No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR CALIFORNIA PUBLIC-SCHOOL TEACHERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should overrule *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and hold that public-sector "agency shop" arrangements violate the First Amendment.

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INTEREST OF AMICI CURIAE

Amici Bruce Aster, Darren Miller, Allen Osborn, Michelle Raley, Robert Vehrs, Stacy Vehrs, and Ryan Yohn are public-school teachers who are subject to compulsory union fees in California. Amicus Association of American Educators is a group whose members include public-school teachers subject to compulsory union fees (in California and elsewhere). Amici have sued California and the California Teachers Association to challenge the compulsory-fee scheme in that State. That lawsuit is pending. *Yohn* v. *California Teachers Association*, No. 17-202 (CD Cal. 2017).[*]

SUMMARY OF ARGUMENT

This amicus brief makes three points: (1) Laws compelling people to pay union fees as a condition of public employment are subject to exacting scrutiny; (2) such laws cannot satisfy *any* level of scrutiny, as confirmed by empirical information that amici have uncovered in discovery in *Yohn*; (3) if the Court overrules *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), it should also clarify that a public-sector union may collect fees from nonmembers only with their affirmative consent.

I. Laws compelling individuals to pay union fees as a condition of public employment are subject to exacting scrutiny. *First*, this Court has long engaged in exacting review of laws requiring people to support

[*] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed letters granting blanket consent to the filing of amicus briefs.

political or ideological causes as a condition of public employment. In contrast, the Court has reserved less exacting review for routine personnel policies that restrict employee speech in order to manage the workplace or ensure effective job performance. Agency-fee laws—which are categorical compulsions to support outside advocacy groups, rather than individualized restrictions on workplace speech—thus deserve exacting review.

Second, the purposes of the First Amendment confirm this analysis. The First Amendment guards against the threat that the government and allied interest groups will abuse their powers to coerce uniformity of thought. There is a grave danger of such abuse whenever a government decides that everyone must support a favored political agenda as a condition of public employment. Also, the open marketplace of political ideas protected by the First Amendment is badly distorted by state-imposed requirements to support a particular advocacy group. Finally, the First Amendment secures a sphere of individual conscience free from government control, and the state intrudes on this sphere when it compels people to contradict their deeply held beliefs by subsidizing causes they fervently oppose.

Third, history confirms the propriety of exacting review. For centuries before the Founding, English rulers tried to secure conformity of religious and political thought by compelling public servants to affirm particular beliefs as a condition of employment. For example, Parliament enacted laws forcing public employees to support the monarch's status as head of the Church, to denounce the theory that the people have the right to rebel against a tyrannical government,

and to profess the legitimacy of the Hanoverian succession. The framers of our Bill of Rights condemned these religious and political tests (even though the tests were imposed only on public employees, rather than on the citizenry at large). This history refutes the notion that the First Amendment allows the government to compel political speech as a prerequisite for public employment.

II. Laws requiring payment of agency fees cannot survive *any* level of review, exacting or deferential.

Abood's defenders claim that compelled agency fees promote "labor peace" by avoiding the problems that would arise if the state had to deal with multiple rival unions instead of a single bargaining agent. But this argument is a *non sequitur*. The state's interest in avoiding multiple unions justifies (at most) the proposition that there should be only one union, not the separate proposition that objectors should be forced to *subsidize* that union. *Abood*'s defenders persist, however, that the state's interest in dealing with a single union justifies compelled agency fees on the ground that, without such fees, the union would become insolvent. Yet *Abood*'s defenders have never provided any empirical evidence to support such claims. Nor can they do so, since public-sector unions flourish at the federal level and in the many states that prohibit agency fees.

Abood's defenders also claim that compelled agency fees are justified to prevent nonmembers from "free riding." This claim is meritless. The First Amendment generally does not allow the government to force someone to subsidize speech with which he disagrees simply because the government thinks that

it benefits him. This is all the more true because a dissenting worker does not "free ride" on the union's policies, but rather *disagrees* with those policies, and must abide by them only because the state has imposed the union on him as his exclusive bargaining representative. It is thus more accurate to describe the dissenter (in JUSTICE KENNEDY's words) as a "compelled rider" on policies with which he disagrees.

Against all of this, *Abood*'s defenders have suggested that public-sector unions have a unique privilege to extract fees from nonmembers because they have a statutory duty to refrain from discriminating against those nonmembers. But unions voluntarily assume this "duty" in exchange for being empowered as an exclusive bargaining representative. The "duty" is, indeed, an essential (but minor) limit on the power of exclusive representation: A union cannot simultaneously insist on both (1) the sole authority to negotiate on behalf of all workers in the unit *and* (2) the authority to discriminate against some of those workers during those negotiations. Nor is there any evidence that the nondiscrimination duty makes any difference in how unions actually conduct themselves. Thus, the "free-rider" justification for compelling speech is even *weaker* in the union context than it is elsewhere.

III. If the Court decides to overrule *Abood*, existing procedures for collecting fees from nonmembers will become defunct. Unions and nonmembers alike need guidance about what rules will take their place. The answer to that question is straightforward: Just like any other political advocacy group, a union may collect fees from a nonmember only if he affirmatively consents (or "opts in") to this subsidization. Under the First Amendment, states must minimize the burden

on political speech. They cannot require individuals to "opt out" of paying union fees, any more than they can require them to "opt out" of making a donation to the Democratic or Republican parties. Forcing nonmembers to shoulder the burden of objecting to political wage-garnishment serves no legitimate public purpose, particularly since it contradicts the probable preferences of nonmembers.

ARGUMENT

The First and Fourteenth Amendments prohibit the States from "abridging the freedom of speech." The freedom of speech includes the right to decide which words to speak, which groups to join, and which political causes to support—or not to support.

One of the most powerful ways to support a cause is to fund it—to put your money where your mouth is. That is why the Declaration of Independence ends: "we mutually pledge to each other our Lives, *our Fortunes* and our sacred Honor." And it is why the Virginia Statute for Religious Freedom (also written by Thomas Jefferson) says: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

In spite of these principles, this Court held in *Abood* that a state may force public employees to support the inherently political agenda pursued by public-sector unions in collective bargaining. That ruling was incorrect, and this Court should overrule it.

This amicus brief addresses three points. First, we explain why exacting scrutiny applies to laws that impose compulsory union fees as a condition of public employment. Second, drawing on information secured

in discovery in *Yohn* v. *California Teachers Association,* we show why such compulsory fees violate the First Amendment under *any* standard of review. Third, if the Court does overrule *Abood,* it should also clarify that a public sector union may not collect *any* agency fees from nonmembers unless they affirmatively consent, or "opt in," to such fee paying.

I. Compulsory Union Fees Are Subject To Exacting Scrutiny

As a general rule, laws that compel people to support a political or ideological cause as a condition of public employment are subject to exacting judicial scrutiny. This Court has already decided that this exacting scrutiny applies to laws that require public employees to pay compulsory union fees to support collective bargaining: "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights." *Knox* v. *Service Employees*, 567 U.S. 298, 310–11 (2012). Such an impingement cannot be justified except in the "exceedingly rare" situation where it "serve[s] a compelling interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. at 310; *see id.* at 314 (compulsory union fees "must serve a compelling interest and must not be significantly broader than necessary to serve that interest").

Defenders of *Abood* have argued, however, that agency-fee laws nonetheless deserve more deferential review because the government has imposed them in its capacity as a public employer. They have relied on

cases such as *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), which holds that the government's decision to restrict employee speech in order to manage the workplace triggers interest-balancing rather than full First Amendment review. They have urged the Court to extend the same balancing test to compulsory-fee laws.

This position is incorrect. Precedent, the purposes of the First Amendment, and the history of conditioning public employment on ideological commitments all establish that compulsory union fees are subject to exacting scrutiny.

A. This Court's Cases Require Exacting Scrutiny Of Compulsory Union Fees Regardless Of The Government's Role As Public Employer

1. Under this Court's precedents, the scope of the government's authority to regulate employee speech depends on the nature of the regulation. The most exacting scrutiny applies to laws that compel support for political or ideological causes as a condition of public employment. By contrast, routine policies that restrict employee speech in order to manage the workplace or ensure effective job performance receive more deferential review. Under this framework, agency-fee laws—which are categorical compulsions to support outside political advocacy groups, rather than individualized restrictions on workplace speech—deserve exacting review.

The Court made this point most clearly in *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality opinion). There, the Court ruled that any government practice that compels public servants to "contribute a portion of

their wages to" an ideological advocacy group "must survive exacting scrutiny." *Id.* at 362. A majority of this Court reaffirmed that rule in *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 74 (1990), which held that patronage practices must be "narrowly tailored to further vital government interests."

The Court further elaborated on this point in *O'Hare Truck Services, Inc.* v. *City of Northlake*, 518 U.S. 712 (1996). There, the Court explained that laws requiring public servants to satisfy a "raw test of political affiliation" face exacting scrutiny and are presumptively invalid. *Id.* at 719. At the same time, where "a government employer" simply regulates "specific instances of the employee's speech or expression" in the course of managing the workplace, courts instead apply "the balancing test from *Pickering*" and often (though not always) sustain the employer's decision. *Id.*

Time and again, the Court has invalidated laws compelling public servants to support a political cause as a condition of getting or keeping their jobs. For example, the Court has ruled that the state lacks the power to:

- Require public-sector employees to join, work for, or contribute money to a political party. *Rutan*, 497 U.S. at 74; *Branti* v. *Finkel*, 445 U.S. 507, 513–17 (1980); *Elrod*, 427 U.S. at 355 (plurality opinion).
- Require public teachers to disavow communism. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 597–604 (1967).

- Require public teachers to affirm that they will respect the national and state flags. *Baggett* v. *Bullitt*, 377 U.S. 360, 371 (1964).
- Require public-sector employees to affirm that they are not members of "subversive organizations." *Wieman* v. *Updegraff*, 344 U.S. 183, 190–91 (1952).

The principles underlying these cases defeat compulsory public-union fees. Such coerced subsidization does not involve the management of the workplace or the regulation of "specific instances of [an] employee's speech," but instead imposes "raw test[s] of political affiliation" by forcing employees to support the inherently political agenda that public-sector unions pursue in collective bargaining. *O'Hare*, 518 U.S. at 720. Nobody who refuses to support this political agenda may hold the public office in question—no matter how qualified, no matter how experienced, no matter how effective a public servant he may be. Under this Court's cases, such coercive political favoritism is subject to exacting review, and the government has no special authority to impose it simply because it is an employer.

2. The general principles underlying this Court's cases about the government's authority as employer confirm that the Court should engage in exacting review of the law here.

This Court has long rejected Justice Holmes' dictum that one "may have a constitutional right to talk politics," but has "no constitutional right to be a policeman." *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668, 675 (1996). Quite the contrary, the Court has consistently ruled that "public employees

do not renounce their citizenship when they accept employment." *Lane* v. *Franks*, 134 S. Ct. 2369, 2377 (2014). And the government may not "leverage the employment relationship" (*Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006)) to "produce a result which it could not command directly" (*Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)).

This Court thus starts with the presumption that laws abridging freedom of political speech trigger exacting scrutiny, regardless of whether the government enforces the restriction by invoking the sovereign's power to punish or the employer's power to discipline. Indeed, since taking away someone's job is generally *more* coercive than simply taking away some of his money—especially in fields such as "teach[ing]," where "the government is a major (or the only) source of employment" (*Rutan*, 497 U.S. at 77)—it makes no sense to reduce the level of scrutiny just because the government has decided to fire rather than to fine. Consequently, for example, this Court engages in exacting review both when the government orders *citizens* to be Democrats and when it orders *employees* to be Democrats (*Elrod*, 427 U.S. at 362), both when the government orders *citizens* to say that God exists and when it orders *employees* to say that God exists (*Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961)).

That said, this Court has recognized an exception to this general rule. Under *Pickering*, the Court engages in interest-balancing when the government regulates the workplace speech of individual employees. 391 U.S. at 568. This Court, however, has never "seen *Abood* as based on *Pickering*." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2641 (2014). *Pickering* applied less strict review because of two basic realities: Applying exacting

scrutiny to discipline for public employees' work-related speech would cripple the government's ability to manage the workplace, and would convert judges into personnel managers. But neither of these problems arises in reviewing laws requiring agency fees, and there is thus no basis for relaxing scrutiny.

To elaborate: The *Pickering* cases explain that "the extra power the government has in this area comes from the nature of the government's mission as employer." *Waters* v. *Churchill*, 511 U.S. 661, 674–75 (1994) (plurality opinion). "Government employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti*, 547 U.S. at 418. If an employee "who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters*, 511 U.S. at 675. Otherwise, "there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418.

This rationale, however, does not cover laws compelling public employees to support the political agenda of an outside advocacy group. A public employer simply has no "need" to require public servants to support the inherently political agenda pursued by public-sector unions' collective bargaining *against* the employer. Nor is there any risk that public servants' refusal to support the union's political agenda will hamper the "effective operation" of the government workplace. There is, accordingly, no justification for deferential review in this context.

Separately, the *Pickering* cases explain that more deferential review is necessary to avoid the "displacement of managerial discretion by judicial supervision." *Garcetti*, 547 U.S. at 423. These cases have cautioned against "intrusive" "judicial oversight" of the interactions between "government employees and their superiors in the course of official business." *Id.*

Again, however, there is no such risk here. This case involves a general law requiring public servants to fund the political agenda of outside advocacy groups. It does not involve any exercise of "managerial discretion" regarding how the workplace is run or how employees perform their job duties. As a result, this key justification that underpinned *Pickering* and *Garcetti* is entirely absent here.

This is particularly true because it is not Mark Janus' *employer*, the Department of Healthcare and Family Services, that has decided to extract fees from him. It is the Illinois General Assembly that has done so. There is no more reason to defer to this law than there is to defer to any other law regulating speech.

In any event, even if Janus's employer itself had extracted the fees, this Court's "duty" to protect the employee's right to refrain from supporting a political cause that he opposes "does not depend upon [its] possession of marked competence in the field where the invasion of rights occurs." *West Virginia State Board of Education* v.*Barnette*, 319 U.S. 624, 639 (1943). The Court "act[s] in these matters not by authority of [its] competence but by force of [its] commissions." *Id.* It should not, "because of modest estimates of [its] competence in such specialties as public [employment], withhold the judgment that history authenticates as [its] function … when liberty is infringed." *Id.*

3. There is no merit to the claim that this Court's decisions require deferential review here because collective bargaining addresses "prosaic" issues rather than issues of "public concern" (*Harris*, 134 S. Ct. at 2655 (KAGAN, J., dissenting)). This characterization of collective bargaining "flies in the face of reality." *Harris*, 134 S. Ct. at 2642. Collective bargaining affects public policy, public services, and the public fisc—all "matter[s] of great public concern." *Id.* at 2643.

More importantly, even assuming the accuracy of this characterization of collective bargaining, the "prosaic" character of the union's speech would not affect the objector's First Amendment rights. People have a right not to fund speech they oppose, prosaic or not. For example, this Court has held that the First Amendment prohibits compelling people to fund mushroom advertising. *United States* v. *United Foods*, 533 U.S. 405 (2001). If there is a fundamental right not to fund something as "mundane" as mushroom advertising, there is also a fundamental right not to fund collective bargaining. *Knox*, 567 U.S. at 309.

This is because the nature of the union's speech tells us only whether the government may prevent *the union* from uttering that speech; it says nothing about whether the government may force *a third party* to subsidize that speech. The "prosaic" nature of the union's speech may diminish the First Amendment protection enjoyed by *the union* in making that speech, but it does not diminish the protection enjoyed by *petitioner* in refusing to fund that speech. Indeed, even if the union's collective-bargaining speech were wholly unprotected, the government would still have no basis for forcing others to fund it. A State's choice not to ban speech that it could constitutionally prohibit hardly

provides a rational justification for forcing others to support that proscribable speech. For example, the government may prohibit unions from contributing to political campaigns (*FEC* v. *National Right to Work Committee*, 459 U.S. 197, 208 (1982)), but that hardly suggests that the government may compel third parties to subsidize a union's political contributions. Similarly, the government may prohibit its employees from participating in partisan politics (*U.S. Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 556 (1973)), but that does not mean that it may compel third parties to support its employees' partisan activities. Thus, *petitioner's* right not to fund the union's bargaining is coextensive with *petitioner's* right to criticize or to refuse to praise that speech; it is not coextensive with *the union's* right to engage in that bargaining in the first place.

B. Exacting Review Advances The First Amendment's Purposes

The basic purposes of the First Amendment reinforce all of these points.

First, the First Amendment is "premised on mistrust of governmental power." *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010). It denies government power to regulate speech, because governments (and allied interest groups) tend to abuse that power to "coerce uniformity of sentiment" in society. *Barnette*, 319 U.S. at 641. There is a grave danger of such abuse any time a government decides to require every public servant to support a given creed as a condition of public employment. That is obvious from, for example, the American experience with loyalty oaths during the

Red Scare. It is essential to review such speech compulsions rigorously, not deferentially.

Second, the First Amendment secures for society an "open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 567 U.S. at 309. It denies the government the power to distort that marketplace by "prohibit[ing] the dissemination of ideas that it disfavors" or "compel[ling] the endorsement of ideas that it approves." *Id.* A categorical requirement that all public employees support a given political cause undoubtedly distorts this marketplace of ideas. By contrast, limiting the speech of government employees in order to manage their workplace or ensure their effective job performance carries no such risk. It therefore makes sense to review the former far more stringently than the latter.

Third, the First Amendment also secures for the individual a "sphere of intellect and spirit" free "from all official control." *Barnette*, 319 U.S. at 642. The state intrudes upon this sphere when it prevents someone from "speak[ing] his own mind," but it intrudes even more seriously when it "compel[s] him to utter what is not in his mind." *Id.* at 634. To be sure, preventing an individual from expressing his views impermissibly distorts the marketplace of ideas by excluding that citizen's voice. But compulsions to speak are worse still, because they force the citizen to affirmatively *contradict* his own views, both violating his conscience and artificially *enhancing* the voice of the opposing side. For this reason, "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* at 633.

The school cases illustrate this principle. On the one hand, public schools have broad power to *prohibit* the utterance of a disruptive message, say by disciplining a student for unfurling a banner urging drug use. *Morse* v. *Frederick*, 551 U.S. 393, 410 (2007). On the other hand, public schools lack similar power to *compel* the support of a favored message, say by disciplining a student for failing to salute the flag. *Barnette*, 319 U.S. at 642.

The same logic is decisive here. A government employer intrudes upon its employees' liberty more seriously when it requires them to support political positions they do not favor (for example, by forcing them to pay union fees) than when it restricts their speech in order to improve workplace functioning and job performance. Such affirmative compulsion therefore inherently deserves the most exacting scrutiny in all circumstances.

C. History Confirms The Propriety Of Exacting Review

History illustrates the evils of imposing compulsory political support as a condition of public employment. For centuries before the Founding, English rulers tried to secure conformity by requiring public servants to affirm religious and political beliefs. For example:

- The Act of Supremacy required everyone "having [the Queen's] Fee or Wagys" to affirm that Elizabeth I was "the supreme Governour of this Realme" in both "Spirituall" and "Temporall" matters. 1 Eliz c. 1 (1558).

- The City of London Militia Act required militia officers to denounce the "traiterous position" that the people may "take Armes against the King." 14 Car. II c. 3 (1662).
- The Act of Uniformity required "every Publique Professor" to reject "change or alteration of Government … in Church or State." 14 Car. II c. 4 (1662).
- The Oaths of Allegiance and Supremacy Act required anyone "admitted into any Office or Imployment" to "Abjure" the "Damnable Doctrine" that "Princes … may be Deposed … by their Subjects." 1 Gul. & Mar. c. 8 (1688).
- The Security of the Succession Act required everyone who received "any Pay, Salary, Fee, or Wages" from the Crown to profess the legitimacy of the Hanoverian succession. 13–14 Gul. III c. 6 (1701).

The framers of our Bill of Rights were familiar with these abuses, and they abhorred them. For example, Noah Webster condemned "test laws, oaths of … abjuration, and partial exclusions from civil offices" as "instruments of slavery" and "badge[s] of tyranny." Noah Webster, "On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office," *A Collection of Essays and Fugitiv Writings*, 151–53 (1790). Oliver Ellsworth insisted that laws requiring people to "make a public declaration of … belief … in order to qualify themselves for public employments" were "useless, tyrannical, and peculiarly unfit for the people of this country." Oliver Ellsworth, *Landholder* No. 7 (1787), in *Essays on the Constitution of the United States*, Paul Leicester Ford ed., 168–71

(1892). And Thomas Jefferson wrote that "proscribing any citizen as unworthy the public confidence, by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess … this or that … opinion, is depriving him injuriously of those privileges and advantages, to which, in common with his fellow citizens, he has a natural right." Virginia Statute for Religious Freedom (1786).

This history forecloses the theory that the government may require people to support a political or ideological cause simply because it happens to be their employer. To the contrary, English history shows that such requirements are rife with potential for abuse, and American history shows that the founding generation would not have tolerated them. It thus makes no difference that agency-fee requirements are enforced through employment sanctions; exacting scrutiny still applies.

II. Compulsory Agency Fees Are Unjustifiable On Any Standard Of Review

Regardless of whether this Court engages in exacting or deferential review, the government bears the burden of identifying a good reason for forcing objectors to fund the political agenda of an outside advocacy group such as a public-sector union. Defenders of *Abood* have identified two justifications for this practice: (1) promoting "labor peace" and (2) preventing "free riding." Neither of these interests, however, can justify the extraordinary step of compelling political speech—on any standard of review. We show why that is so below, drawing on empirical information that we have uncovered during discovery in *Yohn* v. *California Teachers Association*.

A. "Labor Peace" Does Not Justify Compulsory Union Fees

Defenders of *Abood* claim that compelled agency fees promote "labor peace" by helping the state avoid "the confusion and conflict that could arise if rival … unions, holding quite different views, … each sought to" represent employees during collective bargaining. *Abood*, 431 U.S. at 224.

But this argument is a *non sequitur*. The state's interest in avoiding a multiplicity of unions justifies (at most) the proposition that there should be only one union. It does not justify the entirely different proposition that objectors should be forced to subsidize the speech of that one union. Put simply, "a union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked." *Harris*, 134 S. Ct. at 2640.

In an effort to show why the state's interest in having a single union justifies compelled agency fees, defenders of *Abood* have argued that the single union would become insolvent without the funding provided by such fees. This argument is mistaken.

First, *Abood*'s defenders bear the burden of supporting their claims with evidence, since "mere speculation" cannot justify limiting speech. *United States* v. *NTEU*, 513 U.S. 454, 473 (1995). Yet public-sector unions have never offered any empirical evidence that they will wither away without compulsory fees.

The *Yohn* lawsuit currently pending in California confirms this point. In that case, we asked the unions whether loss of compulsory fees really would make them insolvent or preclude them from serving effec-

tively as exclusive bargaining representatives. In response, the unions never asserted (much less provided any evidence) that any such result would occur. They instead said that, if *Abood* falls, "some number" of workers will refuse to pay dues and that this number "may" be "substantial." NEA Response to Interrogatory No. 13. They made no effort to quantify this shortfall or to suggest that it would impede them from effectively representing employees.

This is nothing new. Public-sector unions had a chance in *Harris* to show that "the cited benefits" of exclusive bargaining "could not have been achieved if the union had been required to depend for funding on the dues paid by those … who chose to join." 134 S. Ct. at 2641. They had the same chance again in *Friedrichs*. They had the same chance once more in *Yohn*, and once more after that in this case. Each time, however, "no such showing has been made." *Id.* at 2641. That speaks volumes.

Second, experience refutes the unions' claims. The Federal Government and *most* states already allow employees to decide for themselves whether to pay union fees. Yet despite the inability to extract fees from dissenters, public-sector unions remain vibrant at the federal level and in all such states.

Experience also shows that nonmember fee-payers constitute only a tiny fraction of the people who financially support public-sector unions. For example, we learned in *Yohn* that, in 2016–17, the National Education Association received fees from 3 million members, but only 90,000 nonmembers (or 3 percent of the total number of workers). NEA Response to Interrogatory No. 16. In the same period, the California Teachers Association collected fees from around 315,000

members, but only 25,000 nonmembers (or 7 percent of the total). CTA Response to Interrogatory No. 18. The loss of fees from such a miniscule part of the workforce will not imperil unions' continued existence.

Indeed, even if there were a *massive* increase in the number of nonmembers, and even if all of these nonmembers decide not to pay fees, unions could still continue to do their jobs effectively. After all, at the federal level, around *two-thirds* of covered employees pay no union dues. *Harris*, 134 S. Ct. at 2657 n.7 (KAGAN, J., dissenting). But public-sector unions ably represent their federal bargaining units.

Unions could in all events make up for any shortfall by redirecting funds from express political activity to collective bargaining. Unions spend vast sums on campaigning; just consider the $12 million that the union in *Knox* budgeted to "fight back" against a Republican governor's effort to limit the union's ability to extract coercive fees. 567 U.S. at 306. Unions can more than make up for the loss of compulsory fees by spending less money at the polling place and more money at the workplace.

Third, common sense likewise belies any claim that public-sector unions will collapse unless propped up by compulsory fees. If public-sector workers really consider unions' agenda and services beneficial and worthy of support, it stands to reason that "a high percentage" of public-sector workers would "bec[ome] union members and willingly pay union dues." *Harris*, 134 S. Ct. at 2641. That suffices to keep the union solvent. There is no need (and thus no justification) for the further step of extracting compulsory fees from those who *oppose* the unions.

Ultimately, what the unions really seem to fear is not that the loss of agency fees will hamper their provision of services, but, instead, that it will spur debate about the value of those services. In *Yohn*, the unions speculated that "dark-money groups" will "attempt to persuade" employees to quit unions and to refuse to pay dues. NEA Response to Interrogatory No. 14.

Under the First Amendment, however, more debate is a good to be welcomed, not an evil to be avoided. Perhaps outside groups will indeed try to persuade employees to stop paying dues, but unions remain free to respond to such speech with more speech of their own. If unions really do achieve all the benefits they claim to achieve, they should have little trouble persuading workers to continue supporting them. Regardless, a government cannot justify compulsory subsidization of unions on the grounds that it wishes to avoid public debate about the value of those unions.

B. Concerns About "Free Riding" Do Not Justify Compulsory Union Fees

1. Defenders of *Abood* have also claimed that states may force dissenters to pay dues in order to prevent the dissenters from "free riding" on the union's efforts. But this rationale, too, is wrong.

"Free-rider arguments … are generally insufficient to overcome First Amendment objections." *Knox*, 567 U.S. at 311. Lots of groups provide benefits for people who are not members, but it does not follow that the government may coerce the beneficiaries to subsidize the groups' activities. For example, the Government may not force hikers to fund the Sierra Club, businesses to fund the Chamber of Commerce, or doctors to fund the American Medical Association, even

though they might well benefit from these organizations' activities. So too, the Government may not force objecting employees to fund a public-sector union, regardless of whether the employees benefit from the union's activities.

Indeed, the free-rider rationale is far *weaker* in this setting than it is elsewhere. No law compels unions to represent nonmembers; unions may engage in "members only" bargaining. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236 (1938). Unions *consciously choose* to represent nonmembers in exchange for recognition as *exclusive* bargaining representatives. This recognition subjects the nonmembers to the unions' control, depriving them of their right to negotiate independently with their employer and forcing them to adhere to the employment policies that *the unions* want included in the collective bargaining agreement.

It is thus Orwellian to describe the objectors here as "free riders." As JUSTICE KENNEDY aptly put it, it would be more accurate to describe the objectors as "compelled riders for issues on which they strongly disagree." Transcript of Oral Argument 45, *Friedrichs* v. *California Teachers Association*, 136 S. Ct. 1085 (2016) (No. 14-915). The government's decision to force a nonmember to live by union policies to which he objects hardly justifies the *additional* restriction of forcing him to subsidize the negotiation of those policies.

2. *Abood*'s defenders have nonetheless claimed that the free-rider rationale uniquely permits compulsion to speak here, because the exclusive bargaining representative has a duty to represent nonmembers. Where the government requires a union to provide services to nonmembers (the theory goes), it may also

require the nonmembers to pay the cost. This rationale is incorrect for a number of reasons.

There is, again, no *duty* to represent nonmembers: No law requires any union to represent workers that it does not want to represent. Public-sector unions have *voluntarily* assumed this "duty" in exchange for the power of exclusive representation.

Indeed, the "duty" of nondiscrimination is an essential limitation on the unions' voluntarily assumed power to control nonmembers' employment conditions. Having insisted on exclusive authority to negotiate on behalf of members and nonmembers alike, the union cannot reasonably insist that it should also be allowed to *discriminate* against those nonmembers.

In fact, such an inequitable arrangement—in which a union gets fiduciary powers over nonmembers but owes no fiduciary duties to them—would raise grave constitutional concerns. In *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192 (1944), the Court explained that an exclusive representative "is clothed with power not unlike that of a legislature," and so has "an affirmative constitutional duty" to refrain from "discriminat[ing] against … those for whom it legislates." *Id.* at 198. "Constitutional questions arise" if a statute gives a union exclusive authority to speak on behalf of a worker, yet "without any commensurate statutory duty" to refrain from discriminating against that worker. *Id.*

Unions are not entitled to compensation for fulfilling this duty. Refraining from discrimination against nonmembers, such as the black employees in *Steele,* is not a *favor* that burdens the union; it is, in-

stead, the nonmembers' constitutional due. In nonetheless insisting on payment for refraining from discrimination, a union in effect says to the objector: "Even though you disagree with all of our policies, we've made sure that only our union can represent you during your negotiations with your employer. Now pay up, because if you don't, we'll use our power to see that you get paid less than everybody else." This kind of claim—which resembles a demand for protection money—can hardly justify abridging the nonmembers' speech rights.

Underscoring these points, the nondiscrimination duty imposes no meaningful burden on unions and provides no meaningful benefit to nonmembers. The duty does not require unions to advocate for the views held by nonmembers. It does not even require them to *consider* the views of nonmembers. To the contrary, unions remain free to strike bargains that elevate their own policies over those of nonmembers. The union need only refrain from making agreements that *discriminate on their face* against nonmembers.

Our experience in *Yohn* illustrates these points. During discovery, we asked the defendant unions to identify all instances in which they had even *consulted* with a nonmember about the terms of the collective bargaining agreement. In response, they acknowledged that they had never "undertaken any poll, survey, or other formal outreach" seeking the opinions of nonmembers. NEA Response to Interrogatory No. 10. More generally, they could not identify a single dollar they had spent because of the "nondiscrimination duty," since they "d[o] not maintain records that track or report the total amount or percent-

age of funds" they spend "in connection with representing nonmembers." CTA Response to Interrogatory No. 11.

What is more, the "burden" of nondiscrimination is so trivial and commonplace that advocacy groups (even unions) already voluntarily refrain from discriminating. The AMA and AARP do not seek higher Medicare payments to members than to nonmembers. Unions lobbying state legislatures (a context in which there is no nondiscrimination "duty") do not seek higher statutory overtime rates for members than for nonmembers. The reality that unions and other groups voluntarily refrain from discriminatory advocacy vividly demonstrates both that the "duty" to do so imposes no meaningful burden and that such nondiscrimination does not distinguish unions from other advocacy organizations. The "duty" thus cannot explain why unions should be allowed to extract fees from "free riders," when no other advocacy group can.

3. Perhaps recognizing that the nondiscrimination duty has no effect on collective-bargaining negotiations, defenders of *Abood* have claimed that their obligation to handle the grievances of nonmembers entitles them to fees. Not true.

To begin with, grievance representation in fact helps the union rather than the objector. This representation gives the union control over the grievance process: The union gets to decide which grievances to press, and in doing so it may "subordinat[e]" the "interests of the individual" nonmember to "the collective interests" of the bargaining unit. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). Meanwhile, grievance representation has little value for the

nonmember. Such representation only covers grievances under *the collective bargaining agreement*—the very thing the dissenting nonmember may find objectionable. A State may not require a nonmember to pay a union to help him enforce a provision that he does not agree with in the first place.

In all events, any restriction of speech must be "carefully tailored" to the government's interests. *Knox*, 567 U.S. at 313. But nobody suggests that states have carefully tailored agency fees to grievance handling. Quite the contrary, the costs of grievance representation represent at most a tiny percentage of the total agency fee. Indeed, in *Yohn*, the unions could not even say if they had spent *any* money on "representing nonmembers … in grievance proceedings." CTA Response to Interrogatory No. 11. Asking grievance representation to support the compelled agency fee is thus like asking a Lilliputian to support Gulliver.

III. If The Court Overrules *Abood*, It Should Also Clarify That Unions May Collect Fees From Nonmembers Only With Their Affirmative Consent

1. If this Court decides to overrule *Abood*, it should also clarify what procedures unions must follow when collecting fees from nonmembers. Doing so is a practical necessity.

In *Teachers* v. *Hudson*, 475 U.S. 292 (1986), this Court set out the procedures that unions must follow if they wish to collect ordinary annual assessments. Each year, the union tallies up its "chargeable" expenses (expenses related to collective bargaining) and its "non-chargeable expenses" (expenses related to lobbying). The union then sends nonmembers a "*Hudson*

notice," instructing them to pay the "chargeable" portion of the fee and inviting them to pay the "non-chargeable" portion. *Id.* at 304–09.

If the Court overrules *Abood*, however, the *Hudson* procedure will become defunct. There will no longer be a distinction between "chargeable" and "non-chargeable" expenses; in effect, *all* expenses will be non-chargeable.

Consequently, Unions and nonmembers alike need guidance about what will take *Hudson*'s place. Both of these groups need to know what rules unions must follow going forward when collecting agency fees. Providing guidance on this point would accord with the principle that this Court has a "responsibility" to avoid "halfway decisions," and that its opinions should address the "operational question" of how its rulings should "apply in practice." *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1927 n.4 (2017).

2. The question of what rule should take *Abood*'s and *Hudson*'s place is easy to answer. Like any other political advocacy group, a public-sector union may collect donations from nonmembers only by their affirmative consent. Just as a state cannot require employees to "opt out" of donating money to the Democratic or Republican parties, neither can it do so for public-sector unions.

This Court has already held that a union's use of an opt-out rather than an opt-in scheme for collecting fees is, itself, "a substantial impingement on First Amendment rights." *Knox*, 567 U.S. at 317. Rightly so. *First*, opt-out regimes subject nonmembers to "the burden" of opting out of making payments to which

they object. *Id.* at 312. In practice, this burden will often be severe, since a union will have an incentive to make it as difficult as possible for someone to refuse to fund its activities. *Second*, opt-out regimes distort the marketplace of ideas. "An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* After all, as modern social science demonstrates, "people have a strong tendency to go along with the status quo or default option." Richard H. Thaler & Cass R. Sunstein, *Nudge* 8 (2008). Opt-out regimes thus allow governments to exploit inertia and ignorance in order to promote their preferred ideas. *Third*, opt-out regimes contradict the principle that courts "do not presume the acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 316.

As a result, an opt-out requirement—like any other "impingement" on freedom of speech—complies with the First Amendment only if it survives exacting scrutiny. Or, as the Court put it in *Knox* and *Hudson*, "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement of free speech rights.'" *Knox*, 567 U.S. at 313 (quoting *Hudson*, 475 U.S. at 303).

Opt-out requirements cannot satisfy this test. In *Yohn*, we asked the unions whether they could come up with any justification for a default rule under which every nonmember presumptively subsidizes unions. The unions first asserted that an opt-out regime "reduces administrative burdens for unions." CTA Response to Interrogatory No. 17. But this justification is plainly inadequate. For one thing, the unions have not even attempted to describe in general

terms what sort of unidentified "administrative burdens" an opt-in regime would purportedly impose. And it is not obvious what these administrative burdens would be. Either way, unions would have to send nonmembers forms notifying them of their rights; either way, unions would have to review the responses before deducting any dues from the nonmembers' paychecks. In any event, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 795 (1988). Even if an opt-out system were more efficient than an opt-in system, the government still would have no authority to adopt it.

The unions in *Yohn* also claimed that an opt-out regime "comport[s] with the preferences of most workers." CTA Response to Interrogatory No. 17. This wholly unsupported claim defies common sense. As this Court has already recognized, "the probable preferenc[e] of most nonmembers" is to withhold fees, not to pay them. *Knox*, 567 U.S. at 312. After all, it is "likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues." *Id.* In sum, unions have come up with no cognizable justification at all for an opt-out requirement.

More generally, it is obvious that requiring employees to "opt-out" of subsidizing political activity is inherently unconstitutional. Otherwise, a State could establish a default rule that one percent of every public employee's wages goes to the Democratic Party, requiring employees to check a box on a form in order to avoid that deduction. All would agree, however, that such a scheme violates the First Amendment. Just as the First Amendment requires an opt-in regime for

contributions to political parties, so too it requires an opt-in regime for contributions to unions. Nothing else would "avoid the risk" that dissenters' funds will be used "to finance ideological activities." *Id.* at 312.

It is true that the Court has previously given implicit approval to opt-out regimes like California's. But those earlier cases "have given surprisingly little attention to this distinction." *Id.* Rather, "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.* This Court has never directly decided whether the First Amendment requires that public employees opt into subsidizing nonchargeable speech. It is therefore free to vindicate the important First Amendment interests at stake in setting the default rule without reconsidering any prior decisions. It should do so now.

3. Finally, an opinion squarely clarifying that only truly voluntary, "opt-in" fees are permitted will help ensure that the Court's ruling does not become a dead letter. Public-sector unions have been known to resort to "aggressive" and even "indefensible" ploys to "collect fees from nonmembers." *Id.* at 314. There is every danger that, unless checked by this Court, they will engage in such ploys to circumvent the Court's decision in this case.

To take one example, consider one public-sector union's efforts to evade this Court's decision in *Harris* v. *Quinn*. After the Court decided in that case that states may not compel homecare providers to pay agency fees, one union in Washington unilaterally declared every homecare provider in the State to be one of its members by default. *Fisk* v. *Inslee*, No. 16-5889, Order 2–4 (WD Wash. Oct. 16, 2017). Having done so,

it proceeded to collect *full dues* from these new "members"—even though previously, when these homecare providers were nonmembers, it could collect only a portion of the dues, representing chargeable expenses. *Id.* Making matters worse, a federal district court then blessed this procedure as lawful. *Id.* at 5.

To take another example, consider reports that a public-sector teachers' union in Minnesota has already prepared a new dues form "in anticipation of *Janus*." This form "says that the union is authorized to deduct dues from the teachers' paychecks." The form "also includes the following fine print":

> This authorization shall remain in effect and shall be automatically renewed from year to year, irrespective of my membership in the union, unless I revoke it by submitting written notice to both my employer and the local union *during the seven-day period that begins on September 24 and ends on September 30.*

Kim Crockett, "Unions Act as if They've Already Lost," *Wall Street Journal* (Oct. 2, 2017) (emphasis added).

If this Court overturns *Abood*, it should not leave the door open to such evasions.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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