represent all employees, union members or not, "fairly, equitably, and in good faith." H.R. Rep. No. 2811, 81st Cong., 2d Sess., p. 4.

In *Railway Employment Dep't v. Hanson*, 351 U.S. 225 (1956), a case involving the RLA, the Supreme Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.* at 231. In approving agency-shop arrangements, the Court said, "Congress endeavored to safeguard against [the possibility that compulsory union membership would impair freedom of expression] by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.'" *Id. Hanson* thus held that the compulsory payment of fair-share fees did not contravene the First Amendment.

Several years later, in *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court discussed the careful balancing of interests reflected in the RLA, observing that "Congress did not completely abandon the policy of full freedom of choice embodied in the [RLA], but rather made inroads on it for the limited

purposes of eliminating the problems created by the 'free rider.'" *Id.* at 767. The Court reaffirmed the lawfulness of agency-shop arrangements while cautioning that unions could receive and spend nonmembers' fees only in accordance with the terms "advanced by the unions and accepted by Congress [to show] why authority to make union shop agreements was justified." *Id.* at 768. Legitimate expenditures were limited to those designed to cover "the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Id.* The Court left the question whether state public agencies were similarly empowered under state law to enter into agency-shop arrangements for another day.

That day came on May 23, 1977, when the Supreme Court issued its opinion in *Abood*, 431 U.S. 209. There, a group of public-school teachers challenged Michigan's labor relations laws, which were broadly modeled on federal law. *Id.* at 223. Michigan law established an exclusive representation scheme and authorized agency-shop clauses in collective bargaining agreements between public-sector employers and unions. *Id.* at 224. The Court upheld that system, stating that "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller," *id.*, and that "[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue." *Id.* at 225. It recognized that "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 233–34. Nonetheless, it said that a public employee has no "weightier First Amendment interest than a private employee

in not being compelled to contribute to the costs of exclusive union representation," *id.* at 229, and thus concluded that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

The correct balance, according to *Abood*, was to "prevent[] compulsory subsidization of ideological activities by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237. And for four decades following *Abood*, courts, state public-sector employers, and unions followed this path. See, *e.g.*, *Locke v. Karass*, 555 U.S. 207 (2009); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). Agency-shop arrangements, the Court repeatedly held, were consistent with the First Amendment and validly addressed the risk of free riding. See *Comm'cns Workers of America v. Beck*, 487 U.S. 735, 762 (1988) ("Congress enacted the two provisions for the same purpose, eliminating 'free riders,' and that purpose dictates our construction of § 8(a)(3) . . . ."); *Ellis*, 466 U.S. at 447, 452, 456 (referring in three places to the free-rider concern); see also *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring).

In time, however, the consensus on the Court began to fracture. Beginning in *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298 (2012), the rhetoric changed. *Abood* began to be characterized as an "anomaly," and the Court started paying more attention to the "significant impingement on First Amendment rights" *Abood* allowed and less to the balancing of employees' rights and unions' obligations. *Id.* at 310–11. Building

on *Knox*, *Harris v. Quinn* criticized the reasoning in *Hanson* and *Abood* as "thin," "questionable," and "troubling." 573 U.S. 616, 631–35 (2014). *Harris* worried that *Abood* had "failed to appreciate the conceptual difficulty of distinguishing between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends" and to anticipate "the practical administrative problems that would result." *Id.* at 637. The *Harris* Court also suggested 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 649.

Nonetheless, and critically for present purposes, these observations did not lead the Court in *Harris* to overrule *Abood*. Informed observers thought that *Abood* was on shaky ground, but it was unclear whether it would weather the storm, be restricted, or be overturned in its entirety. That uncertainty continued after the Court signaled its intention to revisit the issue in *Friedrichs v. California Teachers Ass'n*, 135 S. Ct. 2933 (2015), which wound up being affirmed by an equally divided Court. 136 S. Ct. 1083 (2016).

B. Janus's Case

Plaintiff Mark Janus was formerly a child-support specialist employed by the Illinois Department of Healthcare and Family Services. Through a collective bargaining agreement between Illinois's Department of Central Management Services ("CMS") (which handles human resources tasks for Illinois's state agencies) and defendant American Federation of State, County and Municipal Employees ("AFSCME"), Council 31, AFSCME was designated as the exclusive representative of Mr. Janus's employee unit. Mr. Janus exercised his right not to join the union. He also

objected to CMS's withholding $44.58 from his paycheck each month to compensate AFSCME for representing the employee unit in collective bargaining, grievance processing, and other employment-related functions.

Initially, however, Mr. Janus was not involved in this litigation. The case began instead when the then-governor of Illinois challenged the Illinois Public Labor Relations Act ("IPLRA"), which established an exclusive representation scheme and authorized public employers and unions to enter into collective bargaining agreements that include a fair-share fee provision. 5 ILCS § 315/6. Under that law, a union designated as the exclusive representative of an employee unit was "responsible for representing the interests of all public employees in the unit," whether union members or not, § 315/6(d). Fair-share fees were earmarked to compensate the union for costs incurred in "the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." § 315/6(e).

The district court dismissed the governor for lack of standing, but at the same time it permitted Mr. Janus (and some others) to intervene as plaintiffs. Mr. Janus asserted that the state's compulsory fair-share scheme violated the First Amendment. He recognized that *Abood* stood in his way, but he argued that *Abood* was wrongly decided and should be overturned by the high court. Although the lower courts that first considered his case rejected his position on the ground that they were bound by *Abood,* see *Janus v. AFSCME, Council 31*, 851 F.3d 746, 747–48 (7th Cir. 2017) ("*Janus I*"), Janus preserved his arguments and then, as he had hoped, the Supreme Court took the case.

This time, the Court overruled *Abood*. *Janus,* 138 S. Ct. at 2486 ("*Janus II*"). It held that agency-shop arrangements that require nonmembers to pay fair-share fees and thereby "subsidize private speech on matters of substantial public concern," are inconsistent with the First Amendment rights of objectors, no matter what interest the state identifies in its authorizing legislation. 138 S. Ct. at 2460. This is so, the Court explained, because "the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Id.* at 2467.

Several aspects of the Court's opinion are relevant to Mr. Janus's current claim for damages. First, the Court characterized the harm inflicted by the agency-fee arrangement as "compelled subsidization of private speech," 138 S. Ct. at 2464, whereby "individuals are coerced into betraying their convictions," *id.* It was not concerned in the abstract with the deduction of money from employees' paychecks pursuant to an employment contract. Rather, the problem was the lack of *consent* (where it existed) to the use of that money—*i.e.* to support the union's representation work. In other words, the case presented a First Amendment speech issue, not one under the Fifth Amendment's Takings clause.

The Court found that any legitimate interest AFSCME had in those fees had to yield to the objecting employees' First Amendment rights. In so doing, it rejected the approach to free riding that earlier opinions had taken, holding to the contrary that "avoiding free riders is not a compelling interest" and thus Illinois's statute could not withstand "exacting scrutiny." 138 S. Ct. at 2466. Yet it came to that con-

clusion only after weighing the costs and benefits to a union of having exclusive representative status: on the one hand, the union incurs the financial burden attendant to the requirement to provide fair representation even for nonmembers who decline to contribute anything to the cost of its services; on the other hand, even with payments of zero from objectors, the union still enjoys the power and attendant privileges of being the exclusive representative of an employee unit. The Court's analysis focused on the union rather than the nonmembers: the question was whether requiring a *union* to continue to represent those who do not pay even a fair-share fee would be sufficiently inequitable to establish a compelling interest, not whether requiring *nonmembers* to contribute to the unions would be inequitable.

Nor did the Court hold that Mr. Janus has an unqualified constitutional right to accept the benefits of union representation without paying. Its focus was instead on freedom of expression. That is why it said only that the state may not force a person to pay fees to a union with which she does not wish to associate. But if those unions were not designated as exclusive representatives (as they are under 5 ILCS §§ 315/6 and 315/9), there would be no obligation to act in the interests of nonmembers. The only right the *Janus II* decision recognized is that of an objector not to pay *any* union fees. This is not the same as a right to a free ride. Free-riding is simply a consequence of exclusivity; drop the duty of fair representation, and the union would be free to cut off all services to the nonmembers.

Finally, the Court did not specify whether its decision was to have retroactive effect. The language it used, to the extent that it points any way, suggests that it was thinking prospectively: "Those unconstitu-

tional exactions cannot be allowed to continue indefinitely," 138 S. Ct. at 2486; "States and public-sector unions may no longer extract agency fees from nonconsenting employees," *id*; "This procedure violates the First Amendment and cannot continue," *id.* In the end, however, the Court remanded the case to the district court for further proceedings, in particular those related to remedy. *Id.* at 2486.

C. District Court Proceedings

The most immediate effect of the Court's *Janus II* opinion was CMS's prompt cessation of its collection of fees from Mr. Janus and all other nonmembers of the union, and thus the end of AFSCME's receipt of those monies. That relief was undoubtedly welcome for those such as Mr. Janus who fundamentally disagree with the union's mission, but matters did not stop there. Still relying on 42 U.S.C. § 1983 for his right of action, Mr. Janus followed up on the Court's decision with a request for damages from AFSCME in the amount of all fair-share fees he had paid. The State of Illinois joined the litigation as an intervenor-defendant in support of AFSCME.

The district court entered summary judgment for AFSCME and Illinois on March 18, 2019. *Janus v. AFSCME, Council 31*, No. 15 C 1235, 2019 WL 1239780 (N.D. Ill. Mar. 18, 2019) ("*Janus III*"). It began with the observation that in 1982, the Supreme Court held that private defendants could in some circumstances act "under color of state law" for purposes of section 1983 by participating in state-created procedural schemes. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941–42 (1982). Although such private defendants are not entitled to the identical immunity defenses that apply to public defendants, the Court later indicated, they may be entitled to an affirmative

defense based on good faith or probable cause. *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) ("*Wyatt I*"). Noting that "every federal appellate court that has considered the good-faith defense [to a damages action] has found that it exists for private parties," the court followed that rule and found that the defense applies here. The key question, it said, is whether the defendant's reliance on an existing law was in good faith. Given the fact that "the statute on which defendant relied had been considered constitutional for 41 years," it found good faith. In so doing, it rejected the idea that earlier intimations from the Court that *Abood* ought to be overruled undermined the necessary good faith. Accordingly, it held that Mr. Janus was not entitled to damages.

Mr. Janus timely filed a notice of appeal on March 27, 2019. We heard oral argument in both Mr. Janus's appeal and a related case, *Mooney v. Ill. Educ. Ass'n*, No. 19-1774, on September 20, 2019. The predicate for each case is the same—the Supreme Court's decision in *Janus II*—but whereas Mr. Janus seeks damages from the union, Mooney insists that her claim lies in equity and is one for restitution. As we explain in more detail in a separate opinion filed in *Mooney*, we find no substantive difference in the two theories of relief, and so much of what we have to say here also applies to Mooney's case.

II

This appeal presents only questions of law. Accordingly, we review the district court's grant of summary judgment in favor of AFSCME *de novo*. *Mazzai v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 959 (7th Cir. 2001).

A. Retroactivity

We begin with the question whether *Janus II* is retroactive. If it is not, that is the end of the line for Mr. Janus, because the union's collection of fair-share fees was expressly permitted by state law and Supreme Court precedent from the time he started his covered work until the Court's decision, which all agree marked the end of his payments. If it is, then we must reach additional questions that also bear on the proper resolution of the case. As we noted earlier, the Supreme Court's opinion did not address retroactivity in so many words.

Mr. Janus relies primarily on *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), for the proposition that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Id.* at 97; see also *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) ("*Harper*. . . held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events."). Mr. Janus's assertion is that *all* Supreme Court cases, without exception, "must be applied retroactively." AFSCME responds that "[i]t is not at all clear, in the first place, that the Supreme Court's decision in this case is to be applied retroactively."

We agree with AFSCME that the rules of retroactivity are not as unbending as Mr. Janus postulates. Even in *Harper*, the Court said only that its "consideration of remedial issues meant necessarily that we retroactively applied the rule we announced . . . to the litigants before us." 509 U.S. at 99. Right and

remedy are two different things, and the Court has taken great pains to evaluate them separately. See, *e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.,* 503 U.S. 60, 65–66 (1992) ("As we have often stated, the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place.").

Retroactivity poses some knotty problems. The Supreme Court disapproved of what it called "selective prospectivity" in *Harper* (that is, application of the new rule to the party before the court but not to all others whose cases were pending), but it did not close the door on "pure prospectivity"—*i.e.*, wholly prospective force, equally inapplicable to the parties in the case that announces the rule and all others—as used in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"). In that case, after invalidating a Pennsylvania program permitting nonpublic sectarian schools to be reimbursed for secular educational services, see *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon I*"), the Court affirmed a district court order permitting the state to reimburse the schools for all services performed up to the date of *Lemon I*. *Lemon II*, 411 U.S. at 194. One could argue that similar reliance interests on the part of AFSCME and the state argue for pure prospectivity here.

On the other hand, in later decisions the Supreme Court has stated that the "general practice is to apply the rule of law we announce in a case to the parties before us . . . even when we overrule a case." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Only when there is "grave disruption or inequity involved in awarding retrospective relief to the petitioner" does the option of pure prospectivity come into play. *Ryder v. United*

States, 515 U.S. 177, 184–85 (1995). See also *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 650 (7th Cir. 2014) (*en banc*).

Rather than wrestle the retroactivity question to the ground, we think it prudent to assume for the sake of argument that the *right* recognized in *Janus II* should indeed be applied to the full sweep of people identified in *Harper* (that is, Mr. Janus himself and all others whose cases were in the pipeline at the time of the Court's decision). That appears also to be the approach the district court took. We thus turn to the broader question whether Mr. Janus is entitled to the remedy he seeks.

B. Requirements under Section 1983

Section 1983 supports a civil claim against "every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

1. AFSCME is a "person" that can be sued

To be liable under section 1983 a defendant must be a "person" as Congress used that term. While "person" is a broad word, the Supreme Court has held that states do not fall within its compass. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). But it is hard to find other exclusions. The union, as an unincorporated organization, is a suable "person," and we are satisfied that it is sufficiently like other entities that have been sued under section 1983 to permit this action. Compare *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (municipalities and other local government units are "persons" for purposes of section 1983); *Walsh v. Louisiana High School*

Athletic Ass'n, 616 F.2d 152, 156 (5th Cir. 1980) (voluntary association of schools); *Frohwerk v. Corr. Med. Servs.*, 2009 WL 2840961 (N.D. Ind. Sept. 1, 2009) (prison contractors). *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

2. AFSCME acted "under color of" state law

The next question is whether AFSCME acted under color of state law. Unions generally are private organizations. See, *e.g.*, *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009). Nonetheless, private actors sometimes fall within the statute. See *Lugar*, 457 U.S. at 935. Indeed, the "color of law" requirement for section 1983 is more expansive than, and wholly encompasses, the "state action" requirement under the Fourteenth Amendment. *Id.* For our purposes, the analysis is the same—if AFSCME's receipt from CMS of the fair-share fees is attributable to the state, then the "color of law" requirement is satisfied.

A "procedural scheme created by . . . statute obviously is the product of state action" and "properly may be addressed in a section 1983 action." *Id.* at 941. "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); see also *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992). Here, AFSCME was a joint participant with the state in the agency-fee arrangement. CMS deducted fair-share fees from the employees' paychecks and transferred that money to the union, which then spent it on authorized labor-management activities pursuant to the collective bargaining agreement. This is sufficient for the union's conduct to amount to state action. We

therefore conclude that AFSCME is a proper defendant under section 1983.

C. Statute of Limitations

Mr. Janus's claim is also timely under the applicable statute of limitations. Section 1983 does not have its own organic statute of limitations but rather borrows the state statute of limitations for personal-injury actions. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985). In Illinois, this is two years. 735 ILCS § 5/13–202. "The claim accrues when the plaintiff knows or should know that his or her constitutional rights have been violated." *Draper v. Martin*, 664 F.3d 1110, 1113 (7th Cir. 2011).

In this case, the statute began running on the date of the Supreme Court's decision in *Janus II*: June 27, 2018. Mr. Janus neither knew nor should have known any earlier that his constitutional rights were violated, because before then it was the settled law of the land that the contrary was true. Thus, his suit is timely.

III

A. Existence of Good-faith Defense

We now turn to the ultimate question in this case: to what remedy or remedies is Mr. Janus entitled? As the Supreme Court wrote in *Davis v. United States*, 564 U.S. 229 (2011), retroactivity and remedy are distinct questions. "Retroactive application does not . . . determine what 'appropriate remedy' (if any) the defendant should obtain." *Id.* at 243; see also *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 189 (1990) (plurality opinion) ("[T]he Court has never equated its retroactivity principles with remedial principles. . . ."). It thus does not necessarily follow

from retroactive application of a new rule that the defendant will gain the precise type of relief she seeks. See *Powell v. Nevada*, 511 U.S. 79, 84 (1994). To the contrary, the Supreme Court has acknowledged that the retroactive application of a new rule of law does not "deprive[] respondents of their opportunity to raise . . . reliance interests entitled to consideration in determining the nature of the remedy that must be provided." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991).

Sometimes the law recognizes a defense to certain types of relief. An example that comes readily to mind is the qualified immunity doctrine, which is available for a public employee if the asserted constitutional right that she violated was not clearly established. See, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). We must decide whether a union may raise any such defense against its liability for the fair-share fees it collected before *Janus II*.

This is a matter of first impression in our circuit. But, as the district court noted, every federal appellate court to have decided the question has held that, while a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under section 1983. See *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275–78 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118–21 (5th Cir. 1993) ("*Wyatt II*").

Mr. Janus takes issue with this consensus position. He points to the text of section 1983, which we grant

says nothing about immunities or defenses. That, he contends, is the end of the matter. "Shall be liable to the party injured" is mandatory language that, in his view, allows for no exceptions. The problem with such an absolutist position, however, is that the Supreme Court abandoned it long ago, when it recognized that liability under section 1983 is subject to common-law immunities that apply to all manner of defendants.

The Court discussed that history in *Wyatt I*, where it noted that despite the bare-bones text of section 1983, it had "accorded certain government officials either absolute or qualified immunity from suit if the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." 504 U.S. at 163–64 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)) (internal quotation marks omitted). In *Wyatt I*, the Court had to decide how far its immunity jurisprudence reached, and specifically, whether *private* parties acting under color of state law would have been able, at the time section 1983 was enacted (in 1871), to invoke the same immunities that public officials had. (That is more than a bit counterfactual, as the Court did not recognize this type of private liability until 1982, but we put that to one side.) Surveying its immunity jurisprudence, including *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Wood v. Strickland*, 420 U.S. 308 (1975), and *Pierson v. Ray*, 386 U.S. 547 (1967), the Court "conclude[ed] that the rationales mandating qualified immunity for public officials are not applicable to private parties." 504 U.S. at 167.

The Court recognized that this outcome risked leaving private defendants in the unenviable position of

being just as vulnerable to suit as public officials, per *Lugar*, but not protected by the same immunity. *Id.* at 168. But, critically for AFSCME, the Court pointed toward the solution to that problem. It distinguished between defenses to suit and immunity from suit, the latter of which is more robust, in that it bars recovery regardless of the merits. *Id.* at 166. It then confirmed that its ruling rejecting qualified immunity did "not foreclose the possibility that private defendants faced with § 1983 liability under [*Lugar*] could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Wyatt I*, 504 U.S. at 169.

Mr. Janus rejects the line that the Court drew between qualified immunity and a defense to liability; he sees it as nothing but a labeling game. But *Wyatt I* directly refutes this criticism. Adding to the language above from the majority, Justice Kennedy, in concurrence, explained why a defense on the merits might be available for private parties even if immunity is not. "By casting the rule as an immunity, we imply the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute." 504 U.S. at 173 (Kennedy, J., concurring). The distinction between an immunity and a defense is one of substance, not just nomenclature, and "is important because there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Id.* at 174; see also *Lugar*, 457 U.S. at 942 n.23 ("Justice Powell is concerned that private individuals who innocently make use of seemingly valid state laws

would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense.").

The *Wyatt I* Court remanded the case to the Fifth Circuit, which decided that the "question left open by the majority"—whether a good-faith defense is available in section 1983 actions—"was largely answered" in the affirmative by the five concurring and dissenting justices. *Wyatt II*, 994 F.2d at 1118. The court accordingly held "that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Id.*

Other circuits followed suit. In *Jordan*, the Third Circuit noted "the [Supreme Court's] statement [in *Wyatt I*] that persons asserting section 1983 claims against private parties could be required to carry additional burdens, and the statements in *Lugar* which warn us [that] a too facile extension of section 1983 to private parties could obliterate the Fourteenth Amendment's limitation to state actions that deprive a person of constitutional rights and the statutory limitation of section 1983 actions to claims against persons acting under color of law." 20 F.3d at 1277 (cleaned up). Those considerations, the court said, lead to the conclusion that "'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." *Id.* The Sixth Circuit concurred in *Vector Research*,

76 F.3d at 699, as did the Ninth Circuit in *Clement*, 518 F.3d at 1096–97. Most recently, in a case decided after *Harris v. Quinn*, the Second Circuit allowed a good-faith defense to a section 1983 claim for reimbursement of agency fees paid prior to decision. *Jarvis v. Cuomo*, 660 F. App'x 72, 75–76 (2d Cir. 2016).

Mr. Janus pushes back against these decisions with the argument that there is no common-law history before 1871 of private parties enjoying a good-faith defense to constitutional claims. As we hinted earlier, however, the reason is simple: the liability of private parties under section 1983 was not clearly established until, at the earliest, the Court's decision in *United States v. Price*, 383 U.S. 787 (1966). For nearly 100 years, nothing would have prompted the question.

We now join our sister circuits in recognizing that, under appropriate circumstances, a private party that acts under color of law for purposes of section 1983 may defend on the ground that it proceeded in good faith. The final question is whether that defense is available to AFSCME.

B. Good-faith Defense for AFSCME

Although this is a new question for us, we note that every district court that has considered the precise question before us—whether there is a good-faith defense to liability for payments collected before *Janus II*—has answered it in the affirmative.[1] While

---

[1] See *Hamidi v. SEIU Local 1000*, 2019 WL 5536324 (E.D. Cal. Oct. 25, 2019); *LaSpina v. SEIU Pennsylvania State Council*, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019); *Casanova v. International Ass'n of Machinists, Local 701*, No. 1:19-cv-00428, Dkt. #22 (N.D. Ill. Sept. 11, 2019); *Allen v. Santa Clara Cty. Correctional Peace Officers Ass'n*, 2019 WL 4302744 (E.D. Cal. Sept. 11, 2019); *Ogle v. Ohio Civil Serv. Emp. Ass'n*, 2019 WL

those views are not binding on us, the unanimity of opinion is worth noting.

The first task we have under *Wyatt I* is to identify the "most closely analogous tort" to which we should turn for guidance. 504 U.S. at 164 (citations and internal quotation marks omitted). Arguing in some tension with his statute-of-limitations position, Mr. Janus says that his claim lacks any common law analogue. His back-up position is that good faith is pertinent

---

3227936 (S.D. Ohio July 17, 2019), appeal pending, No. 19-3701 (6th Cir.); *Diamond v. Pennsylvania State Educ. Ass'n*, 2019 WL 2929875 (W.D. Pa. July 8, 2019), appeal pending, No. 19-2812 (3d Cir.); *Hernandez v. AFSCME California*, 386 F. Supp. 3d 1300 (E.D. Cal. 2019); *Doughty v. State Employee's Ass'n*, No. 1:19-cv-00053- PB (D.N.H. May 30, 2019), appeal pending, No. 19-1636 (1st Cir.); *Babb v. California Teachers Ass'n*, 378 F. Supp. 3d 857 (C.D. Cal. 2019); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 (D. Conn. Apr. 26, 2019), appeal pending, No. 19-1563 (2d Cir.); *Akers v. Maryland Educ. Ass'n*, 376 F. Supp. 3d 563 (D. Md. 2019), appeal pending, No. 19-1524 (4th Cir.); *Bermudez v. SEIU Local 521*, 2019 WL 1615414 (N.D. Cal. Apr. 16, 2019); *Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019), appeal pending, No. 19-3250 (6th Cir.); *Hough v. SEIU Local 521*, 2019 WL 1274528 (N.D. Cal. Mar. 20, 2019), amended, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), appeal pending, No. 19-15792 (9th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), appeal pending, No. 19-35299 (9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), appeal pending, No. 19-35290 (9th Cir.); *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Or. 2019), appeal pending, No. 19-35191 (9th Cir.); *Danielson v. AFSCME, Council 28*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018), appeal pending, No. 18-36087 (9th Cir.). See also *Winner v. Rauner*, 2016 WL 7374258 (N.D. Ill. Dec. 20, 2016) (post-*Harris* claim for fee reimbursement); *Hoffman v. Inslee*, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016) (same). But see *Lamberty v. Connecticut State Police Union*, 2018 WL 5115559 (D. Conn. Oct. 19, 2018) (dismissing for lack of standing but implying plaintiffs were entitled to previously withheld fees, plus interest).

only if the underlying offense has a state-of-mind element, and he asserts that the most analogous tort in his case lacks such an element.

Mr. Janus compares the First Amendment violation in his case to conversion. But that analogy does not work, at least with regard to the state's deduction of fair-share fees and its transfer of those fees to the union. Conversion requires an intentional and serious interference with "the right of another to control" a chattel. Restatement (Second) of Torts § 222A (1965). At the time AFSCME received Mr. Janus's fair-share fees, he had no "right to control" that money. Instead, under Illinois law and *Abood*, the union had a right to the fees under the collective bargaining agreement with CMS. This rules out conversion. As the Supreme Court said in *Chicot Cnty. Drain- age Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), "the actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored." *Id.* at 374.

There are also at least two privileges that may be relevant to a conversion-style claim: authority based upon public interest, Restatement (Second) of Torts § 265 (1965), and privilege to act pursuant to court order, Restatement (Second) of Torts § 266 (1965). Section 265 provides that "one is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority." While the usual context for the assertion of this privilege is law enforcement, it is not too much of a stretch to apply it to the union's conduct here. CMS and AFSCME acted pursuant to

state law. That sounds like action in discharge of a duty imposed by law. Section 266, which provides a privilege when one acts pursuant to a court order, is not directly applicable because there was no court order directing AFSCME to receive fair-share fees—*Abood* was permissive, not mandatory. Nevertheless, CMS and AFSCME did rely on the Supreme Court's opinion upholding the legality of exactly this process.

AFSCME contends that the better analogy is to the tort of abuse of process. Abuse of process occurs where a party "uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." Restatement (Second) of Torts § 682 (1977). Alternatively, the most analogous tort might be interference with contract. See Restatement (Second) of Torts § 766A (1979). Under the agency-fee arrangement, a certain portion of the salary CMS contracted to pay employees went instead to the union. This arguably made the contract less lucrative for objecting employees and violated their First Amendment rights.

None of these torts is a perfect fit, but they need not be. We are directed to find the *most analogous* tort, not the exact-match tort. This is inherently inexact. Although there are reasonable arguments for several different torts, we are inclined to agree with AFSCME that abuse of process comes closest. But perhaps the search for the best analogy is a fool's errand. As several district courts have commented, the Supreme Court in *Wyatt I* embarked on the search for the most analogous tort only for *immunity* purposes—the Court never said that the same methodology should be used for the good-faith defense. See, *e.g.*, *Carey*, 364 F. Supp. 3d at 1229–30; *Babb*, 378 F. Supp. 3d at 872–73; *Diamond*, 2019 WL 2929875 at *25–26. In the alterna-

tive, therefore, we leave common-law analogies behind and consider the appropriateness of allowing a good-faith defense on its own terms.

C. Good-faith Defense under *Wyatt I*

Like our sister circuits, we read the Court's language in *Wyatt I* and *Lugar*, supplemented by Justice Kennedy's opinion concurring in *Wyatt I*, as a strong signal that the Court intended (when the time was right) to recognize a good-faith defense in section 1983 actions when the defendant reasonably relies on established law. This is not, we stress, a simple "mistake of law" defense. Neither CMS nor AFSCME made any mistake about the state of the law during the years between 1982 and June 27, 2018, when *Janus II* was handed down. *Abood* was the operative decision from the Supreme Court from 1977 onward, until the Court exercised its exclusive prerogative to overrule that case. Like its counterparts around the country, the State of Illinois relied on *Abood* when it adopted a labor relations scheme providing for exclusive representation of public-sector workers and the remit of fair-share fees to the recognized union. The union then relied on that state law in its interactions with other actors.

We realize that there were signals from some Justices during the years leading up to *Janus II* that indicated they were willing to reconsider *Abood*, but that is hardly unique to this area. Sometimes such reconsideration happens, and sometimes, despite the most confident predictions, it does not. See, *e.g.*, *Dickerson v. United States,* 530 U.S. 428 (2000) (reaffirming the *Miranda* rule); see also *Agostini*, 521 U.S. at 237 ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier prece-

dent." (cleaned up)). The Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future.

Notably, Mr. Janus does not allege that CMS and AFSCME, acting pursuant to state law, failed to comply with *Abood*. Mr. Janus says only that AFSCME did not act in good faith because it "spurned efforts to have agency fees placed in escrow while their constitutionality was determined." But AFSCME was under no legal obligation to escrow the fair-share fees for an indefinite period while the case was being litigated. Such an action, as AFSCME says, would (in the absence of a court order requiring security of some kind) "have been hard to square with the fiduciary duty the Union owes to its own members," as the unit's exclusive representative.

Until *Janus II* said otherwise, AFSCME had a legal right to receive and spend fair-share fees collected from nonmembers as long as it complied with state law and the *Abood* line of cases. It did not demonstrate bad faith when it followed these rules.

D. Entitlement to Money Damages

No one doubts that Mr. Janus is entitled to declaratory and injunctive relief. The Supreme Court declared that the *status quo* violated his First Amendment rights and that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 138 S. Ct. at 2486. Mr. Janus is now protected from that practice. Any remaining relief was for the district court to consider. That court declined to grant monetary damages, on the ground that AFSCME's good-faith defense shielded the union from such liability. We agree with that conclusion.

While this may not be all that Mr. Janus hoped for in this litigation, it is not unusual for remedies to be curtailed in light of broader legal doctrines. Moreover, though Mr. Janus contends that he did not want any of the benefits of AFSCME's collective bargaining and other representative activities over the years, he received them. Putting the First Amendment issues that concerned the Supreme Court in *Janus II* to one side, there was no unjust "windfall" to the union, as Mr. Janus alleges, but rather an exchange of money for services. Our decision in *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989) is on point:

> [T]he union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things . . . . The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them.

Id. at 1316.

We have followed similar principles in the ERISA context. "If restitution would be inequitable, as where the payor obtained a benefit that he intends to retain from the payment that he made and now seeks to take back, it is refused." *Operating Eng'rs Local 139 Health*

Benefit Fund v. Gustafson Const. Corp., 258 F.3d 645, 651 (7th Cir. 2001); see also *Constr. Indus. Ret. Fund of Rockford, Ill. v. Kasper Trucking, Inc.*, 10 F.3d 465, 467 (7th Cir. 1993) ("The welfare fund pooled the money to provide benefits for all persons on whose behalf contributions were made. Because the drivers received the health coverage for which they paid through the deductions Kasper sent to the fund, no one is entitled to restitution."); *UIU Severance Pay Tr. Fund v. Local Union No. 18-U, United Steelworkers of Am.*, 998 F.2d 509, 513 (7th Cir. 1993) ("[B]ecause the cause of action we are authorizing is equitable in nature, recovery will not follow automatically upon a showing that the Union contributed more than was required but only if the equities favor it." (internal quotation marks omitted)). We conclude that Mr. Janus has received all that he is entitled to: declaratory and injunctive relief, and a future free of any association with a public union.

IV

Before closing, we emphasize again that the good-faith defense to section 1983 liability is narrow. It is not true, as Mr. Janus charges, that this defense will be available to "every defendant that deprives any person of any constitutional right." We predict that only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute. But for those rare occasions, following the lead first of the Supreme Court in *Wyatt I* and second of our sister circuits, we recognize a good-faith defense for private parties who act under color of state law for purposes of section 1983.

We AFFIRM the judgment of the district court.

MANION, *Circuit Judge*, concurring. The court's opinion in this challenging case is thorough, and I concur with the court's ultimate conclusion. I have a couple additional thoughts. Some might observe that *Abood* had some benefit to the objectors because they no longer had to pay service fees equal to union dues as a condition of employment. But for 41 years, the nonunion employees had to pay their "fair share."

The unions received a huge windfall for 41 years. As the Supreme Court acknowledged in *Janus II*, *Abood* was wrong, so the unions got what the Court called a "considerable windfall." The Court in *Janus II* sums it up pretty well:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2485–86 (2018).

Even though the Supreme Court reached the wrong result in *Abood* 41 years before *Janus II*, the unions justify their acceptance of many millions of dollars because they accepted the money in "good faith." Probably a better way of looking at it would be to say

rather than good faith, they had very "good luck" in receiving this windfall for so many years. Since the court is not holding that the unions must repay a portion of the windfall, they can remind themselves of their good luck for the years ahead.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed March 18, 2019]

Case No. 15 C 1235

MARK JANUS,

Plaintiff,

v.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 31, AFL-CIO, et al.,

Defendants,

LISA MADIGAN, Attorney General of the
State of Illinois,

Intervenor-Defendant.

Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiffs Mark Janus and Brian Trygg brought a second amended complaint against defendants American Federal of State, County and Municipal Employees, Council 31 ("AFSCME"), the General Teamsters/ Professional & Technical Employees Local Union 916 ("Local 916"), and Michael Hoffman in his official capacity as Director of the Illinois Department of

Central Management Services, alleging that plaintiffs were unconstitutionally being forced to pay compulsory union fees ("fair-share fees") to the defendant Unions as a condition of their employment pursuant to Illinois' Public Labor Relations Act ("IPLRA"), 5 ILCS 315/6. They sought a declaratory judgment against the Director of Central Management Services and the Unions declaring that forcing plaintiffs to pay fair-share fees violates the First Amendment; an injunction prohibiting defendants from collecting such fees in the future; and damages from the Unions for the fees wrongfully collected.

This court granted defendants' motion to dismiss, concluding that the Supreme Court had held that such fees were lawful in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). Plaintiffs had argued that *Abood* was wrongfully decided but recognized that it was the current law and controlling on this court. The Seventh Circuit affirmed as to *Janus,* agreeing that the case was controlled by *Abood,* which only the Supreme Court could overrule. *Janus v. AFSCME Council 31,* 851 F.3d 746, 747 (7th Cir. 2017). As to plaintiff Trygg, the court affirmed on a separate ground on claim preclusion. *Id.* at 748. Janus (but not Trygg) sought certiorari, asking the Supreme Court to overrule *Abood.* In a 5 to 4 decision, the Court did just that, holding that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus v. AFSCME Council 31,* __ U.S. __, 138 S.Ct. 2448, 2486 (2018). The Court did not order any specific relief, instead remanding for further proceedings consistent with its opinion. *Id.* Immediately after that decision was issued, AFCME stopped collecting fair-share fees; and at this time Janus is no longer employed by the State of Illinois.

The parties agree that the lone issue remaining before this court is whether plaintiff Janus can collect damages from AFSCME in the amount of the fair-share fees he had paid prior to the Court's decision. The material facts are not in dispute and the parties have filed cross-motions for summary judgment. For the reasons discussed below, defendant AFSCME's motion [Doc. 175] is granted and plaintiff's motion [Doc. 177] is denied.

DISCUSSION

Defendant AFSCME argues that plaintiff's claim for retrospective damages under 42 U.S.C. § 1983 fails as a matter of law because defendant has a "good-faith" defense for the fees it collected prior to the Supreme Court's decision in the instant case. There can be no doubt that for the 41 years prior to the Court's decision, unions such as defendant were permitted to collect fair-share fees. *See Abood,* 431 U.S. 209. Based on *Abood,* Illinois enacted the IPLRA which authorized the collection of such fees. Defendant AFSCME entered into a collective bargaining agreement ("CBA") with the Department of Central Management Services pursuant to this valid statue and collected the fees at issue. In contrast, plaintiff claims that "good-faith" is not a defense to a deprivation of First Amendment rights or to liability under § 1983.

Plaintiffs' § 1983 claims is brought in accord with *Lugar v. Admondson Oil Co. Inc.,* 457 U.S. 922, 932-37 (1982), in which the Supreme Court held that private defendants invoking a state-created attachment statute act under color of law within the meaning of § 1983 if their actions are fairly attributable to the State. To satisfy this requirement, two conditions must be met. First, the "deprivation must be caused by the exercise of some right or privilege created by the

State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 937. "Second, the private party must have 'acted together with or . . . obtain significant aid from State officials' or engaged in conduct 'otherwise chargeable to the State.'" *Wyatt v. Cole,* 504 U.S. 158, 162 (1992) *(quoting Lugar,* 457 U.S. at 937). *Lugar* specifically left open the question whether private defendants charged with § 1983 liability for invoking a state statute later declared unconstitutional are entitled to qualified immunity. *Lugar,* 457 U.S. at 942, n. 23.

In *Wyatt,* the Court answered that question in the negative, holding that qualified immunity "acts to safeguard government, and thereby protects the public at large, not to benefit its agents," rationales that "are not transferable to private parties." *Wyatt,* 504 U.S. at 168. The *Wyatt* court specifically noted, however, that the issued before it was very narrow: "whether private persons, who conspire with state officials to violate constitutional rights, have available the good-faith immunity applicable to public officials." *Id.* at 168. The Court specifically noted that "[i]n so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under [*Lugar*] . . . could be entitled to an affirmative defense based on good-faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Id.* at 169.

On remand, the Fifth Circuit noted that the five concurring and dissenting justices in *Wyatt* all indicated "support for a standard that would relieve private parties who reasonably relied on a state's statute of liability." *Wyatt v. Cole,* 994 F.3d 1113, 1118 (5th Cir. 1993). It thus held that "private defendants sued on

the basis of *Lugar* may be held liable for damages for under § 1983 only if they fail to act in good-faith in invoking the unconstitutional state procedure, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Id.*

The Fifth Circuit is not alone. Indeed, as Judge Shah of this district noted in a case almost identical to the instant case, although the Seventh Circuit has not yet addressed the issue, "[e]very federal appellate court that has considered the good-faith defense, though, has found that it exists for private parties." *Winner v. Rauner,* 2016 WL 7374258, *5 (N.D. Ill. Sept. 20, 2016) *(citing Pinsky v. Duncan,* 79 F.3d 306, 311-12 (2d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1275-78 (3d Cir. 1994); *Wyatt,* 994 F.2d 1118-21; *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.,* 76 F.3d 692, 698-99 (6th Cir. 1996); *Clemente v. City of Glendale,* 518 F.3d 1090, 1096-97 (9th Cir. 2008)).

Plaintiff argues that even if a good-faith defense applies, it is available only if state of mind could be an element of defense to the alleged deprivation of constitutional rights. And, according to plaintiff, no such state of mind is required to establish that defendant deprived plaintiff of his First Amendment rights.

The court disagrees. As defendants argue, the relevant question for a good-faith defense is not the nature of the particular statute on which the defendant relied, but whether that reliance was in good faith. As the Fifth Circuit held, that depends on whether the defendant knew or should have known that the statute on which the defendant relied was unconstitutional. *Wyatt,* 994 F.3d at 1118.

In the instant case, the statute on which defendant relied had been considered constitutional for 41 years. It is true, as plaintiff argues, that in *Harris v. Quinn,* 134 S.Ct. 2618 (2014), the Court found that collection of compulsory fair-share fees from in-home-care personal assistants who were not full-fledged public employees, was unconstitutional, but left for another day whether *Abood* remained good law. Plaintiffs argue that, as the *Janus* court stated, "unions have been on notice for years regarding this Court's misgivings about *[Abood],"* and that "any public-sector union seeking an agency fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Janus,* 138 S.Ct. at 2484.

Despite these statements in *Janus,* prior to the instant case *Abood* remained the law of the land. And, despite these statements, there was no way for defendant to predict the resolution of this case. Indeed, had the general and/or presidential election resulted differently, the composition of the Supreme Court that decided the case may well have been different, leading to a different result. As Judge Shah noted in *Winner,* "`even the clarity of hindsight is not persuasive that the constitutional resolution [. . .] could be predicted with assurance sufficient to undermine [. . .] reliance on [the challenged law].'" *Winner,* 2016 WL 7374258 at *5 *(quoting Lemon v. Kurtzman,* 411 U.S. 192, 207 (1973)). Defendants' action were in accord with a constitutionally valid state statute. Nothing presented by plaintiff prevents application of that defense to defendant AFSCME. Defendant AFSCME followed the law and could not reasonably anticipate that the law would change. Consequently, the court concludes that the good faith defense applies, and plaintiff is not entitled to any damages. *See Danielson v. AFSCME*

Council 28, 340 F.Supp.3d 1083, 1087 (W.D. Wash. 2018); *Cook v. Brown,* 2019 WL 982384 (D. Or. Feb 28, 2019); *Carey v. Inslee,* 2019 WL 1115259 (W.D. Wash. Mar. 11, 2019).

CONCLUSION

For the reasons described above, defendant's motion for summary judgment [Doc. 175] is granted. Plaintiff's motion for summary judgment [Doc. 177] is denied.

ENTER: March 18, 2019

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS

Case No. 15 cv 1235

MARK JANUS,

Plaintiff(*s*),

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al*.

Defendant(*s*).

Judge Robert W. Gettleman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre-judgment interest.

☐ does not include pre-judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31
and against plaintiff(s) MARK JANUS,

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Robert W. Gettleman on a motion

Date: 3/18/2019 Thomas G. Bruton, Clerk of Court

Claire E. Newman, Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 16-3638

MARK JANUS and BRIAN TRYGG,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al*.,

Defendants-Appellees,

and

LISA MADIGAN, Attorney General of the State of Illinois,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15 C 1235 – Robert W. Gettleman, *Judge*.

September 24, 2018

ORDER

The Supreme Court granted plaintiff Mark Janus's petition for certiorari, overruled its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and

reversed and remanded for further proceedings consistent with its opinion. *Janus v. Am. Fed'n of State, Cty., & Mun. Emp's, Council 31*, 138 S. Ct. 2448, 2486 (2018). We ordered the parties to file statements of position under Circuit Rule 54. They have done so.

We now REVERSE the district court's judgment as to Janus and REMAND for further proceedings consistent with the Supreme Court's opinion. As to plaintiff Brian Trygg, however, the district court's judgment is AFFIRMED. We previously affirmed the dismissal of his claim on preclusion grounds, *see Janus v. Am. Fed'n of State, Cty., & Mun. Emp's, Council 31*, 851 F.3d 746, 748 (7th Cir. 2017), and he did not petition for certiorari.

APPENDIX D

138 S.Ct. 2448

SUPREME COURT OF THE UNITED STATES

No. 16–1466

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al*.,

Respondents.

Argued Feb. 26, 2018
Decided June 27, 2018

Attorneys and Law Firms

William L. Messenger, Springfield, VA, for Petitioner.

Noel J. Francisco, Solicitor General, for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

David L. Franklin, Solicitor General, Chicago, IL, for the State Respondents.

David C. Frederick, Washington, DC, for the Respondent AFSCME Council 31.

Dan K. Webb, Joseph J. Torres, Lawrence R. Desideri, Winston & Strawn LLP, Chicago, IL, Jacob H. Huebert, Jeffrey M. Schwab, Liberty Justice Center, Chicago, IL, William L. Messenger, Aaron B. Solem,

c/o National Right to Work Legal Defense Foundation, Inc., Springfield, VA, for Petitioner.

Lisa Madigan, Attorney General, State of Illinois, David L. Franklin, Solicitor General, Counsel of Record, Brett E. Legner, Deputy Solicitor General, Frank H. Bieszczat, Jane Flanagan, Sarah A. Hunger, Richard S. Huszagh, Lindsay Beyer Payne, Andrew Tonelli, Assistant Attorneys General, Chicago, IL, for Respondents Lisa Madigan and Michael Hoffman.

John M. West, Bredhoff & Kaiser, PLLC, Washington, DC, Judith E. Rivlin, Teague P. Paterson, AFSCME, Washington, DC, David C. Frederick, Derek T. Ho, Benjamin S. Softness, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC, for Respondent American Federation of State, County, and Municipal Employees, Council 31.

OPINION

Justice ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical

problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, § 315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§ 315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§ 315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours [,] and other conditions of employment." § 315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies. § 315/4; see § 315/6(c); see generally, *e.g., Illinois Dept. of Central Management Servs. v. AFSCME, Council 31,* No.

S–CB–16–17 etc., 33 PERI ¶ 67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§ 315/6(c)-(d), 315/10(a)(4); see *Matthews v. Chicago Transit Authority,* 2016 IL 117638, 402 Ill.Dec. 1, 51 N.E.3d 753, 782; accord, *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 683–684, 64 S.Ct. 830, 88 L.Ed. 1007 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. § 315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood,* nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U.S., at 235, 97 S.Ct. 1782; see *id.,* at 235–236, 97 S.Ct. 1782. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters

affecting wages, hours [,] and conditions of employment." § 315/6(e); see also § 315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." § 315/3(g); see § 315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," § 315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris v. Quinn,* 573 U.S. ——, ——————, 134 S.Ct. 2618, 2633–2634, 189 L.Ed.2d 620 (2014) (describing this process). Nonmembers need not be asked, and they are not required to consent before the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.,* at 310, 106 S.Ct. 1066. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris, supra,* at ——, 134 S.Ct., at 2633.

As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se,* but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and con-

ventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.,* at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.,* at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.,* at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.,* at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Id.,* at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.,* at 14a—which would amount to about $535 per year.

Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.,* at 60.

Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E.g., id.,* at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.,* at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.,* at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F.3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U.S. ——, 138 S.Ct. 54, 198 L.Ed.2d 780 (2017).

II

Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.,* at

13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893 (1914), actually works against them. That case concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.,* at 162, 34 S.Ct. 550. One creditor filed suit before the 6–month starting date, but another intervened within the 6–to–12–month window. The Court held that the "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated

treating "intervention . . . as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e.g.,* filing a separate complaint and properly serving the defendants. *Id.,* at 163–164, 34 S.Ct. 550. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood,* the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U.S., at 232, 97 S.Ct. 1782, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox v. Service Employees,* 567 U.S. 298, 311, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012), and that *Abood's* "analysis is questionable on several grounds," *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632; see *id.,* at ——————, 134 S.Ct., at 2632–2634 (discussing flaws in *Abood's* reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris, supra,* at ——————, 134 S.Ct., at 2638–2639, while leaving for another day the question whether *Abood* should be overruled, *Harris, supra,* at ——, n. 19, 134 S.Ct., at 2638, n. 19; see *Knox, supra,* at 310–311, 132 S.Ct. 2277.

We now address that question. We first consider whether *Abood*'s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); see *Riley v. National*

Federation of Blind of N. C., Inc., 487 U.S. 781, 796–797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256–257, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); accord, *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 9, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec., supra,* at 12, 106 S.Ct. 903 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, see, *e.g., Garrison v. Louisiana,* 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), and it furthers the search for truth, see, *e.g., Thornhill v. Alabama,* 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette, supra,* at 633, 63 S.Ct. 1178; see also *Riley, supra,* at 796–797, 108 S.Ct. 2667 (rejecting "deferential test" for compelled speech claims).

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox, supra,* at 309, 132 S.Ct. 2277; *United States v. United Foods, Inc.,* 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *Abood, supra,* at 222, 234–235, 97 S.Ct. 1782. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves

and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson,* 475 U.S., at 305, n. 15, 106 S.Ct. 1066. We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox, supra,* at 310–311, 132 S.Ct. 2277 (quoting *Ellis v. Railway Clerks,* 466 U.S. 435, 455, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)).

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox, supra*; *Harris, supra*; *Friedrichs v. California Teachers Assn.,* 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*) (affirming decision below by equally divided Court).

In *Knox,* the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U.S., at 309–310, 321–322, 132 S.Ct. 2277. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 562–563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), prior precedent in that area, specifically *United Foods, supra,* had applied what we characterized as "exact-

ing" scrutiny, *Knox,* 567 U.S., at 310, 132 S.Ct. 2277, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U.S., at ——, 134 S.Ct., at 2641. But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.,* at ——, 134 S.Ct., at 2639.

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post,* at 2489 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to

alternative rationales proffered by respondents and their *amici*.

B

In *Abood,* the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U.S., at 224, 97 S.Ct. 1782. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.,* at 220–221, 97 S.Ct. 1782. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.,* at 220, 97 S.Ct. 1782. And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]." *Id.,* at 221, 97 S.Ct. 1782.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood's* fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris, supra,* at ——, 134 S.Ct., at 2640.

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency

fees. See 5 U.S.C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members.[1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U.S.C. §§ 1203(a), 1209(c), and about 400,000 are union members.[2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris, supra,* at ——, 134 S.Ct., at 2639 (internal quotation marks omitted).

C

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders'" as justification for agency fees, 431 U.S., at 224, 97 S.Ct. 1782. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent

---

[1] See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

[2] See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), unionstats.com.

[3] See National Conference of State Legislatures, Right–to–Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx# chart; see also, *e.g.,* Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

nonmembers from enjoying the benefits of union representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e.g.,* Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Knox,* 567 U.S., at 311, 132 S.Ct. 2277. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the

government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.[4]

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. § 315/6(d); see, *e.g.,* Brief for State Respondents 40–41, 45; *post,* at 2490 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the

---

[4] The collective-action problem cited by the dissent, *post,* at 2489–2490, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

contrary, designation as exclusive representative is avidly sought.[5] Why is this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See § 315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. § 315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn. v. Douds,* 339 U.S. 382, 401, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see § 315/6(c), and having dues and fees deducted directly from employee wages, §§ 315/6(e)-(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." Brief for State

---

[5] In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, § 315/9(a) (2016); see, *e.g., County of Du Page v. Illinois Labor Relations Bd.,* 231 Ill.2d 593, 597–600, 326 Ill.Dec. 848, 900 N.E.2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e.g.,* Brief for Employees of the State of Minnesota Court System as *Amici Curiae* 9–17.

Respondents 41; see *Cintron v. AFSCME, Council 31,* No. S–CB–16–032, p. 1, 34 PERI ¶ 105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009); *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, see *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192, 202–203, 65 S.Ct. 226, 89 L.Ed. 173 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.,* at 198–199, 202, 65 S.Ct. 226 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 69, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has

explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. § 315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 58, n. 19, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); see *Stahulak v. Chicago,* 184 Ill.2d 176, 180–181, 234 Ill.Dec. 432, 703 N.E.2d 44, 46–47 (1998); *Mahoney v. Chicago,* 293 Ill.App.3d 69, 73–74, 227 Ill.Dec. 209, 687 N.E.2d 132, 135–137 (1997) (union has "'discretion to refuse to process'" a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris,* 573 U.S., at ——, 134 S.Ct., at 2639 (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied union representation

altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra,* at 2460–2461. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele, supra,* at 198, 65 S.Ct. 226.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox,* 567 U.S., at 311, 321, 132 S.Ct. 2277. We therefore hold that agency fees cannot be upheld on free-rider grounds.

---

[6] There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.,* Cal. Govt.Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

IV

Implicitly acknowledging the weakness of *Abood's* own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.,* at 1. Cf., *e.g.,* Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti v. Ceballos,* O.T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and its progeny would fall. Yet *Pickering,* as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the

exaction of agency fees for political or ideological purposes. 431 U.S., at 234–235, 97 S.Ct. 1782 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e.g., Rutan v. Republican Party of Ill.,* 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Also imperiled would be older precedents like *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (loyalty oaths), *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (disclosure of memberships and contributions), and *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte Curtis,* 106 U.S. 371, 372–373, 1 S.Ct. 381, 27 L.Ed. 232 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "'contemptuous or disrespectful words against

the President'" and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e.g., Brown v. Glines,* 444 U.S. 348, 353, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556–557, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that, "[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U.S., at 144, 103 S.Ct. 1684, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "neces-

sary to protect" fundamental government interests. *Curtis, supra,* at 374, 1 S.Ct. 381.

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid–20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced

---

[7] Indeed, under common law, "collective bargaining was unlawful," *Teamsters v. Terry,* 494 U.S. 558, 565–566, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair v. United States,* 208 U.S. 161, 174–175, 28 S.Ct. 277, 52 L.Ed. 436 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

compelled support for such beliefs as "'sinful and tyrannical,'" *supra,* at 2464, and others expressed similar views.[8]

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti v. Ceballos,* 547 U.S. 410, 421–422, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), or if it involved a matter of only private concern, see *Connick, supra,* at 146–149, 103 S.Ct. 1684. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'" *Harris,* 573 U.S., at ——, 134 S.Ct., at 2642 (quoting *Pickering, supra,* at 568, 88 S.Ct. 1731). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see

---

[8] See, *e.g.,* Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

573 U.S., at ————————, 134 S.Ct., at 2653–2656 (KAGAN, J., dissenting), and we found the argument unpersuasive, see *id.,* at ————————, 134 S.Ct., at 2641–2643. The intervening years have not improved its appeal.

1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U.S., at ——, and n. 26, 134 S.Ct., at 2641, and n. 26. The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U.S., at 230, n. 27, 97 S.Ct. 1782. That aside has no bearing on the agency-fee issue here.[9]

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris, supra,* at ——, 134 S.Ct., at 2641. And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e.g., Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 348–349, 363, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (rejecting efforts to recast *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S.Ct. 1391,

[9] Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 259, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

108 L.Ed.2d 652 (1990)); see also *Citizens United, supra,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

2

Even if that were attempted, the shoe would be a painful fit for at least three reasons.

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States v. Treasury Employees,* 513 U.S. 454, 467, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. See 513 U.S., at 466–468, and n. 11, 115 S.Ct. 1003. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.,* at 468, 115 S.Ct. 1003. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.,* at 466, 115 S.Ct. 1003, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.,* at 475–476, n. 21, 115 S.Ct. 1003; accord, *id.,* at 482–483, 115 S.Ct. 1003 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely

resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post,* at 2493–2494, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti,* 547 U.S., at 421–422, 425–426, 126 S.Ct. 1951. Otherwise, however, it is not easy to imagine a situation in which

a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U.S., at 148, 103 S.Ct. 1684. As a result, we held, the district attorney could fire her for making those comments. *Id.,* at 154, 103 S.Ct. 1684. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood,* a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering,* the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood,* nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering,* Illinois' agency-fee arrangement would not survive.

A

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti, i.e.,* as speech "pursuant to [an employee's] official duties," 547 U.S., at 421, 126 S.Ct. 1951. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect public employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.,* at 425–426, 126 S.Ct. 1951, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees,* not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

Since the union speech paid for by agency fees is not controlled by *Garcetti,* we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U.S., at ————, 134 S.Ct., at 2654–2655 (KAGAN, J., dissenting). We squarely rejected that argument, see *id.,* at ————, 134 S.Ct., at 2642–2643, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern," *id.,* at ————, 134 S.Ct., at 2642–2643.

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems.[10] As of 2013, Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities.[11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills.[12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities.[13] These problems and others led Moody's and S & P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U.S. state."[14]

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is "'squeezing core programs in education,

---

[10] See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19 &step=2# reqid=19&step=2&isuri=1&1921 =survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

[11] PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50# ind4.

[12] See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed–Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

[13] Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

[14] E. Campbell, S & P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U.S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.'" Securities Act of 1933 Release No. 9389, 105 S.E.C. Docket 3381 (2013). It therefore "told the Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.,* at 13; *Illinois Dept. of Central Management Servs. v. AFSCME, Council 31,* No. S–CB–16–17 etc., 33 PERI ¶ 67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.,* at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post,* at 2495 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e.g.,* Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as

Amici Curiae 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and education is typically the largest component of state and local government expenditures.[15]

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?[16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots?[17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

---

[15] See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, pp. 306, Table 476, 321, Table 489.

[16] See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

[17] See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low–Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21] and minority religions.[22] These are sensitive political topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder v. Phelps,* 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.,* at 452, 131 S.Ct. 1207.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post,* at 2496. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post,* at 2495. For instance, the Union respondent in this case recently

---

[18] See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

[19] See Reagan, Anti–Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

[20] See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L.A. Times, Oct. 16, 2011, p. A1.

[21] See Goodstein, A Web of Faith, Law and Science in Evolution Suit, N.Y. Times, Sept. 26, 2005, p. A1.

[22] See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State v. AFSCME Council 31,* 2016 IL 118422, 401 Ill.Dec. 907, 51 N.E.3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

C

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra,* at 2465–2469—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." 573 U.S., at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting); see also *post,* at 2489–2490 (KAGAN, J., dissenting). This was not "the interest *Abood* recognized and protected," *Harris, supra,* at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post,* at 2490–2491, 2492–2493, ample experience, as we have noted, *supra,* at 2465–2466, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context,

see *supra,* at 2472–2473, the balance tips decisively in favor of the employees' free speech rights.[23]

We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S., at 568, 88 S.Ct. 1731. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial

---

[23] Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post,* at 2495–2497. Both hypotheticals are short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.

In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post,* at 2496. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.

In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post,* at 2496. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering* balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post,* at 2496. And the time and place of the agitation would also be important.

speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See *supra,* at 2464 –2465. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering, supra,* at 564–566, 88 S.Ct. 1731 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin v. McPherson,* 483 U.S. 378, 392, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees,* 513 U.S., at 477, 115 S.Ct. 1003 (holding federal-employee honoraria ban unconstitutional).

VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We will not overturn a past deci-

sion unless there are strong grounds for doing so. *United States v. International Business Machines Corp.,* 517 U.S. 843, 855–856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996); *Citizens United,* 558 U.S., at 377, 130 S.Ct. 876 (ROBERTS, C.J., concurring). But as we have often recognized, *stare decisis* is "'not an inexorable command.'" *Pearson v. Callahan,* 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); see also *Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Agostini v. Felton,* 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Payne, supra,* at 828, 111 S.Ct. 2597.

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini, supra,* at 235, 117 S.Ct. 1997. And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 500, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Citizens United, supra,* at 362–365, 130 S.Ct. 876 (overruling *Austin,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652); *Barnette,* 319 U.S., at 642, 63 S.Ct. 1178 (overruling *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)).

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood's* reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citizens United,* 558 U.S., at 363–364, 130 S.Ct. 876; *id.,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring); *Lawrence,* 539 U.S., at 577–578, 123 S.Ct. 2472, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U.S., at ————, 134 S.Ct., at 2632–2634. We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employes v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U.S., at 226, 97 S.Ct. 1782. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization* " of *private-sector* union shops under the Railway Labor Act. *Street, supra,* at 749, 81 S.Ct. 1784 (emphasis added).[24] *Abood* failed to

[24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop

appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See *Harris, supra,* at ——, 134 S.Ct., at 2632.

Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson,* the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U.S., at 233–235, 76 S.Ct. 714. After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.,* at 238, 76 S.Ct. 714; see *Harris, supra,* at ——, 134 S.Ct., at 2632. For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U.S., at 749–750, 768–769, 81 S.Ct. 1784. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris,* 573 U.S., at ——,

---

arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 53, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Compare, *e.g., White v. Communications Workers of Am., AFL–CIO, Local 1300,* 370 F.3d 346, 350 (C.A.3 2004) (no state action), and *Kolinske v. Lubbers,* 712 F.2d 471, 477–478 (C.A.D.C.1983) (same), with *Beck v. Communications Workers of Am.,* 776 F.2d 1187, 1207 (C.A.4 1985) (state action), and *Linscott v. Millers Falls Co.,* 440 F.2d 14, 16, and n. 2 (C.A.1 1971) (same). We reserved decision on this question in *Communications Workers v. Beck,* 487 U.S. 735, 761, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), and do not resolve it here.

134 S.Ct., at 2632. As we said in *Harris,* "[s]urely a First Amendment issue of this importance deserved better treatment." *Ibid.*

Abood's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra,* at 2464–2465, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street,* which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S., at 222, 97 S.Ct. 1782 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the

designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. See *supra,* at 2465–2466; *Harris, supra,* at 2465–2466, 134 S.Ct., at 2640.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political'" speech. 431 U.S., at 226, 97 S.Ct. 1782. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.,* at 228, 97 S.Ct. 1782; see *id.,* at 228–231, 97 S.Ct. 1782. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. *Id.,* at 229, 97 S.Ct. 1782. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632.

Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Id.,* at ——, 134 S.Ct., at 2632. Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that

would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." *Ibid.* Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." *Id.,* at ——, 134 S.Ct., at 2633.

In sum, as detailed in *Harris, Abood* was not well reasoned.[25]

B

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo v. Louisiana,* 556 U.S. 778, 792, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), and that factor also weighs against *Abood*.

1

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be "'germane'" to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U.S., at 519, 111 S.Ct. 1950, but the Court splintered over the application of this test, see *id.,* at 519–522, 111 S.Ct. 1950 (plurality

---

[25] Contrary to the dissent's claim, see *post,* at 2497, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e.g., Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defend [its actual] reasoning." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 363, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *id.,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring).

opinion); *id.,* at 533–534, 111 S.Ct. 1950 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.,* at 551, 111 S.Ct. 1950 (opinion of Scalia, J.), rendering the test "altogether malleable" and "no[t] principled," *id.,* at 563, 111 S.Ct. 1950 (KENNEDY, J., concurring in judgment in part and dissenting in part).

Justice Scalia presciently warned that *Lehnert*'s amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.,* at 551, 111 S.Ct. 1950, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education funding was not chargeable. *Id.,* at 519–522, 111 S.Ct. 1950. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.,* at 533–542, 111 S.Ct. 1950. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox,* for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox v. Service Employees,* O.T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U.S., at 320–321, 132 S.Ct. 2277, but the dissent refused to do so, *id.,* at 336, 132 S.Ct. 2277 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That

formulation is broad enough to encompass just about anything that the union might choose to do.

Respondents agree that *Abood's* chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that "a firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 66; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U.S., at 306, 106 S.Ct. 1066, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	Total Expense	Chargeable Expense
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.[26]

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e.g., Knox v. Chiang,* 2013 WL 2434606, *15 (E.D.Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1 million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up

[26] For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post,* at 2498–2499 (KAGAN, J., dissenting).

at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

C

Developments since *Abood,* both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris,* 573 U.S., at ——, 134 S.Ct., at 2634; *Abood,* 431 U.S., at 220–222, 97 S.Ct. 1782. But, as already noted, experience has shown otherwise. See *supra,* at 2465–2466.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By 2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, pp. 17, Table 14, 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris, supra,* at ——, 134 S.Ct., at 2627; *Knox,* 567 U.S., at 311, 132 S.Ct. 2277. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the "'exacting scrutiny'" applied in other cases involving significant impingements on First Amendment rights. 431 U.S., at 259, 97 S.Ct. 1782; see *id.,* at 259–260, and n. 14, 97

S.Ct. 1782. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e.g., Roberts,* 468 U.S., at 623, 104 S.Ct. 3244; *United Foods,* 533 U.S., at 414, 121 S.Ct. 2334. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox, supra,* at 314, 132 S.Ct. 2277; *Harris, supra,* at ————, 134 S.Ct., at 2639.

Abood particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party. See *Elrod,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547; *Branti,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574; *Rutan,* 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52; *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan, supra,* at 95, 110 S.Ct. 2729 (Scalia, J., dissenting); see also *Elrod,* 427 U.S., at 353, 96 S.Ct. 2673 (plurality opinion); *id.,* at 377–378, 96 S.Ct. 2673 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood, supra,* at 260, n. 14, 97 S.Ct. 1782 (opinion concurring in judgment) (citing *Elrod, supra,* at 376–380, 382–387, 96 S.Ct. 2673 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political pat-

ronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood,* we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

In some cases, reliance provides a strong reason for adhering to established law, see, *e.g., Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202–203, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991), and this is the factor that is stressed most strongly by respondents, their *amici,* and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post,* at 2498–2501 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona v. Gant,* 556 U.S. 332, 349, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota v. Wayfair, Inc., ante,* at 20, —— U.S. ——, 138 S.Ct.

2080, —— L.Ed.2d ——, 2018 WL 3058015 (2018); see *supra,* at 2480–2482.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox,* decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U.S., at 311, 132 S.Ct. 2277. Two years later in *Harris*, we were asked to overrule *Abood,* and while we found it unnecessary to take that step, we cataloged *Abood's* many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs v. California Teachers Assn.,* 576 U.S. ——, 136 S.Ct. 2545, 195 L.Ed.2d 880 (2016). After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

That is certainly true with respect to the collective-bargaining agreement in the present case. That agreement initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid*. Thus, for the past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 76–79, 73 S.Ct. 519, 97 L.Ed. 832 (1953); see also 8 R. Lord, Williston on Contracts § 19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post,* at 2499, n. 5 (KAGAN, J., dissenting).

In short, the uncertain status of *Abood,* the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.[27]

---

[27] The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post,* at 2499. But as we explained in *Citizens United,* "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

All these reasons—that *Abood's* proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "'special justification[s]'" for overruling *Abood*. *Post,* at 2497 (KAGAN, J., dissenting) (quoting *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015)).[28]

---

what the law is.'" 558 U.S., at 365, 130 S.Ct. 876 (quoting *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). Nor does our decision "'require an extensive legislative response.'" *Post,* at 2499. States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.

* * *

[28] Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post,* at 2501–2502. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. § 315/6(e). No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); see also *Knox,* 567 U.S., at 312–313, 132 S.Ct. 2277. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 680–682, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). Unless employees

---

requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.

I join Justice Kagan's dissent in full. Although I joined the majority in *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e.g., National Institute of Family and Life Advocates v. Becerra, ante,* p. ——, —— U.S. ——, 138 S.Ct. 2361, ——L.Ed.2d ——, 2018 WL 3116336 (2018). Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in . . . an aggressive way" just as the majority does today. *Post,* at 2501.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For over 40 years, *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that gov-

ernment entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," *ante,* at 2463, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6–year campaign to reverse *Abood*. See *Friedrichs v. California Teachers Assn.,* 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*); *Harris v. Quinn,* 573 U.S. ——, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014); *Knox v. Service Employees,* 567 U.S. 298, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood.* It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws

underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I

I begin with *Abood,* the 41–year–old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause, which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood,* 431 U.S., at 212, 97 S.Ct. 1782. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations" since the New Deal. *Id.,* at 220, 97 S.Ct. 1782. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit [ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations."

Id., at 220–221, 97 S.Ct. 1782. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.,* at 219, 229, 97 S.Ct. 1782. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.,* at 221, 97 S.Ct. 1782. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.,* at 222, 97 S.Ct. 1782. And they "counteract[ ] the incentive that employees might otherwise have to

become 'free riders.'" *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.,* at 232, 234, 97 S.Ct. 1782. Employees might well object to the use of their money to support such "ideological causes." *Id.,* at 235, 97 S.Ct. 1782.

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.,* at 225–226, 97 S.Ct. 1782. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.,* at 225, 97 S.Ct. 1782. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any

conflicting government interest. See *id.,* at 234–235, 97 S.Ct. 1782.

II

Unlike the majority, I see nothing "questionable" about *Abood's* analysis. *Ante,* at 2463 (quoting *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U.S., at 220–221, 97 S.Ct. 1782. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. See *id.,* at 221, 97 S.Ct. 1782. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.,* at 222, 97 S.Ct. 1782.

The majority does not take issue with the first point. See *ante,* at 2478 (It is "not disputed that the State may require that a union serve as exclusive bargaining

agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood,* but is willing to assume it for the sake of argument. See *ante,* at 2476–2477; but see *Abood,* 431 U.S., at 221, 97 S.Ct. 1782 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante,* at 2477–2478 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante,* at 2467.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra,* at 2488–2489. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood's* rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante,* at 2466 (quoting *Knox,* 567 U.S., at 311, 132 S.Ct. 2277). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante,* at 2466–2467. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e.g., Machinists v. Street,* 367 U.S. 740, 762, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood*: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U.S., at 556, 111 S.Ct. 1950.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood's* economic insight. Here, the majority

delivers a four-page exegesis on why unions will seek to serve as an exclusive bargaining representative even "if they are not given agency fees." *Ante,* at 2467; see *ante,* at 2467–2469. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante,* at 2467. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right–to–Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991).[1] And when the vicious cycle finally ends,

[1] The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante,* at 2465. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e.g.,* R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools v. FLRA,* 495 U.S. 641, 649, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector

chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra,* at 2487–2488, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often depends on agency fees. See, *e.g., Harris,* 573 U.S., at ——, 134 S.Ct., at 2656–2658 (Kagan, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

---

uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

"Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA v. Nelson,* 562 U.S. 134, 148, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist v. Oregon Dept. of Agriculture,* 553 U.S. 591, 598, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." *Engquist,* 553 U.S., at 600, 128 S.Ct. 2146. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA,* 562

U.S., at 149, 131 S.Ct. 746 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.,* at 419, 126 S.Ct. 1951. But when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e.g., id.,* at 426, 126 S.Ct. 1951; *Connick v. Myers,* 461 U.S. 138, 154, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification

for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante,* at 2473–2474. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering's* analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating *Abood*. See *ante,* at 2471–2472.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

Like *Pickering, Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargain-

---

[2] For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante,* at 2473. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 2493–2494.

ing, contract administration, and grievance adjustment." 431 U.S., at 225–226, 97 S.Ct. 1782. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea v. Guarnieri,* 564 U.S. 379, 391, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011); the speech occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U.S., at 220–222, 224–226, 97 S.Ct. 1782; *supra,* at 2460. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U.S., at 235, 97 S.Ct. 1782. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.,* at 234, 97 S.Ct. 1782. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

Abood thus dovetailed with the Court's usual attitude in First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide

berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

2

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering,* to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante,* at 2472. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante,* at 2472–2473. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante,* at 2474–2477. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must concede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante,* at 2472. In

fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States v. Treasury Employees,* 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees,* the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest. See *id.,* at 470, 477, 115 S.Ct. 1003.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante,* at 2463–2464. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628

(1943)). Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); see *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of").[3] So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a manage-

[3] That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood,* involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller v. State Bar of Cal.,* 496 U.S. 1, 14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 233, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 474, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997); see also *infra,* at 2497–2498.

rial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA,* 562 U.S., at 148, 131 S.Ct. 746.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here that, at *Pickering's* first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect [s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante,* at 2474, 2476 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U.S., at 466, 115 S.Ct. 1003 (quoting *Pickering,* 391 U.S., at 568, 88 S.Ct. 1731). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U.S., at 466, 115 S.Ct. 1003; see *id.,* at 465, 470, 115 S.Ct. 1003 (repeating that analysis twice more). The Court could not have cared less whether the speech at issue was "important." *Ante,* at 2475–2476. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering's* first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri,* 564 U.S., at 391, 131 S.Ct. 2488; see *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668, 675, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (stating that public employees' speech on merely private employment matters is unprotected"). For that reason, even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U.S., at 263, n. 16, 97 S.Ct. 1782 (Powell, J., concurring in judgment). Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante,* at 2475. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante,* at 2476. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri,* 564 U.S., at 391, 131 S.Ct. 2488. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra,* at 2491–2493.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-

unionized) employees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering*'s "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante,* at 2477, n. 23.) But in fact, this Court has always understood such cases to end at *Pickering*'s *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951; see *supra,* at 2492. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering's* first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti,* 547 U.S., at 418, 126 S.Ct. 1951; *supra,* at 2492. That inquiry is itself famously respectful of government

interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti,* 547 U.S., at 419, 126 S.Ct. 1951; *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent. See 431 U.S., at 220–221, 224–226, 97 S.Ct. 1782; *supra,* at 2488–2489. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See *supra,* at 2489–2491 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected and acceded to those interests—just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015). Any departure from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.,* at ——, 135 S.Ct., at 2409 (internal quotation marks omitted); see, *e.g., Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). And the majority does not have anything close. To the contrary: all that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood,* beyond even the normal precedent.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions"—is "a foundation stone of the rule of law." *Kimble,* 576 U.S., at ——, 135 S.Ct., at 2409 (quoting *Michigan v. Bay Mills Indian Community,* 572 U.S. ——, ——, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720

---

[4] And then, after ostensibly turning to *stare decisis,* the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante,* at 2480–2481; see *ante,* at 2479–2481.

(1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.,* by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e.g., Locke v. Karass,* 555 U.S. 207, 213–214, 129 S.Ct. 798, 172 L.Ed.2d 552 (2009); *Lehnert,* 500 U.S., at 519, 111 S.Ct. 1950; *Teachers v. Hudson,* 475 U.S. 292, 301–302, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Ellis v. Railway Clerks,* 466 U.S. 435, 455–457, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke,* 555 U.S., at 213, 129 S.Ct. 798. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor sphere—cases today's decision does not question. See, *e.g., Keller v. State Bar of Cal.,* 496 U.S. 1, 9–17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 230–232, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (public university student fees); *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 471–473, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) (commercial advertising assessments); see also n. 3, *supra*.

Ignoring our repeated validation of *Abood,* the majority claims it has become "an outlier among our First Amendment cases." *Ante,* at 2482. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra,* at 2492–2494. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante,* at 2484. But in fact those decisions strike a balance much like *Abood's*. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod v. Burns,* 427 U.S. 347, 366–367, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel,* 445 U.S. 507, 517, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod,* 427 U.S., at 366, 96 S.Ct. 2673; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti,* 547 U.S., at 419, 126 S.Ct. 1951. So all that the majority has left is *Knox* and *Harris*. See *ante,* at 2483–2484. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante,* at 2480–2481. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante,* at 2480–2481. Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood,* this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e.g., Johnson v. United States,* 576 U.S. ——, ——S.Ct. ——, —— L.Ed.2d —— (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided—as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante,* at 2481—as though those weren't stock terms in dissenting vocabulary. See, *e.g., Murr v. Wisconsin,* 582 U.S. ——, ——, 137 S.Ct. 1933, 1950–1951, 198 L.Ed.2d 497 (2017) (ROBERTS, C.J., dissenting); *Dietz v. Bouldin,* 579 U.S. ——, ——, 136 S.Ct. 1885, 1897, 195 L.Ed.2d 161 (2016) (THOMAS, J., dissenting); *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1281, 191 L.Ed.2d 314 (2015) (Scalia, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of hand-

wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U.S. Reports." 573 U.S., at ——, 134 S.Ct., at 2652.

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis,* this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991). That is because overruling a decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e.g.,* Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante,* at 2485, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that "[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied–Signal, Inc. v. Director, Div. of Taxation,* 504 U.S. 768,

785, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); *Hilton,* 502 U.S., at 203, 112 S.Ct. 560.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne,* 501 U.S., at 828, 111 S.Ct. 2597. Not today. The majority undoes bargains reached all over the country.[5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra,* at 2472. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few

---

[5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante,* at 2485 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

years' time." *Ante,* at 2484, 2485. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra,* at 2472. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining as well. See Brief for Governor Tom Wolf et al. 11.[6]

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood.*" *Ante,* at 2484. Here, the majority proudly lays claim to its 6–year crusade to ban agency fees. In *Knox,* the majority relates, it described *Abood*

---

[6] In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood*'s] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for collective bargaining from those for political activities. *Ante,* at 2484–2485. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra,* at 2498–2499. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

as an "anomaly." *Ante,* at 2484 (quoting 567 U.S., at 311, 132 S.Ct. 2277). Then, in *Harris,* it "cataloged *Abood's* many weaknesses." *Ante,* at 2484. Finally, in *Friedrichs,* "we granted a petition for certiorari asking us to" reverse *Abood,* but found ourselves equally divided. *Ante,* at 2485. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid*. And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp. v. North Dakota,* 504 U.S. 298, 320, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (concurring opinion). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.,* at 321, 112 S.Ct. 1904 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "private parties anticipate our overrulings." 504 U.S., at 320, 112 S.Ct. 1904. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid. Abood's* holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments,

were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante,* at 2485, is to trivialize *stare decisis.*

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey,* 467 U.S., at 212, 104 S.Ct. 2305—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood,* the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood's* legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an

energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 2485, n. 27.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e.g., National Institute of Family and Life Advocates v. Becerra, ante,* p. ——, —— U.S. ——, 138 S.Ct. 2361, 138 L.Ed.2d 2361, 2018 WL 3116336 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overrid-

ing citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-3638

MARK JANUS and BRIAN TRYGG,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Defendants-Appellees,

and

LISA MADIGAN, Attorney General of the State of Illinois,

Intervening Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15 C 1235 – Robert W. Gettleman, *Judge*.

Argued March 1, 2017
Decided March 21, 2017

Before POSNER, SYKES, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court

upheld, against a challenge based on the First Amendment, a Michigan law that allowed a public employer (in that case a municipal board of education), whose employees (public-school teachers) were represented by a union, to require those of its employees who did not join the union nevertheless to pay fees to it because they benefited from the union's collective bargaining agreement with the employer. The fees could only be great enough to cover the cost of the union's activities that benefited them; they could not be expanded to enable the union to use a portion of them "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235–36. For were that permitted, the workers who disagreed with the political views embraced by the union would be unwilling contributors to expenditures for promoting political views anathema to them, and the law requiring those contributions would thereby have infringed their constitutional right of free speech.

Illinois has a law, similar to the Michigan law, called the Illinois Public Relations Act, 5 ILCS 315 *et seq.*, under which a union representing public employees collects dues from its members, but only "fair share" fees (a proportionate share of the costs of collective bargaining and contract administration) from nonmember employees on whose behalf the union also negotiates. See 5 ILCS 315/6. But in 2015 the governor of Illinois filed suit in federal district court to halt the unions' collecting these fees, his ground being that the statute violates the First Amendment by compelling employees who disapprove of the union to contribute money to it.

The district court dismissed the governor's complaint, however, on the ground that he had no standing to sue because he had nothing to gain from eliminating the compulsory fees, as he is not subject to them. But two public employees—Mark Janus and Brian Trygg—had already moved to intervene in the suit as plaintiffs seeking the overruling of *Abood*. Of course, only the Supreme Court has the power, if it so chooses, to overrule *Abood*. Janus and Trygg acknowledge that they therefore cannot prevail either in the district court or in our court—that their case must travel through both lower courts—district court and court of appeals—before they can seek review by the Supreme Court.

While dismissing the governor's complaint for lack of standing, the district court granted the employees' motion to intervene and declared that the complaint appended to their motion would be a valid substitute for Governor Rauner's dismissed complaint. Technically, of course, there was nothing for Janus and Trygg to intervene in, given the dismissal of the governor's complaint. But to reject intervention by Janus and Trygg on that ground would be a waste of time, for if forbidden to intervene the two of them would simply file their own complaint when Rauner's was dismissed. As there would be no material difference between intervening in Rauner's suit and bringing their own suit in the same court, the efficient approach was, as the district court ruled, to deem Rauner's suit superseded by a motion to intervene that was the equivalent of the filing of a new suit. See *Village of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007).

But we need to distinguish between the two plaintiffs, Janus and Trygg, because while Janus has never

before challenged the requirement that he pay the union "fair share" fees, Trygg has. First before the Illinois Labor Relations Board and then before the Illinois Appellate Court, Trygg complained that the union bargaining on his behalf (the Teamsters Local No. 916, one of the defendants in this case) was ignoring a provision of the Illinois law that allows a person who has religious objections to paying a fee to a union to instead pay the fee to a charity. 5 ILCS 315-6(g). The Illinois court agreed, and on remand to the Board Trygg obtained the relief he sought: instead of paying the fair-share fee to the union, he could pay the same amount to a charity of his choice. The defendants (the unions that bargain on behalf of Janus and Trygg, respectively—AFSCME for Janus, the Teamsters for Trygg—the Director of the Illinois Department of Central Management Services, which is the state agency that has collective bargaining agreements with both unions; and the Attorney General of Illinois intervening on the side of the defendants) argue that Trygg's claim in the present suit is precluded by his earlier litigation.

Claim preclusion is designed to prevent multiple lawsuits between the same parties where the facts and issues are the same in all of the suits, and 28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to a state court judgment that it would be given by the courts of the state in question. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). Trygg's First Amendment claim and his earlier Illinois statutory claim arise from the same fact: the existence of an Illinois law requiring that he pay fees to the Teamsters, the union required to bargain on his behalf. But the parties disagree as to whether Trygg could have raised his First Amendment claim in the earlier litigation. It's true that the Illinois Labor Rela-

tions Board could not have entertained a constitutional challenge to the statute, but Trygg could have included the claim in his appeal from the Board's decision to the court, because it presented an issue relevant to the legality of the Board's action. See *Reich v. City of Freeport*, 527 F.2d 666, 671–72 (7th Cir. 1975). He did not do so; and because he had a "full and fair opportunity" to do so, he is precluded by Illinois law from litigating the claim in the present suit. See *Abner v. Illinois Department of Transportation*, 674 F.3d 716, 719 (7th Cir. 2012). He missed his chance.

Janus's claim was also properly dismissed, though on a different ground: that he failed to state a valid claim because, as we said earlier, neither the district court nor this court can overrule *Abood*, and it is *Abood* that stands in the way of his claim.

The judgment of the district court dismissing the complaint is therefore

AFFIRMED.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[September 13, 2016]

MARK JANUS and BRIAN TRYGG,

Plaintiff,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/ PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; MICHAEL HOFFMAN, Director of the Illinois Department of Central Management Services, in his official capacity,

Defendants.

and

LISA MADIGAN, Attorney General of the State of Illinois,

Intervenor-Defendant.

ORDER

Plaintiffs Mark Janus and Brian Trygg have brought a second amended complaint challenging the constitutionality of the compulsory collection of union fees under the Illinois Public Labor Relations Act ("IPLRA"), 52 ILCS 315/6. Defendants have moved to dismiss, arguing that the case is controlled by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which upheld the con-

stitutionality of such assessments. Plaintiffs brought the suit hoping that *Abood* would be reversed in a matter then pending before the Supreme Court in which the continued validity of *Abood* was challenged. *Friedrichs v. California Teachers Association*, __ U.S. __, 136 S.Ct. 1083 (2016). In *Friedrichs* an equally divided Supreme Court affirmed the Ninth Circuit's decision upholding fair share fees based on the reasoning in *Abood*. *Id.* As a result, *Abood* remains valid and binding precedent.

Plaintiffs continue to argue that *Abood* was wrongly decided, but recognize that it remains controlling in the instant case. Consequently, defendants' motion to dismiss (Doc. 146) is granted.

ENTER: September 13, 2016

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 19-1553

MARK JANUS,

Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31; AFL-CIO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:15-cv-01235 – Robert W. Gettleman, *Judge*.

Before

DIANE P. WOOD, *Chief Judge*
DANIEL A. MANION, *Circuit Judge*
ILANA D. ROVNER, *Circuit Judge*

December 12, 2019

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on November 19, 2019. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

[1] Judge Joel M. Flaum did not participate in the consideration of this matter.