No. 11-681

In the Supreme Court of the United States

PAMELA HARRIS, ET AL.,

Petitioners,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, ET AL.,

Respondents.

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

BRIEF OF CALIFORNIA PUBLIC-SCHOOL TEACHERS, THE CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, AND THE CENTER FOR INDIVIDUAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The First Amendment establishes that the government may neither "deny a benefit to a person on a basis that infringes his constitutionally protected ... interest in freedom of speech," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), nor "compel[] subsidies for speech in the context of a program where the principal object is speech itself," *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001). Here, the State of Illinois has required Petitioners—as a condition of public employment—to pay mandatory fees to a labor union, solely in order to fund that union's political speech in the form of negotiations with State officials. The court of appeals found that this arrangement was permitted by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Amici* will address the following question:

Should the Court overrule *Abood* and hold that public employment cannot be conditioned on the payment of fees to a labor union?

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INTEREST OF *AMICI CURIAE* [1]

Amici Karen Cuen, Harlan Elrich, Rebecca Friedrichs, Kevin Roughton, George White, Scott Wilford, and Irene Zavala are public-school teachers in California who, along with *amicus* Christian Educators Association International, are plaintiffs in a lawsuit currently pending in the District Court for the Central District of California, *Friedrichs v. California Teachers Association* (No. 8:13-cv-00676), that challenges a California law allowing school districts to enter into "agency shop" arrangements. Because this case implicates the scope and vitality of the decision allowing such arrangements, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the plaintiffs in *Friedrichs* have a pronounced interest in the outcome here.

The Center for Individual Rights is a public-interest law firm based in Washington, D.C. It has litigated many First Amendment lawsuits on behalf of parties and *amici*—including several cases in this Court—and is co-counsel to the plaintiffs in the *Friedrichs* suit. The Center has an interest in protecting public employees' right not to support expressive activity to which they are opposed.

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[1] The parties have filed with the Clerk letters consenting to the filing of *amicus* briefs. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to, at long last, give "adequate recognition to the critical First Amendment rights at stake" when the government forces public employees to financially subsidize the political speech of public-sector unions through "agency shop" agreements. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012). Any focused analysis of such arrangements dooms this Court's decision in *Abood*, and the court of appeals' decision in this case along with it. Both should be overturned.

1. Under any normal application of First Amendment principles, compelled subsidization of public-sector union speech would be subject to heightened scrutiny. The opinion in *Abood* was able to avoid this result only by creating a completely unworkable distinction. The Court recognized that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment," such that a public employee cannot be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." 431 U.S. at 234-35. Yet in the very same breath, *Abood* allowed public employers to require that all employees financially support a union's "attempt to influence governmental policymaking" in collective bargaining, even though public-sector collective bargaining "may be properly termed political." *Id.* at 231. This distinction between "bargaining" political speech (exempt from the First Amendment) and all other political speech (protected by the First Amendment) is contrived and unworkable, and

Abood's authorization of compelled subsidization of political "bargaining" speech conflicts with at least three different lines of this Court's decisions.

First, this Court has long held that government employers "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Here, the State of Illinois (the "State") does precisely that. As a condition of public employment, every homecare provider in Illinois is required to toe the union line and support its message—rather than deliver his own message—to the State legislature. Whether spoken via bargaining, lobbying, or pamphleteering, a union's message embodies core political speech, as *Abood* itself recognized. 431 U.S. at 231. *Abood*'s recognition that collective bargaining is political speech renders it irreconcilable with this Court's unconstitutional-conditions cases, especially *Elrod v. Burns*, 427 U.S. 347 (1976), and its progeny. As Justice Powell long ago recognized, "[t]he public-sector union is indistinguishable from the traditional political party in this country." *Abood*, 431 U.S. at 257 (Powell, J., concurring in judgment). Indeed, the State's regime imposes a *greater* burden than *Elrod*'s coercion to join a political party, because here the State requires Petitioners to affirmatively subsidize the message of Respondent SEIU.

Second, the State's regime flies in the face of this Court's compelled-speech cases, foremost *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). That decision—which arose in the less exacting context of commercial speech—makes clear that a government may compel speech only as an incident to

a larger regulatory scheme. Such compulsion violates the First Amendment when speech "itself … is the principal object" of the scheme. *Id.* at 411-12. *United Foods* forecloses precisely what *Abood* sanctions. Collective bargaining *is* speech, and the *entire point* of agency-shop laws is to require that non-union employees pay their "fair share," Pet.App. 6a, of "the costs" that speech incurs. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007). The only difference between this case and *United Foods* is that this case involves "political" speech, *Abood*, 431 U.S. at 231, and is thus *even more* offensive to the First Amendment.

Finally, and most simply, the State's system of compelled speech constitutes textbook viewpoint discrimination, *i.e.*, "censorship in its purest form.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). This Court has long held that when a government "attempt[s] to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978). Yet that is precisely what *Abood* permits—authorizing governments to give an "advantage" to the pro-union side of numerous "debatable public question[s]," *id.*, by forcing dissenting employees to support the union message.

2. Once it is clear that heightened First Amendment scrutiny applies, the underpinnings of *Abood* collapse. *Abood* and its progeny suggest two possible justifications for abridging the First Amendment rights of dissenting employees:

preventing "free-riding" and promoting "labor peace." Neither justification can survive inspection.

Foremost, "free-rider arguments [ ] are generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. A union's efforts to obtain benefits for nonmembers from elected officials does not justify compelled subsidization of those "*bargaining*" efforts, just as the union's beneficial "*lobbying*" efforts do not either. But even if they did, this justification would *still* fail because it is untrue that dissenting employees "free-ride" off the union's advocacy. As *Abood* itself recognized, "[u]nion members in both the public and private sectors may find that a variety of union activities *conflict* with their beliefs." 431 U.S. at 231. Unions routinely bargain for provisions that dissenting employees oppose and do not benefit from—such as seniority protections that advantage veteran employees over newer employees, regardless of each individual's relative ability. Dissenting employees are not "free-riding"; they are being conscripted.

The only other justification *Abood* suggests is a state interest in preserving "labor peace." By this, *Abood* meant a state's interest in negotiating with a single union and avoiding a multiplicity of competing demands. *Id.* at 224. But while that may be a justification for exclusive representation (having only one union) it is plainly *not* a justification for forcing dissenting employees to compensate that union. Mandatory exclusive representation is plainly not the same thing as—and does not justify—mandatory financial support for an exclusive representative.

3. Because *Abood* is an "anomaly" in the First Amendment landscape, *Knox*, 132 S. Ct. at 2290, the time has come to overturn it. Stare decisis must yield when necessary to "erase [an] anomaly," *Alleyne v. United States*, 133 S. Ct. 2151, 2167 (2013) (Breyer, J., concurring in part and in judgment), or jettison "an outlier." *Id.* at 2165 (Sotomayor, J., concurring). Here, each of the factors this Court generally considers in assessing whether to overturn a prior decision militates in favor of overturning *Abood*.

ARGUMENT

I. State-Mandated Payments To Public-Sector Unions Transgress Core First Amendment Principles.

It is axiomatic that, just as the First Amendment prohibits the government from restricting expenditures of money to engage in speech, it prohibits coercing citizens to financially support speech they oppose. As Thomas Jefferson famously stated, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948). He was echoed by his fellow Virginian, James Madison, who rhetorically asked: "Who does not see ... [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" 2 THE WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901). This Court has therefore long recognized that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high

or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also United Foods*, 533 U.S. at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

Despite this foundational principle, the decision below sanctions a regime that requires unwilling individuals to subsidize the efforts of Respondent SEIU to influence the State's legislators, on the theory that those efforts constitute "collective bargaining" on behalf of "public employees" as opposed to "lobbying." That bargaining-lobbying distinction springs directly from *Abood* and its progeny, which make the constitutionality of compelling payments to unions contingent upon whether the union's persuasion of public officials comes in the form of "lobbying" or "collective bargaining." The parties disagree about which box the activity here falls within, but the dispositive point is that the First Amendment should not depend upon such artificial labels.

Since public-sector "collective bargaining" is unquestionably political speech intended to influence governmental policy, public employment cannot be conditioned on subsidizing that speech any more than it can be conditioned on paying for "lobbying." Compelled financial support for "collective bargaining," like that for "lobbying," conflicts with multiple lines of this Court's jurisprudence—

including its decisions involving unconstitutional conditions, compelled subsidization of speech, and viewpoint discrimination. For that reason, this Court acknowledged two Terms ago that *Abood* is an "anomaly" which failed to give "adequate recognition to the critical First Amendment rights at stake." *Knox*, 132 S. Ct. at 2289-90.

This case vividly demonstrates the gulf between *Abood* and core constitutional principles. It therefore provides a prime opportunity to "revisit" and excise that "anomaly." *Id.*

A. *Abood* Depends Upon An Empty Distinction.

It is undeniable and undisputed that—as *Abood* itself explains—a public-sector union's speech in the course of "collective bargaining" with public officials "may be properly termed political" because it constitutes an "attempt to influence governmental policymaking." 431 U.S. at 231; *see also, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968) (school-district funding "is a matter of legitimate public concern") Forced contributions for public-sector "collective bargaining" therefore constitute compelled subsidization of political speech to the same extent as forced contributions for "lobbying." Both embody mandatory contributions to efforts "influenc[ing] governmental policymaking" and they differ only in their labels. The distinction between these interchangeable concepts—which *Abood* creates and depends upon—is thus wholly artificial.

1. In *Abood*, the Court considered the validity of conditioning public employment on employees making financial contributions to the union responsible for their bargaining unit. The petitioners were public-school teachers who opposed both public-

sector collective bargaining in general and union activities unrelated to collective bargaining. 431 U.S. at 212-13. Citing the Court's prior decisions invalidating unconstitutional conditions on public employment, *Abood* recognized that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 234. Finding those principles to be "no less applicable to the case at bar," the majority held that governments cannot require public employees "to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Id.* at 235. Public employers therefore could not require employees to pay union dues "for political and ideological purposes unrelated to collective bargaining." *Id.* at 232.

When it came to compelled compensation for collective-bargaining efforts, however, *Abood* reached the opposite conclusion, holding that employers *can* mandate such payments. *Id.* at 231. But this distinction between forbidden coercion of dues to support political or ideological speech and permissible coercion of dues to support collective-bargaining speech makes no sense. As *Abood* itself recognized, collective bargaining *is* political or ideological speech that endeavors to influence governmental policymaking. The Court readily acknowledged that decision making for public-sector employers is "above all a political process," *id.* at 228, that implicates deeply held values. "[O]fficials who represent the public employer are ultimately responsible to the electorate," such that "[t]hrough exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives

who sit on the other side of the bargaining table." *Id.* The decision whether or not to "accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service." *Id.*

Consequently, *Abood* recognized "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." *Id.* at 231. This Court has subsequently reiterated that "public-sector union[s] take[] many positions during collective bargaining that have powerful political and civic consequences," *Knox*, 132 S. Ct. at 2289, such that compelling financial support for collective bargaining imposes a "significant impingement on First Amendment rights." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 455 (1984).

2. Once it is recognized—as *Abood* correctly did—that public-sector collective bargaining is itself political speech, it becomes clear that public employment cannot be conditioned on financially supporting that speech. There is no principled reason why political speech in the collective-bargaining context is the one First Amendment right that the government may require citizens to forfeit in order to obtain public employment. Asking public officials to adopt certain policies affecting public employees' benefits and protections is core political

speech regardless of whether the union is seeking those policies in an ordinance or statute, or in a collective-bargaining agreement that will bind future officials. Both forms of speech and both objectives equally implicate employment conditions and public policy issues, and both are equally political. Particularly given that the *raison d'être* of public employee unions is to engage in this political speech, compelled subsidization of that speech—whatever form it takes—infringes the First Amendment rights of dissenting employees.

Notably, *Abood* itself never suggested that there is actually a meaningful distinction between union advocacy to secure a favored ordinance and union advocacy to obtain a preferred contractual provision. Rather, *Abood* permitted the coerced subsidization of public-sector collective-bargaining on the ground that the Court had previously allowed such arrangements in the *private* sector. *See Abood*, 431 U.S. at 232; *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740 (1961); *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956). The majority reasoned that "differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232. But that is a non sequitur.

The fact that private employers *not* subject to the First Amendment may do something says nothing about whether *state* actors—who *are* subject to the Amendment—may do the same. That private employers may constitutionally hire or fire employees based on political affiliation or speech about public issues, or engage in naked viewpoint discrimination in their spending or selection policies, hardly

suggests that public entities may do so. *See Elrod*, 427 U.S. at 359 (public employers cannot condition employment on providing "support for the favored political party"); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (viewpoint-based restrictions are forbidden when the government "expends funds to encourage a diversity of views from private speakers" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (the government may not "leverage its power to award subsidies … into a penalty on disfavored viewpoints").

Accordingly, contrary to *Abood*, the fact that *Street* and *Hanson* upheld a private employer's decision (permitted but not required by federal law) to condition employment on financial support for unions cannot justify that same coercion by public employers. Obviously, "the government may authorize private parties to enter into voluntary agreements whose terms it could not adopt as its own."[2] *Abood*, 431 U.S. at 250 (Powell, J., concurring

[2] On this question, *Abood* conclusorily states that the "claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226. But since there was no governmental coercion in *Hanson*, the Court could not have *reached* the question of whether government-compelled dues constitute "a First Amendment violation," much less held that they do not. The federal law in *Hanson* was "only permissive," since "Congress ha[d] not compelled nor required carriers and employees to enter into" such agreements. 351 U.S. at 231. It was thus *the private employer's* decision whether to create an agency shop; there was no state-imposed condition to trigger the First Amendment. To the extent *Hanson* discussed First Amendment

in judgment); *see also* Edwin Vieira, *Are Public-Sector Unions Special Interest Political Parties?*, 27 DEPAUL L. REV. 293, 303 (1977-78) ("[I]t is more correct to say that [in *Hanson*], no violation of the First Amendment *can* occur than that one *has not* occurred.").

The permissibility of private-sector agency shops is thus not constitutionally relevant here. And as shown below, it is quite clear that this Court's precedent concerning *public* coercion of speech invalidates that coercion in the collective-bargaining context.

B. *Abood* Conflicts With The First Amendment's Prohibition Of Unconstitutional Conditions.

This Court has long rejected "Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *McAuliffe v. Mayor of New Bedford,* 29 N.E. 517, 517 (Mass. 1892)). The reason for that rejection is simple: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.'" *Sindermann*, 408 U.S. at 597 (citation omitted). A long line of decisions reiterate this basic rule, rejecting "the proposition that a public employee has no right to a government job and

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concerns, it brushed them aside as either inapplicable or "not presented by this record." *Id.* at 238.

so cannot complain that termination violates First Amendment rights ...." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996); *see also Umbehr*, 518 U.S. at 673-75 (collecting cases).

The Court's decision in *Elrod*—decided just months before *Abood*—is foundational to this doctrine. *Elrod* considered whether public employers could require public employees uninvolved in policymaking to join a particular political party. The Court held that because a state cannot mandate association with a political party generally, it cannot condition public employment on the same. "The financial and campaign assistance that [employees are] induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief." 427 U.S. at 355 (plurality op.); *see also, e.g.*, *id.* at 359 (Brennan, J., plurality) ("The threat of dismissal for failure to provide [] support [for a political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise."); *id.* at 375 (Stewart, J., concurring in relevant part); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (states cannot bar members of Communist Party from public employment).

2. By allowing government officials to condition public employment on supporting a union's "political" activities, *Abood* created an irreconcilable conflict with *Elrod*, as four Justices recognized at the time. Justice Rehnquist explained that he was "unable to see a constitutional distinction between a governmentally imposed requirement that a public

employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union." 431 U.S. at 243-44 (Rehnquist, J., concurring); *see also id.* at 242 ("Had I joined the plurality opinion in *Elrod v. Burns*, I would find it virtually impossible to join the Court's opinion in this case."). Justice Powell, in a special concurrence joined by Chief Justice Burger and Justice Blackmun, likewise recognized that *Abood* should have simply been *Elrod II*: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of political patronage." *Id.* at 260 n.14 (Powell, J., concurring in judgment). After all, "[t]he public-sector union is indistinguishable from the traditional political party in this country." *Id.* at 257; *see also* Vieira, *supra*, at 376 (public-sector unions are "special interest political parties, both without and (especially) with regard to their participation as exclusive representatives in the inherently political process of compulsory public-sector collective bargaining").

3. This Court's decision in *Pickering* further illustrates the conflict between *Abood* and this doctrine. There, the Court held that the First and Fourteenth Amendments prohibited firing a public-school teacher for criticizing district leadership's efforts to raise revenue. The Court explained that it had "unequivocally rejected" the idea that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest

in connection with the operation of the public schools in which they work." 391 U.S. at 568. As a result, the First Amendment bars public employers from firing employees based on speech regarding "matters of public interest." *Id.*

Abood was simply the flip side of *Pickering*, yet the Court came to the opposite result. While *Pickering* invalidated a *prohibition* of teacher speech concerning matters related to public employment (there, a district's efforts to raise revenue), *Abood* permits compelling teachers to *support* union speech on those *same* topics. But it is a bedrock principle that compelling speech and prohibiting speech are equally offensive to the Constitution: "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988); *see also Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating "a state measure which forces an individual ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable"); *Barnette*, 319 U.S. at 634 (refusing "to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind"). There is no way to reconcile these decisions, one of which protects the decision "what to say" (*Pickering*), while the other gives no protection to the decision "what not to say" (*Abood*).

4. *Abood* not only transgresses *Elrod* and its progeny, but actually sanctions a far more substantial burden on First Amendment freedoms than anything at issue in those cases.

First, coercing an individual to join a particular political party imposes a less substantial burden than the mandatory payments at issue here. Registering as a member of a particular party requires no expenditure of time or money and leaves the employee entirely free to support the candidates and views that employee prefers. Here, by contrast, Petitioners are coerced not just to symbolically associate with a political entity they reject, but to financially subsidize that entity's political advocacy in conflict with their beliefs. In addition to inflicting economic injury, that subsidization both *increases* speech extolling a contrary viewpoint and *diminishes* Petitioners' ability to express their views by taking speech out of their pocket and putting it into a union's. Agency-shop laws are thus a much more pernicious intrusion into First Amendment freedoms than the passive-membership mandate *Elrod* invalidated. They are, indeed, more analogous to the infamous practice in Nassau County, New York of requiring state employees to give "1 percent kickbacks of their salaries ... to the county Republican Party to obtain overtime, promotions or other considerations," Roy R. Silver, *G.O.P. Kickbacks Are Charged To 8*, N.Y. Times (Mar. 6, 1976)—a practice that resulted in criminal convictions. *See People v. Haff*, 394 N.E.2d 278 (N.Y. 1979).

Second, *Abood*'s forced-subsidization comes *on top of* the preexisting suppression of individual expression inherent in exclusive representation—a burden wholly absent in *Elrod*. By requiring that every public employee communicate with his employer through a union, agency-shop laws stifle speech before mandatory subsidies even enter the

picture. Collective bargaining addresses the most important issues in many people's professional lives. It resolves topics such as how employees will be evaluated or promoted, who gets fired and who gets to stay, and what conditions will prevail in the workplace. And in the public sector, that process implicates fundamental public-policy issues, such as merit pay, class size, and how many of the government's finite dollars will go to workers rather than other public needs.

Despite all this, dissenting employees are prevented from negotiating employment policies that they believe are beneficial, such as merit-based compensation rather than seniority-based compensation. Those employees must instead accept a union's decision on what employment and other policies are optimal, and are stuck with whatever contract the union negotiates. While it may not independently violate the First Amendment to deny individuals the right to speak for themselves in bargaining, that preliminary restriction on speech certainly exacerbates the constitutional harm of compelling silenced employees to affirmatively support a union's message.

C. *Abood* Conflicts With The First Amendment's Prohibition Of Compelled Speech.

Abood is irreconcilable not only with *Elrod* and its progeny, but also with this Court's more recent decisions concerning compelled subsidization of speech. This Court's decision in *United Foods*, 533 U.S. 405, in particular, undermines *Abood*'s central premise. There, Congress empowered the Secretary of Agriculture to establish a "Mushroom Council" to oversee efforts to promote the mushroom industry.

The Council was authorized to fund its programs by imposing mandatory assessments on handlers of fresh mushrooms. "[A]lmost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising" to promote mushroom sales. *Id.* at 412. The respondent in that case objected to this regime because it wanted "to convey the message that its brand of mushrooms is superior to those grown by other producers." *Id.* at 411.

The Court invalidated the mandatory assessments. It began with the premise that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views ... or from compelling certain individuals to pay subsidies for speech to which they object." *Id.* at 410. The Court explained that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *Id.* at 411. The Court made "clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met." *Knox*, 132 S. Ct. at 2289. First, there needs to be "a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy." *Id.* (quoting *United Foods*, 533 U.S. at 414). And second, "even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (quoting *United Foods*, 533 U.S. at 414). In *United Foods*, those criteria were not met

because "the advertising itself ... is the principal object of the regulatory scheme." 533 U.S. at 411-12.

Abood is irreconcilable with *United Foods* on multiple fronts.

1. Compelled payments to public-employee unions are not *incidental* to an association that is mandated for non-speech reasons—those payments are, rather, compelled for the *express purpose* of supporting union speech in collective bargaining. Unions are thus fundamentally different from, say, bar associations, *see Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990), which are part of a broad regulatory scheme that exists for reasons unrelated to advocacy on particular issues, with speech comprising a minor, incidental component of the organization's purpose. While unions do serve non-speech functions (grievance representation, training programs, etc.), there is no serious question that collective bargaining—*i.e.*, speech—is the dog while the union's other duties are the tail. *Abood* thus collides headlong with the Court's refusal to uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

The facts of *United Foods* capture this conflict. There, one mushroom producer objected to compelled subsidies for speech that promoted all mushrooms alike. *Id.* at 409. The objecting producer wanted to promote its mushrooms as being better than the rest, and thus objected to "being charged" for "[t]he message [] that mushrooms are worth consuming whether or not they are branded." *Id.* at 411. *Abood* involves the same dynamic: a mandated association that exists to promote "a message which seems to be

favored by a majority of [public employees]" and which therefore promotes one conception of the collective good. *Id.* Like mushroom growers confident in the quality of their mushrooms, employees who believe they have superior skills object to collective-bargaining contracts geared toward protecting middling employees at their expense. Those employees' First Amendment rights are thus violated just as much as the successful mushroom grower when they are forced to promote the union's message exalting the average. As *United Foods* explained, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *Id.*

2. Indeed, *Abood* sanctions a compelled-speech regime that is more egregious than that in *United Foods.* Foremost, mandatory subsidization of public-sector bargaining involves *core political speech*, whereas *United Foods* involved "commercial speech," which the Court assumed is "entitled to lesser protection." *Id.* at 410. "Core political speech occupies the highest, most protected position" in the First Amendment hierarchy. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment).

Moreover, the regime in *United Foods* did not silence dissenting mushroom producers. Such producers remained free to run ads touting the superiority of their mushrooms. Here, by contrast, the State's law precludes Petitioners from bargaining for themselves. *See supra* at 17-18. As a result, Petitioners have no mechanism for meaningfully engaging in speech that counters the union message

they already have to subsidize. That combination of forced silence *and* forced subsidization exacerbates the First Amendment problem.

D. *Abood* Conflicts With The First Amendment's Prohibition Of Viewpoint Discrimination.

Finally, *Abood* permits states to engage in clear-cut viewpoint discrimination—the most "egregious" form of First Amendment regulation. *Rosenberger*, 515 U.S. at 829. *Abood* recognized that public employees "may very well have ideological objections to a wide variety of activities undertaken by the union," and may "believe[] that a union representing [them] is urging a course that is unwise as a matter of public policy." 431 U.S. at 222, 230. But it nevertheless held that states can promote unions' messages by compelling every public employee to support them.

There is no question that state-mandated support for union speech constitutes viewpoint discrimination. A case decided just before *Abood* confirms as much. In *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976), the Court rejected union efforts to preclude a dissenting teacher from addressing a school board on the merits of the union's collective-bargaining proposal. The Court explained that "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Id.* Agency-shop laws do precisely that by compelling dissenting employees to

support *the union's* "side" on "debatable public question[s]." *Id.*[3]

This discrimination has the effect of skewing all bargaining-related speech in favor of union viewpoints. The most basic issues that unions address—wages, pensions, hours—implicate matters of public concern, affecting "the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates." *Abood*, 431 U.S. at 258 (Powell, J., dissenting).[4] The First Amendment forecloses skewing those fundamental debates absent a compelling interest. States do not have "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

II. Public-Sector Agency-Shop Laws Cannot Survive "Exacting" First Amendment Scrutiny.

For all of these reasons, it is clear that the *Abood* regime must be subjected to "exacting" First Amendment scrutiny. *Elrod*, 427 U.S. at 363. To

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[3] Countless decisions have recognized that pro-union speech is a distinct viewpoint. *See, e.g.*, *Carey v. Brown*, 447 U.S. 455, 468 (1980) (overturning statute that forbade picketing except that relating to a labor dispute, and rejecting as "illegitimate" the statute's "desire to favor one form of speech over all others"); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 356 (6th Cir. 1998) (restricting pro-union speech "offends the values underlying the First Amendment"); *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998) (rejecting effort at restricting pro-union speech).

[4] The fact that public-sector unions are highly partisan entities, *infra* at III.D, makes the viewpoint discrimination even more stark.

survive that scrutiny, public-sector agency-shop laws "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* These laws—with the Illinois regime as a banner example—cannot possibly survive heightened review. *Abood* mentions two supposed justifications for compelling public employees to support union speech: (1) preventing "free-riding," and (2) preserving "labor peace." Once the Court gives "adequate recognition to the critical First Amendment rights at stake," *Knox*, 132 S. Ct. at 2289, both justifications crumble.

A. Preventing "Free-Riding" Does Not Justify Compelled Payments To Unions.

The "primary purpose" for compelled subsidization of public-sector unions is to prevent "nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U.S. at 181. That interest cannot justify the serious First Amendment burdens *Abood* permits.

1. At the threshold, the government's determination that an advocacy group's controversial viewpoints "benefit" dissenting individuals cannot possibly justify forcing those individuals to support the group. Even the *Abood* cases flatly reject the notion that "free-riding" could justify compelled subsidization of "legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). The

Court has thus prohibited "lobbying" subsidies even though the potential for "free-riding" is the same as it is for bargaining.

The rejection of a "free-riding" justification in the lobbying context makes sense, of course, because "free-rider arguments" are "generally insufficient to overcome First Amendment objections." *Knox*, 132 S. Ct. at 2289. Countless groups petition on behalf of discrete sectors of society, with purported benefits inuring to the entire sector. The First Amendment nonetheless prohibits governments from requiring every beneficiary of those groups' efforts to compensate them, even if that robust lobbying is beneficial. It would be clearly unconstitutional, for example, for Congress to mandate that senior citizens support the AARP. Similarly, as *Knox* noted, a PTA is not entitled to compensation from all parents any time it raises funds for a school-related cause. *Knox*, 132 S. Ct. at 2289 (citing Summers, *Book Review, Sheldon Leader, Freedom of Association*, 16 COMP. LAB. L.J. 262, 268 (1995)).

Professional organizations—which are identical to public-sector unions in all material respects—confirm the point. The American Nurses Association ("ANA"), for example, is a private organization that works to advance nurses' interests by, among other things, lobbying legislatures. The ANA's objectives and methods are no different from what Respondent SEIU does here—it seeks to persuade legislators to take action on issues like the prevention of mandatory-overtime policies, or the establishment of minimum nurse-staff ratios. Nurses who decline to become dues-paying members of the ANA "free-ride" off its efforts in precisely the same sense that

dissenting employees "free-ride" here. Yet the government obviously could not compel every nurse to subsidize this advocacy organization. Preventing "free-riding" thus does not justify compelled subsidization of political speech.

2. But even if "free-riding" somehow could overcome the First Amendment, that rationale would remain particularly illogical where, as here, the "free-rider" supposedly benefitting from the union message *disagrees* with that message. *See Abood*, 431 U.S. at 231 ("Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs."). Numerous examples illustrate how union demands concerning core workplace issues frequently *harm* dissenting employees. For example, unions regularly bargain for compensation based on seniority rather than merit, and therefore privilege long-time employees over newer employees who may be more talented. Similarly, unions tend to seek tenure provisions that effectively redistribute compensation from the most talented teachers to the difficult-to-fire ones. And in the policy realm, teachers unions bargain over basic matters of education policy, such as class size, even though many teachers reasonably disagree with the unions' preferences concerning education policy. In each of these instances—and countless others—the union's bargaining efforts impose harm on some employees to benefit others. Those injured employees are plainly not "free-riding" in any comprehensible conception of the term.

Because *Abood* focused chiefly on disagreements at the periphery of collective bargaining, however, it is conceivable that the Court believed dissenters

disagree only with a union's expression at that periphery, such as an employee's "moral or religious views about the desirability of abortion," which "may not square with the union's policy in negotiating a medical benefits plan." 431 U.S. at 222. This characterization is not only factually inaccurate for the reasons noted above, it is also legally irrelevant.

Once it is established that employees "have ideological objections" to a union's efforts, *id.*, the First Amendment does not permit picking and choosing among those objections to decide which are really worth protecting. It makes no difference from the First Amendment's perspective whether dissenters disagree with 100%, 10%, or 1% of the speech they are compelled to support, or even if they just disagree with the basic concept of compelled speech. A state could not mandate financial support for the Republican Party even if it limited that mandate to registered Republicans. The fact that those Republicans might agree with all or most of what the Party espouses—and thus might derive benefit from the Party's advancement of their ideals—makes no difference. This is particularly clear because money is fungible and there is thus no way to "limit" the dissenting employees' contributions to those collective bargaining provisions that the employees "support."

3. Dissenting employees do not "free-ride" on union bargaining efforts for yet another reason: the most important labor protections for public employees are typically already enshrined in legislative enactments that supersede any collective-bargaining agreement. In order for "free-riding" to justify mandatory annual payments, there needs to

be an actual benefit from collective bargaining that dissenting employees "free-ride" on, and it must be distinct from the union lobbying efforts for which they cannot be charged. In virtually all instances, however, statutes and civil-service protections *already* provide the most important benefits that bargaining could obtain.

The California public-education system, where the individual *amici* teach, proves as much. There, the legislature has passed numerous statutes that resolve issues which would otherwise be subjects of collective bargaining. Those statutes provide, for instance, that teachers become "permanent employees"—*i.e.*, receive tenure—"after having been employed by the district for two complete consecutive school years." Cal. Educ. Code § 44929.21(b). Other statutes require districts to follow a complex procedure in order to terminate an employee (§§ 44934, 44938(b)(1), (2), 44944); provide that the teachers terminated first must always be the teachers hired most recently (*i.e.*, "last in, first out") (§ 44955); and set standards for class size (§ 41376).

Because California law resolves these fundamental issues, it limits what the unions can bargain about, leaving little for dissenting employees to "free-ride" upon. California teachers could quite rationally conclude that these statutes provide sufficient employment protection, such that there is no reason to pay local, state, and national unions as much as $1,000 annually to compensate them for bargaining over whatever minor issues remain. Surely the state's interest in preventing "free-riding" is diminished when the cost of the ride far exceeds its benefits.

4. The disconnect between the "free-riding" justification and the reality of *Abood* is further highlighted by the huge portion of union payments that flow to national organizations with no connection to local collective bargaining.[5] It is difficult to see how the need to prevent "free-riding" on local bargaining efforts could justify the compulsion of large payments to multi-hundred-million-dollar state and national organizations that play no direct role in that local bargaining. On the other hand, it is easy to see how this broad authorization to extract large payments from all public employees provides substantial assistance to the unions in furthering their non-bargaining-related political objectives—most of which are orchestrated by the state and national organizations rather than their local chapters.

B. The Interest In "Labor Peace" Does Not Justify Compelled Payments To Unions.

The second state interest that *Abood* suggests justifies mandatory payments to public-sector unions is the "desirability of labor peace." 431 U.S. at 224. By that *Abood* meant the prevention of "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* This interest, too, is facially insufficient to justify compelled political speech, for at least two reasons.

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[5] For example, in *Lehnert*, which approved this use of compelled fees, $259 of the $284 service fee—or 91%—went to State and National teachers' unions, rather than the local. 500 U.S. at 512-13.

The state's interest in bargaining with *one* union (rather than many) does not justify compelling dissenting teachers to support that one union's speech. The potential "conflict" between rival unions disappears once one union is designated. Compelling dissenting employees to contribute to that designated union does nothing to ameliorate that already-eliminated conflict. The interest in "labor peace" thus cannot justify compelled subsidization even if it can justify exclusive representation.

Moreover, if anything, the designation of a single speaker is a good reason to *not* require dissenters to subsidize that state-designated exclusive voice. The designation of a single speaker already precludes the dissenter from meaningfully conveying his views about workplace terms and conditions to his public employer. *See supra* at 17-18. Moreover, as *Abood* noted, even different *unions* hold "quite different views" on core collective-bargaining topics like "proper class hours" and "tenure," 431 U.S. at 224. Thus, even within the "pro-labor" community, there is wide disagreement concerning the topics of collective bargaining. The designated union-speaker is therefore not advancing views that *benefit* allegedly "free-riding" dissenters if those dissenters subscribe to the "quite different view" of a defeated union.

III. *Abood* Should Be Overturned.

Abood is thus an extreme "anomaly" on multiple fronts. 132 S. Ct. at 2290. The Court should take this opportunity to overturn that decision and restore harmony to the First Amendment. *Abood* amply satisfies the factors typically used to determine whether a precedent should be overturned. *See*

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (reciting the factors).

A. *Abood* Is Unworkable.

Because *Abood* recognizes that it would be unconstitutional to compel subsidization for political speech non-germane to collective bargaining, it forces courts to draw an unworkable line between political "bargaining" speech and all other political speech.

There is no principled difference between these categories of political speech. Unions frequently lobby state legislatures to preserve and expand statutory employment terms and protections like those noted above. That activity—non-chargeable under *Lehnert*, 500 U.S. at 522—is materially indistinguishable from Respondent SEIU "bargaining" with the Illinois legislature over homecare-provider issues, or a California teachers' union bargaining with local officials for protections similar to those provided by California statutes. *Lehnert* prohibited unions from demanding compensation for lobbying on the ground that "[t]he balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." *Id.* at 521 (plurality op.). This point applies with equal force to public-sector collective bargaining.

Justice Marshall made precisely that point in *Lehnert*, demonstrating the absurdity of distinguishing among "lobbying," "bargaining," and "lobbying about bargaining." As he explained, the majority opinion "would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but

it would not permit lobbying for the same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement." *Lehnert*, 500 U.S. at 537 (Marshall, J., concurring in part and dissenting in part). Justice Marshall also noted that the supposed interest in preventing "free-riding" applies with equal force to both lobbying the legislature to "increase[] funding for education" (non-chargeable) and to lobbying the legislature for "ratification of a public sector labor contract" (chargeable). *Id.* at 538 (emphasis omitted). In both instances, dissenting employees might "disagree with the trade-off the legislature has chosen," but are equally obligated to "shar[e] the union's cost of obtaining benefits for them." *Id.*; *see also id.* (if a "lobbying program succeeds in generating higher funding for professors and teachers in the public sector, [dissenting employees] will surely benefit along with the other members of their bargaining unit").

The facts of *Knox* reinforce the unworkability of this line. There, the SEIU—the same union affiliated with Respondent here—defended its decision to charge nonmembers for multiple categories of speech that fall in the absurd middle between *Abood*'s twin holdings. For example, the SEIU argued "broadly that all funds spent on 'lobbying ... the electorate' are chargeable." 132 S. Ct. at 2294-95 (citations omitted). The Court rejected this assertion, explaining that accepting it "would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities." *Id.* at 2295. But the SEIU's charges in *Knox*—while obviously political—are not

fundamentally distinct from the compelled speech *Abood* permits. Indeed, the referendum that SEIU used compelled fees to oppose "would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation." *Id.* at 2285. Yet even though the referendum "would have 'effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances,'" *id.* at 2295—such that it pertained *directly* to bargaining—seven Justices agreed that SEIU could not fund its opposition with dissenters' fees. That decision was correct, of course, but it is difficult to square with *Abood*'s broad authorization for compelled subsidization of bargaining-related speech; speech that likewise has "powerful political and civic consequences." *Id.* at 2289.

B. No Entity Has A Valid Reliance Interest In *Abood*.

No reliance interests counsel against overturning *Abood*. "[T]he union has no constitutional right to receive any payment from" nonmembers. *Knox*, 132 S. Ct. at 2295. The unions' only interest is in receiving as much money as possible, at the expense of the nonmembers whose constitutional rights are at stake. Reliance interests in perpetuating a First Amendment violation cannot possibly justify the continuation of an anomalous precedent.

C. Subsequent Developments Have Confirmed That *Abood* Is An Anomaly.

The purpose of compelled subsidies is to promote union speech. As this Court has explained: "The primary purpose of [agency-shop] arrangements is to

prevent non-members from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U.S. at 181. That makes sense, since collective bargaining—*i.e.*, speech—is the overriding purpose of unions.

Whenever this Court has grappled with *Abood* in the compelled-speech context, however, it has described it in much-different terms that suggest—contrary to *Abood*, *Davenport*, and other post-*Abood* decisions—that unions are *not* fundamentally advocacy groups. For example, in *Keller*, the Court drew "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members on the other." 496 U.S. at 12. Later, in *United Foods*, the Court explained that governments can compel speech only when there is an "overriding associational purpose" independent from the compelled speech, 533 U.S. at 413, and dealt with *Abood* by explaining that, there, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association." *Id.* at 414.

These opinions elide the fact that a union's overriding purpose is to obtain "benefits" through "collective bargaining," with compelled fees necessary to "shar[e] the costs incurred." *Davenport*, 551 U.S. at 181. Unions are fundamentally about *bargaining* and bargaining fundamentally *is* speech. Unions thus differ from bar associations—which exist primarily for the non-expressive purpose of

regulating the legal profession—and mandatory association with unions has no purpose "independent from the speech itself." *United Foods*, 533 U.S. at 415. The fact that this Court has been able to reconcile *Abood* with its compelled speech cases only by characterizing collective bargaining as a non-speech activity confirms that *Abood* is "a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857.

D. Factual Developments Since *Abood* Have Confirmed That That Decision Lacks An Adequate Justification.

Finally, factual developments "have robbed the old rule of significant application or justification," *Casey*, 505 U.S. at 855, and cemented *Abood*'s outlier status. Whatever role unions once played, contemporary public-sector unions are powerful political actors that have profound influence over state and local governments. The modern public-sector union is indistinguishable from a political party. It is an advocacy organization that pushes its views to the exclusion of all others, often in a highly partisan fashion.

The facts of this case prove as much. The forced unionization of homecare providers was the result of executive action by then-Governor Blagojevich. Pet. Br. at 9. The Governor (correctly) recognized that requiring additional compelled payments to the Respondent SEIU would increase that union's political power in Springfield, with a concomitant benefit to himself and other Illinois Democrats. Thus, mere months after taking office—fueled in part by $800,000 in contributions from various entities of Respondent SEIU—Governor Blagojevich signed the

executive order requiring homecare providers to engage in collective bargaining through an exclusive representative. Kris Maher & David Kesmodel, *Illinois Scandal Spotlights SEIU's Use of Political Tactics*, Wall St. J., (Dec. 20, 2008), http://online.wsj.com/news/articles/SB122973200003022963. This paved the way for Respondent SEIU to become the representative for roughly 20,000 homecare providers and to establish an agency-shop arrangement with the State, with a resulting influx of roughly $3.6 million in annual fees. Pet. Br. at 10.

As these facts illustrate, there is no principled difference between requiring Petitioners to make payments to Respondent SEIU and requiring them to make payments to the Illinois Democratic Party. Both are equally and extremely offensive to dissenting employees. The latter would be unquestionably unconstitutional, even if Democratic Party staff lobbied the Illinois legislature on behalf of Petitioners, and even if the charges were limited to compensating the Democratic Party for those lobbying efforts. That is because the Democratic Party has a particular viewpoint; because lobbying (or "bargaining" with) the State legislature is a political activity; because this Court has consistently held that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights," *O'Hare Truck Serv.*, 518 U.S. at 717; because "the principal object" of that mandate is "speech itself," *United Foods*, 533 U.S. at 415; and because no government may give "one side of a debatable public question an advantage in expressing its views to the people," *First Nat'l Bank of Boston*, 435 U.S. at 785.

Whatever bases once existed for distinguishing *Elrod*, reconciling *United Foods*, and evading the prohibition of viewpoint discrimination, those distinctions have crumbled over time. Even if *Abood*'s constitutional rule originally had merit—and there is good reason to doubt that, *see* Petitioner's Br. at 18-24—it has not withstood the test of time.

CONCLUSION

The Court should overturn *Abood* and reverse the judgment of the court of appeals.

Respectfully submitted,

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