No. 16-1466

In the
Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

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

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, GOLDWATER INSTITUTE, THE FAIRNESS CENTER, EMPIRE CENTER FOR PUBLIC POLICY, INC., PIONEER INSTITUTE, INC., REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND YANKEE INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Twice in the past five years this Court has questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, __ U.S. __, 134 S. Ct. 2618, 2632-34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 132 S. Ct. 2277, 2289 (2012). Last term this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, __ U.S. __, 136 S. Ct. 1083 (2016).

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

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other things, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make payments to support political or expressive activities with which they disagree. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF also has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016).

The Goldwater Institute is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, policy analysis, and public advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and

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[1] All parties consent to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

files amicus briefs when it or its clients' objectives are directly implicated. The Institute seeks to enforce the features of state and federal constitutions that protect individual rights, including the rights to free speech and free association. To this end, the Institute is engaged in policy research and analysis pertaining to union fees and dues, professional licensing fees, and related issues. Additionally, the Goldwater Institute currently represents a member of the South Dakota State Bar in a challenge to the constitutionality of compulsory member dues in that state. *See Fleck v. Wetch*, 868 F.3d 652 (8th Cir. 2017).

The Fairness Center is a nonprofit public interest law firm that provides legal services to those injured by public employee union officials. The Center represents certain clients whose rights have been violated through the seizure of so-called "fair share" fees, and it desires to serve and further those clients' interests as amicus curiae in this matter. The Center represents the plaintiffs in *Hartnett, et al. v. PSEA, et al.*, Case No. 17-cv-00100 (M.D. Pa. filed Jan. 18, 2017), challenging Pennsylvania laws that permit public-sector unions, pursuant to *Abood*, to seize so-called "fair share" fees from nonmember public employees as a condition of employment.

The Empire Center for Public Policy, Inc., is an independent, non-partisan, non-profit think tank based in Albany, New York. The Center's mission is to make New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government.

Pioneer Institute, Inc., is an independent, non-partisan, privately funded research organization that

seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited, and accountable government. The Institute focuses on achieving policy goals in four issue areas: increasing access to high-performing schools and affordable, high-quality health care; ensuring that government services are efficient, accountable, and transparent; expanding prosperity; and economic opportunity. PioneerLegal, as the Institute's public-interest law initiative, uses a litigation-based approach to change policies that adversely affect the public interest in the Institute's core policy areas.

Reason Foundation is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com, and www.reason.tv, and issuing policy research reports, which are available at www.reason.org. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant legal and constitutional issues.

The Individual Rights Foundation (IRF) was founded in 1993. It is the legal arm of the David Horowitz Freedom Center (DHFC), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies—and to defend America's free society—

through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property, and limited government. In support of this mission, the IRF litigates cases and participates as amicus curiae in appellate cases, such as the case at bar, that raise significant First Amendment speech issues.

Yankee Institute for Public Policy is a nonpartisan, nonprofit free-market think tank dedicated to ensuring that the people of Connecticut are free to succeed. It develops and advances policies that promote smart, limited government; fairness for taxpayers; and an open road to opportunity for everyone in our state.

INTRODUCTION AND SUMMARY OF ARGUMENT

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), has permitted infringement of dissenting workers' First Amendment rights for too long. It should be overruled.

Beyond the obviously political expenditures that the unions admit are nonchargeable, "chargeable" collective bargaining expenses are *also* political in nature, if for no other reason than that collective bargaining in the public sector depends on lobbying and affects allocation of public resources (i.e., tax dollars). The distinction between chargeable and nonchargeable is untenable and highlights the basic problem with *Abood*: it allows the state to force people to pay for political causes with which they disagree, which is "sinful and tyrannical." *Chicago Teachers*

Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 305 n.15 (1986) (quoting Thomas Jefferson).

This Court acknowledged in *Knox*, 567 U.S. at 311, and *Harris*, 134 S. Ct. at 2632-34, that *Abood* was based on faulty premises and adopted an unrealistic view of public-employee unionism—and the consequence was to give this Court's blessing to the infringement of individual rights. This case shows how those problems are inescapable, given the *Abood* precedent. The time has come for this Court to vindicate the First Amendment's protections for dissenters—and overrule *Abood*.

ARGUMENT

I

PUBLIC SECTOR COLLECTIVE BARGAINING IS INHERENTLY POLITICAL

A. *Abood* Identified, Then Improperly Discounted, the Political Component of Public Sector Union Collective Bargaining

In *Harris v. Quinn*, this Court criticized *Abood* for failing to distinguish between the unionization of public-sector workers and private-sector workers. "In the public sector," said the Court, "core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." 134 S. Ct. at 2632. *Harris* also recognized that *Abood* failed to acknowledge the difficulty of separating "chargeable" from "nonchargeable" union expenditures, which involves "substantial judgment call[s]" that *Abood* has forced this Court to make in many cases since *Abood* was decided. *Id*. at 2633

(citing *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Hudson*, 475 U.S. 292; *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 555 U.S. 207 (2009)). These criticisms of *Abood* are well taken because *all public employee negotiations are inherently political*, whether they go to collective bargaining or to other, concededly nonchargeable, activities.

To be precise, the *Abood* Court did acknowledge this reality, but discounted its legal import. The majority decision briefly identified several differences between private and public sector unions, finally noting, "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political." 431 U.S. at 231. Chief Justice Rehnquist's concurring opinion further explained that

> the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word "political" be taken in its normal meaning. Success in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way.

Id. at 243 (Rehnquist, C.J., concurring). Justice Powell, concurring in the judgment, explicitly equated the goals and methods of public sector unions with political parties:

> Collective bargaining in the public sector is "political" in any meaningful sense of the word. This is most obvious when public-sector bargaining extends . . . to such matters of public policy as the educational philosophy that will inform the high school curriculum. But it is also true when public-sector bargaining focuses on such "bread and butter" issues as wages, hours, vacations, and pensions. Decisions on such issues will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates.

Id. at 257-58 (Powell, J., concurring in the judgment). The *Abood* opinions only scratched the surface of the pervasively political nature of collective bargaining with public employee unions, and failed to fully appreciate the depth and breadth of the alliance between public-sector unions and their collective bargaining "adversaries."

B. Statutes Govern Many Aspects of Public Employment

The terms and conditions of public employment are governed, at least in broad strokes, by statute. A statute that sets terms of public employment, like any other statute, establishes codified public policy for the local or state government that enacts it. *See Bldg. Serv. Emps. Int'l Union Local 262 v. Gazzam*, 339 U.S. 532, 536 (1950); *Village of Riverwoods v. BG Ltd. P'ship*, 276 Ill. App. 3d 720, 728 (1995) ("[C]odification of public policy is for the legislature.").

Illinois statutes are replete with terms and conditions of public employment, as well as other job-related matters. To cite just one example, a provision of the Illinois Personnel Code governs layoffs of state employees in light of reduced funding or lack of work and mandates that agencies implement reductions in force while considering each employee's performance records and seniority, as well as the effect layoffs will have on diversity goals. *Foster v. Civil Service Comm'n*, 255 Ill. App. 3d 30, 35 (1993) (applying statutes). *See also Ragano v. Civil Service Comm'n*, 80 Ill. App. 3d 523, 528 (1980) (The purpose of the Personnel Code "is to establish [a] system of personnel administration based on merit principles and scientific methods.").

The state's courts construe union contracts in light of the policies codified in these statutes. Thus, it is possible for a matter in public employment to be both one of wages, hours, and other conditions of employment *and* within the public employer's inherent managerial authority for purposes of mandatory bargaining. Thus, for instance, in *International Brotherhood of Teamsters, Local 700 v. Illinois Labor Relations Board, Local Panel, County of Cook*, 73 N.E.3d 108, 121 (Ill. Ct. App. 2017), the court required a sheriff's department to bargain with the Teamsters over whether it could forbid employees from affiliating with people that they "know or should have known" were members of a "known criminal organization."

While many details of public employment are left to negotiation, no aspect of a collective bargaining agreement can counter the public policies established by statute. *See Parisi v. Jenkins*, 236 Ill. App. 3d 42,

52 (1992) (police board's statutory power to determine cause for dismissal and terminate employee could not be abrogated by collective bargaining agreement); *Bd. of Educ. of City of Chicago v. Illinois Educational Labor Relations Bd.*, 69 N.E.3d 809, 817 (Ill. 2015) (school board's discretionary power to terminate probationary teachers by nonrenewal of their contracts may not be limited by a collective bargaining agreement).

Naturally enough, where statutes directly govern the terms and conditions of public employment, and override negotiated agreements to the contrary, public employee unions devote their time and energy to determining the content of those *statutes*—lobbying for passage and modification to serve the interests of their members. AFSCME's legislative and political arm, denoted Public Employees Organized to Promote Legislative Equality (PEOPLE), aspires to lobby school boards, city councils, county boards, the state legislature, and the Congress.[2] AFCSME and other Illinois unions have successfully promoted their agenda. State statutes favor employee bargaining rights[3] and state administrative agencies and courts broadly interpret those statutes to cover a growing number of employees and expand their hold on public resources. *See* Ann C. Hodges, *Lessons from the*

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[2] AFSCME Council 31, Why Political Action, http://www.afscme31.org/political-action/why-political-action (last visited Nov. 27, 2017).

[3] *See, e.g.*, 65 ILCS 5/10-2.1-17, which sets forth procedures for removal and discharge of public employees *unless* "the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement."

Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum, 18 Cornell J.L. & Pub. Pol'y 735, 741 (2009) (citing R. Theodore Clark, Jr. & F. Donald O'Brien, *Illinois Public Sector Collective Bargaining Legislation: The First Fifteen Years*, *in Collective Bargaining in the Public Sector: The Experience of Eight States* 206-07 (Joyce M. Najita & James L. Stern, eds., 2001)).

The Illinois Supreme Court recognized the symbiotic relationship between public-sector collective bargaining and legislation in *State v. AFSCME, Council 31*, 51 N.E.3d 738 (Ill. 2016), when it noted that "public employee unions, as a part of their collective-bargaining duties, must often engage in political activities in order to achieve what most private sector unions are able to achieve solely at the bargaining table." *Id.* at 749 (quoting *Antry v. Illinois Educational Labor Relations Board*, 195 Ill. App. 3d 221, 270-71 (1990)).

C. The Terms and Conditions of Public Employment Necessarily Involve Public Policy—That Is, Political—Considerations

Most fundamentally, unions exist to promote the economic interests of their members, including not just negotiation of wages and benefits, but also action to affect or control a wide variety of government policies that affect, even tangentially, the unionized workforce. AFSCME proudly explains:

> After years of intense legislative work, in 1983, AFSCME won passage of laws granting union rights to virtually every public employee in Illinois. Winning

> these rights touched off another tremendous wave of organizing across the state, which increased the number of AFSCME-represented public workers in Illinois from 40,000 to 60,000. ¶ Over the last 15 years Council 31 has grown to 75,000 members and expanded its presence in the political and legislative arena.[4]

There is nothing wrong, of course, with unions promoting the interests of their members—on the contrary, that is their purpose, and they have an ethical obligation to pursue that goal.

But public-sector unions are qualitatively different from private-sector unions. Unlike their private-sector counterparts, the wages, benefits, working conditions, and opportunities for which *public-sector* unions negotiate are provided exclusively by the *government*, and are paid for exclusively through tax dollars. Because the government employer is inherently monopolistic—its "customers" are forced to pay—the consequences of public-sector union bargaining are unlike the consequences of such bargaining in the competitive private-sector market, where the bottom-line consequences of collective bargaining (the purchase price of the company's product or service) set the ultimate boundaries of what workers can demand from management. If management and unions reach an unsustainable bargain in the private sector, the

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[4] AFSCME Council 31, *AFSCME Council 31 – Organizational History*, http://www.afscme31.org/about/afscme-council-31-organizational-history (last visited Nov. 27, 2017).

company will fail. But government never goes out of business.

That is why the Second Circuit concluded that "the 'economic' advocacy of public employee unions touches directly on matters of political concern," *State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126, 134 n.7 (2d Cir. 2013), and why, in a case brought by AFSCME, the Illinois Court of Appeals noted the "inextricable" connection between the terms and conditions of public employment, state funding constraints, and the collective bargaining process. *AFSCME v. State Labor Relations Bd.*, 274 Ill. App. 3d 327, 333 (1995).[5]

Unions from coast to coast participate in legislative advocacy to further their objectives. *See Murray v. Town of Stratford*, 996 F. Supp. 2d 90, 116 n.33 (D. Conn. 2014) (union's successful advocacy for including overtime pay in pension benefit calculations increased the town's financial liability to retiring firefighters); *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro U.S.D.*, 46 Cal. 4th 822,

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[5] As an example of how negotiations and politicking are inextricably intertwined, consider *DiQuisto v. Cty. of Santa Clara*, 181 Cal. App. 4th 236, 242 (2010). That litigation arose out of political jockeying over local initiatives relating to arbitration of labor disputes. The Registered Nurses Professional Association, the California Correctional Peace Officers Association, and the Government Attorneys' Association (all public sector unions) sponsored a local ballot initiative, Measure C, to amend a county charter to mandate binding arbitration as the means of resolving labor disputes with the county. The county opposed the measure and placed two countermeasures on the ballot. Meanwhile, the unions and the county were negotiating a collective bargaining agreement and, during the negotiations, the county urged the unions to withdraw their support for the initiative. *Id.* at 242-44.

836 (2009) (public employee unions "have an important political dimension, given that they are governed by and negotiate with government entities.").

Thus in the negotiations between government and public employee unions, monopoly sits on one side of the table, and monopsony sits on the other. The taxpayer has no seat. As a result of their largely unchallenged influence, public employee unions' "negotiation" of benefits has been the most significant cause of the nationwide public pension crisis,[6] a crisis that looms especially large in Illinois, which currently staggers under a $130 billion pension liability[7] as the state's financial health teeters on junk bond status.[8]

Rowland, *Stratford*, and other recent holdings are based on the works of Harry Wellington and Ralph Winter, Jr., and Clyde Summers, who were among the first to explore the implications of then-newly established public employee unions. *See generally*, Harry H. Wellington & Ralph K. Winter, Jr., *The Unions and the Cities* (1974); Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1164 (1974). Wellington and Winter explained that "[c]ollective bargaining by public

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[6] *See* Joshua D. Rauh, *The Public Pension Crisis*, Defining Ideas (Hoover Institution Apr. 12, 2016), http://www.hoover.org/research/public-pension-crisis.

[7] *See, e.g.*, Dave McKinney, *Illinois' unfunded pension liabilities reach $130 billion: study*, Reuters, Nov. 16, 2016, https://www.reuters.com/article/us-illinois-pensions/illinois-unfundedpension-liabilities-reach-130-billion-study-idUSKBN13B29N.

[8] Elizabeth Campbell, *S&P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U.S. State*, Bloomberg, June 1, 2017, https://www.bloomberg.com/news/articles/2017-06-01/illinois-bonds-cut-to-one-step-above-junk-by-s-p-over-stalemate.

employees and the political process cannot be separated. The costs of such bargaining, therefore, cannot be fully measured without taking into account the impact on the allocation of political power in the typical municipality." *Unions and the Cities*, *supra*, at 29.

Summers identified three specific political implications of public employee union bargaining:

First, because the union enjoys exclusive representation of all employees in the bargaining unit, any "[d]issonance or indifference in the employee group is submerged, giving the employees' voice increased clarity and force." *Political Perspective*, 83 Yale L.J. at 1164.[9]

Second, unlike typical citizens who present their concerns to government officials on a sporadic basis and with no guarantee of a firm commitment from the officials, unions are legally entitled to demand good-faith bargaining from officials, on a long-term consistent basis, until they receive a firm commitment, or one side declares an impasse (which leads to further mandated procedures). *Id.*

Third, the union enjoys "a closed two-sided process within what is otherwise an open multi-sided process. Other groups interested in the size or

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[9] As a corollary, the unions spend considerable effort to tamp down any real or perceived variance among workers toward the unions' objectives. *See* Martin Barillas, *Michigan worker pleads intimidation by AFSCME labor union*, Spero News, Feb. 25, 2014 (union engaged in "hardball tactic" of posting names and home addresses of non-union members, resulting in "intimidation, peer pressure, [and] public shaming"), http://www.speroforum.com/a/RJVIXSZQZX9/74761-Michigan-workerpleads-intimidation-by-AFSCME-labor-union#.WfJmpnZrxzk.

allocation of the budget are not present during negotiations and often are not even aware of the proposals being discussed." *Id.* These other groups—including, of course, taxpayers—have no formal opportunity to present their concerns or generate their own political pressure. *See* Dawn Geske, *Ives fights for more transparency in union contracts with Illinois entities*, DuPage Policy J., Oct. 1, 2016 (recounting Illinois state representative's repeated and doomed attempts to give the public 14 days to review union contracts prior to approval, noting, "Most of the opposition . . . comes from unions that want contract negotiations kept out of the public eye and behind closed doors").[10]

Theoretically, government officials could—and should—represent those other interests, but as a practical matter, that representation is minimal or nonexistent as officials are either allied with, beholden to, or cowed by union power.

For all these reasons, many courts acknowledge the inherent legal tension created by public employee collective bargaining. *See, e.g.*, *Montgomery Cty. Educ. Ass'n v. Bd. of Educ.*, 534 A.2d 980, 987 (Md. 1987) ("Public school employees are but one of many groups in the community attempting to shape educational policy by exerting influence on local boards."). Because teacher unions can force school boards "to submit matters of educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups." *Commonwealth v. Cty. Bd. of Arlington Cty.*, 232 S.E.2d 30, 39 (Va. 1977) (Agreements

[10] https://dupagepolicyjournal.com/stories/511012541-ivesfights-for-more-transparency-in-union-contracts-with-illinois-entities.

between county boards and unions "seriously restricted the rights of individual employees to be heard" and gave unions "a substantial voice in the boards' ultimate right of decision in important matters affecting both the public employer-employee relationship and the public duties imposed by law upon the boards."). *See also* R. Theodore Clark, Jr., *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 681 (1975) (The combination of public employee union collective bargaining and unions' active participation "in the election of officials with whom they negotiate at the bargaining table gives public sector unions a disproportionate amount of power" that "distort[s] the political process.").

The dissenting voices of union members who do not support the views of the union leadership, the non-union members forced to pay agency shop fees, and taxpaying members of the public are all effectively silenced by public employee union collective bargaining. Yet again, unlike in the private sector, the taxpayers have an extraordinarily important economic interest in the result of the bargaining, because *they* are both "the source of funds for the public employer and the recipient of the public services negotiated." Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U. Pa. J. Lab. & Emp. L. 453, 454 (2003).

They are the source of the funds in most states, yet the taxpayers have few means of tracking expenditures, as their taxes are collected generally, rather than being itemized for public schools, utilities, law enforcement, and so on. Only when government

agrees to a union deal that so dramatically affects public resources that it generates press reports does the public begin to get an inkling of what their tax dollars are expected to support. *See, e.g.*, Michael Powell, *Public Workers Face Outrage as Budget Crises Grow*, N.Y. Times, Jan. 1, 2011 ("In California, pension costs now crowd out spending for parks, public schools and state universities; in Illinois, spiraling pension costs threaten the state with insolvency. And taxpayer resentment simmers.");[11] Mailee Smith, *Palatine School-District Contract a Case Study in How Close-Door, Government-Union Deals Hurt Taxpayers*, Illinois Policy, June 3, 2016 (Illinois school district publicly revealed a 10-year, non-negotiable contract with the teachers' union more than a month after it was signed).[12]

An agreement to increase wages, for example, may well result in a decrease in public services as operations are reduced to boost salaries and benefits. Negotiated holidays force city services to cease for the day, just as negotiated "in-service" days for teachers close schools—leaving working parents on the hook for child care, or requiring them to use a vacation day. And in recent years, the cumulative effect of generous public employee pensions has made headlines. *See* Matt Egan, *How Illinois became America's most messed-up state*, CNN, July 1, 2017 (Illinois' unfunded pension liabilities total $251 billion, an "enormous" problem resulting largely from the legislature's

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[11] http://www.nytimes.com/2011/01/02/business/02showdown.html.

[12] https://www.illinoispolicy.org/palatine-school-districtcontract-a-case-study-in-how-closed-door-government-uniondeals-hurt-taxpayers/.

unwillingness to stop "reward[ing] the state's powerful unions with more generous benefits.").[13] *See also* Michael A. Fletcher, *In San José, Generous Pensions for City Workers Come at Expense of Nearly All Else*, Wash. Post, Feb. 25, 2014 (drastic cuts to public services as a result of civil pension plans guaranteeing retired public workers up to 90% of their former salaries generated a heated political battle).[14]

The bottom line is that, in the public sector, "the collective agreement is not an economic decision but a political decision; it shapes policy choices which rightfully belong to the voters to be made through the political processes. Collective bargaining in the public sector is properly and inevitably political; to try to make it otherwise denies democratic principles." Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265, 266 (1987).

II

ILLINOIS' PUBLIC SECTOR UNIONS EXERT TREMENDOUS POLITICAL POWER

Collective bargaining is just one avenue for unions to pursue their goals. The negotiations, far from occurring in a vacuum, are intimately tied to the close relationship that unions develop with the elected officials ostensibly on the opposite side of the table.

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[13] http://money.cnn.com/2017/06/29/investing/illinois-budget-crisis-downgrade/index.html.

[14] http://www.washingtonpost.com/business/economy/in-sanjose-generous-pensions-for-city-workers-come-at-expense-of-nearlyall-else/2014/02/25/3526cd28-9be7-11e3-ad71-e03637a299c0_story.html.

Rutgers University economics professor Leo Troy spells out four main ways that unions apply political pressure to achieve their goals: (1) cash; (2) free labor time; (3) information; and (4) benefits derived from the unions' structure. Troy, *Municipal Collective Bargaining*, 5 U. Pa. J. Lab. & Emp. L. at 454-55. Illinois public sector unions have mastered all four, making them true political kingpins.

A. Cash

It is no easy matter to track public employee union spending. Most statewide unions collect revenue from members through local affiliates, which retain most of the money for local collective bargaining and other political expenditures. The state does not require comprehensive financial reporting by these affiliates, and unions have no reason to voluntarily provide a transparent accounting. Even with these challenges, researchers have demonstrated that public employee unions are among the top donors to national, state, and local political campaigns. *See, e.g.*, Nathan A. Benefield, *Super PACs Supersize Union Political Spending*, Forbes, Apr. 7, 2014[15] (citing studies by OpenSecrets.org and the National Institute for Labor Relations Research); Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools* 290-94 (Brookings Inst. 2011). They are most effective in influencing policymaking at the local level. Clark, *Politics and Public Employee Unionism*, 44 U. Cin. L. Rev. at 684 ("[A] highly organized public employee union [has] a totally disproportionate impact on the results of [low turnout]

[15] https://www.forbes.com/sites/realspin/2014/04/07/super-pacs-supersize-union-political-spending/#41dbc65e3a2e.

elections"—typically municipal and school board elections.). In one study of local school board elections, incumbents who did not have a union endorsement lost more often than not, but *incumbents with union support won 92 percent of their races*. Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 Or. L. Rev. 673, 702-03 (2013) (citation omitted).

Relying on public documents, the Center for Responsive Politics analyzed the political cash distributed by AFSCME's 3,400 local unions. In terms of contributions, AFSCME spent $15,419,966 on Democratic politicians[16] (no Republicans) in the 2016 election cycle, placing it 29th out of 18,618 organizations on the Open Secrets list.[17] It spent another $2,560,000 on lobbying in 2016.

That year was not an outlier. In 2010, AFSCME spent $87.5 million to assist Democrats in congressional elections. The union tapped into a $16 million "emergency" account and even took out a $2 million loan to aid Democratic prospects, "spending money on television advertisements, phone calls, campaign mailings and other political efforts." Cate Long, *Public unions: How strong is their influence?* Reuters, Apr. 19, 2013 (citing Brody Mullins & John D. McKinnon, *Campaign's Big Spender; Public-Employees Union Now Leads All Groups in*

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[16] The contributions were to a combination of candidate funds, leadership PACs, parties, 527 committees, and outside spending groups, but all to the ultimate benefit of union-supporting Democrats across the country.

[17] Center for Responsive Politics, *American Fedn of State, County & Municipal Employees*, http://www.opensecrets.org/orgs/summary.php?id=D000000061 (last visited Nov. 27, 2017).

Independent Election Outlays, Wall St. J., (Oct. 21, 2010)).[18]

This direct financial support for one political party entirely disregards the fact that many union members are not Democrats. Although union leadership aligns strongly with Democratic politicians, the members themselves are not nearly so monolithic, with most studies showing 30%-40% of unionized workers identifying as Republican. Larry Sand, *Are Workers and Their Union the Same?* Cal. Policy Center (Jan. 3, 2017) (30%);[19] James Sherk, *What do Workers Want? Union Spending Does Not Reflect Member Priorities, Testimony before State Gov't Comm*., Pa. House of Representatives (July 15, 2014) (40%).[20] *See also* Greg Toppo, *Teacher unions smarting after many members vote for Trump*, USA Today, Nov. 23, 2016 (1 in 3 National Education Association members voted for President Trump while 1% of NEA's $30 million campaign contributions supported Republicans).[21]

Public-sector unions support candidates and incumbents for a simple reason: making them

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[18] http://blogs.reuters.com/muniland/2013/04/19/publicunionsshow-strong-is-their-influence/. Unions are closely tied to the Democratic Party nationwide. *See* J. Patrick Coolican, *AFSCME forum marks the unofficial start of the campaign for Minnesota governor*, Star Tribune, Sept. 30, 2017 (AFSCME news release announcing a forum bluntly states, "Republican candidates were not invited."), http://www.startribune.com/afscme-forum-marks-the-unofficial-start-of-the-campaign/448824333/.

[19] http://californiapolicycenter.org/are-workers-and-their-union-the-same/.

[20] http://www.heritage.org/testimony/what-do-workers-want-union -spending-does-not-reflect-member-priorities.

[21] https://www.usatoday.com/story/news/2016/11/23/election-unions-teachers-clinton-trump/94242722/.

"dependent on union money and manpower to ensure their reelection" gives the unions power to "control[] the very people with whom they negotiate[] for higher wages or better benefits." Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 105 (2004). This money comes from the paychecks of government employees, who are paid from taxpayer money—and is used to subsidize efforts to expand union power and increase government spending still further: an endless cycle of government funding the demand for its own growth, all at the expense of citizens and dissenting workers who are forced to bankroll the enterprise.

B. Free Labor Time

Public-sector unions offer free manpower to candidates and campaigns in two ways.

First, they often negotiate "release time" whereby taxpayers pay salaries for public employees to work, not for the public, but for the union itself—work that frequently includes lobbying and other means of influencing public policy. *See Cheatham v. DiCiccio*, 240 Ariz. 314, 324 (2016) (upholding city collective bargaining agreement paying $1.7 million to union for "release time" employees who work solely for the union's benefit and owed no duties to the city); *Santa Clara Cty. Corr. Peace Officers Ass'n., Inc. v. Abbate*, No. A124037, 2010 WL 302782, at *4 (Cal. Ct. App. Jan. 27, 2010) (correctional officers union's collective bargaining agreement included release time—"time taken by a union official away from his duties as a correctional officer to prepare grievances or address other union matters").

Second, union members are encouraged to volunteer in campaigns or for political parties that promote union causes. Former union official and Labor Party founder Tony Mazzocchi explained, "Every election year, . . . [w]e knock on doors, we staff the phone banks, we sponsor get-out-the-vote drives." Tony Mazzocchi, *Building a Party of Our Own*, *in* Gregory Mantsios, ed., *A New Labor Movement for the New Century* 283 (1998). Unions sometimes also pay "volunteers" to work full-time in political campaigns. Chavez & Gray, *Betrayal*, *supra* at 41. Unions are particularly eager to provide volunteer support when candidates are themselves union members. "[T]hey will often benefit from union support provided through endorsements, financial contributions, communications campaigns, field volunteers, and voter mobilization." Aaron J. Sojourner, *Do Unions Promote Members' Electoral Office Holding? Evidence from Correlates of States Legislatures' Occupational Shares*, 66 Indus. & Lab. Rel. Rev. 467, 470 (2013). The union may also provide "candidate boot camp" training for member-candidates. *Id.*

C. Information Communication

Informational support consists of union newspapers and magazines that endorse favored candidates and parties, as well as leaflets distributed at unionized workplaces telling workers how to vote. *See United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121 (1948) (union periodicals may advise members of the "danger or advantage to their interests" from pending legislation or candidates for elective office); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978) (employees may distribute union leaflets discussing both collective bargaining

and general political matters on employer's premises, such as opposing "right to work" legislation); *Local 174, Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. NLRB*, 645 F.2d 1151, 1152 (D.C. Cir. 1981) (union leaflets distributed on work premises to induce workers to vote for specific candidates).

These publications promote the union's recommendations as to which candidates and issues the membership should favor, and they disregard or denigrate members of the political opposition. *See, e.g.*, AFSCME Council 31, *AFSCME Endorsements: 2017 Local Elections* (Mar. 6, 2017)[22] (advising members how to vote on an array of ballot measures and elective offices, including mayors, school boards, aldermen, and even township assessor).

D. Using the Unions' Structure to Benefit Candidates and Issues

According to its website, AFSCME has approximately 3,400 local unions and 58 councils and affiliates in 46 states, the District of Columbia, and Puerto Rico. Its central organization, the International Union in Washington, D.C., coordinates the overall course of action for the union and all its affiliates on national issues including privatization, fair taxes, and health care. The International Union provides resources to councils and local unions for organizing, bargaining, political action and education, and administers members-only benefits.[23]

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[22] http://www.afscme31.org/news/afscme-endorsements-2017-local-elections.

[23] AFSCME, *We Are AFSCME*, https://www.afscme.org/union/about (last visited Nov. 27, 2017).

The unions' structure is both wide and deep, and places unions in a dominating position to promote candidates and issues at all levels of government. The leverage of public-sector unions is especially great in municipalities and school districts because they are closest to the public employer-politicians. Troy, *Municipal Collective Bargaining*, 5 U. Pa. J. Lab. & Emp. L. at 456. For example, in New Mexico, after a state law permitted school districts to allow collective bargaining agreements to expire without renewal, the Las Cruces school district initially chose to allow its agreements to expire. However, the teachers' union successfully backed school board candidates in subsequent elections who then voted to restore collective bargaining in the district. Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement*: *Evidence from a New Mexico Natural Experiment*, 120 Yale L.J. 1130, 1171 n.146 (2011).

Local elections are only part of the picture, because AFSCME—and other state and local public employee unions—also act as part of a nationally coordinated whole as, for instance, when its members demonstrated in protests in solidarity with the unions opposed to Wisconsin Governor Scott Walker's reforms.[24] AFCSME Council 31, the local *Illinois* affiliate that is the respondent in this case, urged its

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[24] *See* Matthew DeFour, *National AFSCME president says Scott Walker is a top target*, Wisc. State J., Sept. 11, 2014, http://host.madison.com/wsj/news/local/govt-andpolitics/onpolitics/national-afscme-president-says-scott-walkeris-atoptarget/article_448eb81d-0e8a-53b9-a064-353eb3d274b1.html. (AFSCME President Lee Saunders said the union would have 40,000 staff and volunteers across the country knocking on doors, making phone calls, and visiting work sites.).

members to join a rally at the *Wisconsin* State Capitol to protest pending right-to-work legislation. For those unable to make it to Madison, more than 250 miles from the Illinois capital, the union hosted "anti-right-to-work phone bank[s]" in Springfield and Chicago. AFCSME Council 31, *Help stop 'Right To Work' in Wisconsin* (Feb. 23, 2015).[25]

The vertical integration of national, state, and local public-sector unions amplifies their political influence beyond what they could accomplish standing alone. In the private sector, this remarkable lobbying machinery would ultimately be answerable to the bottom line of economic efficiency. Private-sector political organizations, such as the Republican and Democratic Parties, Planned Parenthood, the National Rifle Association, and others, operate equally effective as well-designed lobbying mechanisms. But unlike those entities, public-sector union activities are ultimately funded by *taxpayers*, who are forced—by taxation—to underwrite every level of this immense political machine. Whether public-sector union political advocacy occurs in the course of collective bargaining or while organizing a letter-writing or phone-bank campaign to state legislators, it is all equally political and, as such, should be funded only by people who share the union's political goals and choose to subsidize them.

[25] http://www.afscme31.org/news/help-stop-right-to-work-in-wisconsin.

III

UNIONS HAVE NO CONSTITUTIONAL RIGHT TO GARNISH WORKERS' WAGES FOR *ANY* PURPOSE

Labor unions often complain that prohibiting the forced collection of union dues from non-union employees would diminish their effectiveness and imposes hardships on them. *Cf. Knox*, 567 U.S. at 312 ("[R]equiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions."). But this Court's focus should not be on the difficulties faced by unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the freedom of choice of individual workers. *Id*. at 321 (the risk of pecuniary loss must lie with the "side whose constitutional rights are not at stake," i.e., the unions). *Cf. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) ("For purposes of the First Amendment, . . . [w]hat matters is . . . the union's extraordinary state entitlement to acquire and spend *other people's money*." emphasis added).

The special benefits legislatively given to unions to garnish wages are not only inconsistent with constitutionally protected individual rights, but they are frankly anti-constitutional. Public employee collective bargaining distorts the democratic process "because it gives one interest group, public employees and their unions, an avenue of access that is unavailable to other interest groups and may, as a practical matter, preempt the voices of competing

interest groups." Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 Comp. Lab. L. & Pol'y J. 277, 279 (2013). For example, police unions "are unparalleled in their ability to successfully advocate for policy proposals that conflict with traditional democratic values of accountability and transparency." Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 112 (2017) (describing successful union lobbying to prohibit public disclosure of disciplinary records and the outcomes of misconduct investigations).

These adverse effects on the body politic are nearly impossible to reverse once the union is established as the exclusive bargaining representative. Once a union is certified, it remains in power unless and until it is decertified. As a practical matter, unions usually remain in power for years as it is rare that a certified union is dislodged through decertification. Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit*, 7 U.C. Davis Bus. L.J. 3, nn.71-72 (2006) ("Although decertification is possible, '[m]ost American workers who have union representation have never had the opportunity to vote on it themselves, since the union was certified before they were hired.'" (quoting George C. Leef, *Free Choice for Workers: A History of the Right to Work Movement* 19 (Jameson Books, 2006))). Most public employee unions were certified in the 1960s and 1970s, when the law first permitted them. New York City schoolteachers voted to certify the United Federation

of Teachers in 1961,[26] and there has never been a subsequent election. As a result, few current public employee union members ever cast a vote for the certification of their exclusive representative. This state of affairs is "fundamentally undemocratic," particularly when contrasted with the frequent federal elections by which citizens choose their political representatives. Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teachers Association, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341, 388 (2016).

This distortion of the political process that entrenches one type of political interest group—public-sector unions—at the expense of individual workers' First Amendment rights, demands especially close judicial scrutiny. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The combination of the politically weak position of dissenting workers, the unions' documented and pervasive abuses of the state-granted ability to garnish wages,[27] the lack of protection in administrative agencies,[28] and the fundamental

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[26] United Federation of Teachers, *50 Years: 1960-2010*, http://www.uft.org/files/attachments/uft-50-years-book.pdf (last visited Nov. 27, 2017). The union won certification on the vote of 20,045 teachers. It currently represents over 200,000 teachers, nurses, and other public employees. United Federation of Teachers, *Who We Are*, http://www.uft.org/who-we-are (last visited Nov. 27, 2017).

[27] *See generally*, Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* (2004).

[28] *See* U.S. House of Representatives Comm. on Oversight and Gov't Reform, *President Obama's Pro-union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional*

importance of the expressive and associative rights at issue, requires this Court to protect the individual's freedom to choose—and to dissent—in a unionized workplace as the guiding principle in this case. *See* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience."). *Abood* is flatly incompatible with individual rights, and this Court should overrule it.

CONCLUSION

Public employee unions differ from private-sector unions in that they use money obtained ultimately from taxpayers to fund self-interested political machines that typically result in expanding government still further, at the taxpayer's expense. At no point in the process does the taxpayer have a say. Yet public employees, like Mark Janus and his colleagues, are taxpayers, too, and they do not agree with the political agendas these unions pursue. Nevertheless, thanks to this Court's decision in *Abood*, their paychecks are regularly docked to subsidize the unions' political efforts. There would be nothing objectionable with unions or any other group lobbying the government, supporting candidates, or opposing initiatives, as described in this brief—if they did it with their own money. To use the law to force Janus and others to support the union's priorities against their own consciences violates the First Amendment and the basic principle that "'to compel a man to furnish contributions of money for the

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Union Advocate (Dec. 13, 2012), http://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf.

propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Hudson*, 475 U.S. at 305 n.15 (citation omitted).

It is far past time for public-employee unions to join the great American tradition of voluntary associations, where participants willingly contribute their time and treasure to common goals. This Court should uphold workers' First Amendment rights and overrule *Abood*.

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