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

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Brief of Amicus Curiae James Madison Center for Free Speech, Inc. Supporting Petitioner

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November 2017

Question Presented

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector, agency-fee arrangements declared unconstitutional under the First Amendment. Amicus focuses on the included issues of (i) whether *Abood* applied proper First Amendment scrutiny, (ii) the scrutiny applied in analogous campaign-finance cases, and (iii) the proper level of scrutiny in this case.

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Interest of Amicus Curiae[1]

The purpose of the James Madison Center for Free Speech is to support litigation and public education activities defending the rights of political expression and association. The Madison Center is an internal educational fund of James Madison Center, Inc., a District of Columbia non-profit corporation. Madison Center is tax-exempt under 26 U.S.C. 501(c)(3). *See* https://www.jamesmadisoncenter.org. Counsel for Amicus have authored articles, testimony, and comments and litigated numerous cases involving campaign-finance and free-speech issues. James Bopp, Jr. is Madison Center's general counsel. Cases in which he was counsel in this Court include *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *FEC v. Beaumont*, 539 U.S. 146 (2003), *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), *Randall v. Sorrell*, 548 U.S. 230 (2006), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), *Citizens United v. FEC*, 558 U.S. 310 (2010), *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012), and *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).

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[1] Rule 37 statement: All parties filed blanket consents; no counsel for any party authored this brief in whole or in part; and no person or entity other than amicus or its counsel funded its preparation or submission.

Summary of the Argument

This Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), erroneously failed to apply First Amendment scrutiny to the public-sector, agency-fee issue before the Court today, though free speech and free association were at issue. (**Part I**.) While *Abood* and Justice Powell's concurrence cited *Buckley v. Valeo*, 424 U.S. 1 (1976), *Abood* is inconsistent with the high scrutiny in the analogous campaign-finance cases, which require (**A**) strict scrutiny of speech burdens and (**B**) rigorous review of association burdens, including contribution limits. (**Part II**.) Strict scrutiny is required in public-sector, agency-fee cases. (**Part III**.)

Argument

I.

Abood Erroneously Failed to Apply First Amendment Scrutiny.

The *Abood* Court erroneously failed to apply First Amendment scrutiny to the public-sector, agency-fee issue before the Court today. So it cannot control and should be overruled as to the issue before this Court.

Abood did apply First Amendment scrutiny to its *second* issue: whether public-sector unions can use objecting members' fees for "ideological activities unrelated to collective bargaining," 431 U.S. at 236, including "the expression of political views," *id.* at 235. It relied on *Buckley*, 424 U.S. 1, for the proposition that "'[m]aking a contribution ... enables like-minded persons to pool their resources in furtherance of common political goals,'" and "that limitations upon the freedom to contribute 'implicate fundamental First Amendment

interests.'" 431 U.S. at 234 (quoting *Buckley*, 424 U.S. at 22-23). *Abood* held that compelled contributions (instead of prohibited contributions) did not alter the constitutional analysis, citing compelled-speech cases. *Id.* at 234-35 (citations omitted). And it held that compelling union members to pay the union "for the expression of political views" with which they disagree violates the First Amendment." *Id.* at 235-36. *Abood* did not state a scrutiny level for this issue.

Abood did *not* apply First Amendment scrutiny to the *first* issue: whether public employees can constitutionally be assessed an agency fee by public-sector unions with which employees disagree, though *Abood* acknowledged that "compel[ling] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Id.* at 222. Rather, it said that perceived "interfer[ence] ... with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so" was permissible based on two precedents that held, according to the *Abood* majority, "that such interference as exists is constitutionally justified." *Id.* And *Abood* held that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. But the majority did not state the scrutiny level, did not analyze whether the government had met its burden of proving burdens and tailoring, and so did no proper First Amendment analysis.

This was called to the *Abood* majority's notice at the time. As Justice Powell's concurrence observed, "the Court avoids [a careful inquiry into the constitutional interests at stake] on the grounds that it is foreclosed by this Court's decisions in Railway Employees' Dept.

v. Hanson, 351 U.S. 225 (1956), and Machinists v. Street, 367 U.S. 740 (1961)." 431 U.S. at 245 (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment); *accord id.* at 242-44 (Rehnquist, J., concurring). Justice Powell declared the majority's reliance on precedents "misplaced," *id.*, and showed that those cases didn't do the First Amendment analysis necessary in *Abood*, *id.* at 245-54.

Justice Powell would have held that "compelling a government employee to give financial support to a union in the public sector regardless of the uses to which the union puts the contribution impinges seriously upon interests in free *speech* and *association* protected by the First Amendment." *Id.* at 255 (emphasis added). He asserted that there is no "basis here for distinguishing 'collective-bargaining activities' from 'political activities'" for First Amendment purposes because "[c]ollective bargaining in the public sector is 'political' in any meaningful sense of the word." *Id.* at 257.

Regarding scrutiny, the Powell concurrence noted that the First Amendment protects activities involved and the burden is on the government to prove "paramount governmental interests":

> Under First Amendment principles that have become settled since Hanson and Street were decided, it is now clear, first, that any withholding of financial support for a public-sector union is within the protection of the First Amendment; and, second, that the State should bear the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests.

Id. at 255. Regarding association-burden scrutiny, the Powell concurrence noted first that in *Buckley* this

Court held that limits on political contributions "'impinge on protected association freedoms.'" *Id.* at 256 (citation omitted). He observed that there is no First Amendment difference between contribution limits and compelled contributions for association-right purposes. *Id.* And he noted that "no principled distinction" exists between "a union in the public sector" and "a political candidate or committee." *Id.* "The ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership," he observed. *Id.* So, as already noted, "[c]ollective bargaining in the public sector is 'political' in any meaningful sense of the word." *Id.* at 257. Justice Powell noted that precedents established an "exacting scrutiny" requirement in the "public employment" context. *Id.* at 259. And he quoted *Elrod v. Burns*, 427 U.S. 347 (1976), for the following "paramount" or "vital importance" scrutiny level:

> "'The [governmental] interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.... [C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, ... the government must "employ[ ] means closely drawn to avoid unnecessary abridgement ...."'"

Id. at 259-60 (quoting *Elrod*, 427 U.S. at 362 (controlling plurality opinion) (quoting *Buckley*, 424 U.S. at 25)). Notably, *Elrod* summarized the free-belief and free-association level of scrutiny as requiring a "vital" interest and least-restrictive means: "In short, ... it 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.* at 363. In *Abood*, Justice Powell said "[t]he justifications offered by the Detroit Board of Education must be tested under this settled standard of review." *Id.* at 260. And "[t]he Court's failure to apply the established First Amendment standards articulated in Elrod ... and Buckley ... is difficult to explain" absent an "unarticulated belief." *Id.* at 260 n.14. The Powell concurrence proceeded to consider interests in "labor peace" and "free riders" and express doubts that they "justify the intrusion upon First Amendment rights that results from compelled support for a union as a condition of government employment." *Id.* at 260-61.

Regarding speech-burden scrutiny, Justice Powell said that the "exclusivity principle," i.e., barring a "minority-employee" from "engaging in meaningful dialogue with his employer on the subjects of collective bargaining, a dialogue that is reserved to the union," required the government to meet its "burden ... to show" a "paramount interest" or "overriding governmental objectives." *Id.* at 262. "The same may be said of the asserted interests in eliminating the 'free rider' effect and in preserving labor peace," he continued. *Id.* This, he asserted, involved a speech burden and required overriding-interest scrutiny: "Before today it has been well established that when state law intrudes upon protected *speech*, the State itself must shoulder the burden of proving that its action is justified by *overriding* state interest." *Id.* at 263 (emphasis added).[2]

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[2] Justice Powell's reference to "protected *speech*" properly notes that compelled employees' First Amendment ob-

(continued...)

And he reiterated: "I would adhere to established First Amendment principles and require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives." *Id.* at 264.

So *Abood* did not do the required First Amendment scrutiny, despite Justice Powell's urging. *Abood* did not require the government to carry its "exacting scrutiny" burden of proving a "paramount," "vital," or "overriding" interest and proper, narrow tailoring.[3]

That *Abood* did not do the required First Amendment scrutiny has been reiterated by this Court. *See Harris v. Quinn*, 134 S.Ct. 2618, 2631 (2014) (In *Abood*, "[t]his Court treated the First Amendment issue as largely settled by *Hanson* and *Street*.").

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[2] (...continued)
jection is to both compelled association and to compelled funding of speech to which they object, e.g., about "how best to educate the young" or whether to "strike against a public agency," *id.* at 263.

[3] Note that "exacting scrutiny" has been used for both association burdens and speech burdens until more recent cases. For example, this Court applied "exacting scrutiny" to what would now be called strict scrutiny in *Buckley*, 424 U.S. at 44-45 ("the exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). And *Buckley* applied "exacting scrutiny" to disclosure requirements, a burden on free-association rights. *Id.* at 64. This terminology was followed in subsequent campaign-finance cases, with this Court then equating "exacting scrutiny" with "strict scrutiny" in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 n.10 (1995).

Harris said "no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox* [*v. SEIU, Local 1000*, 567 U.S. 298 (2012)]." *Harris*, 134 S.Ct. at 2639. But clearly establishing First Amendment scrutiny levels in this context—as recently done in the campaign-finance context in *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), *see infra* Part II—would provide vital guidance in this area of the law and help this Court fulfill its duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

The issue of what level of First Amendment scrutiny should have been applied in *Abood* and is required for compelled speech and association (both involved here) is further discussed in Parts II and III.

II.

Abood Is Inconsistent with the High Scrutiny in Campaign-Finance Cases.

As noted, in the part of *Abood* that *did* do a First Amendment analysis—*Abood* expressly quoted *Buckley* as establishing that contributions "'implicate fundamental First Amendment interests.'" 431 U.S. at 234 (citations omitted). And Justice Powell's concurrence recited *Buckley* at multiple points. *Id.* at 255-56, 260 & n.14. Moreover, as Justice Powell noted in his *Abood* concurrence, "[c]ollective bargaining in the public sector is 'political' in any meaningful sense of the word." *Abood*, 431 U.S. at 257. Because (i) *Abood* relied on *Buckley*, (ii) the activity at issue in *Abood* and the present case is "political," and (iii) campaign-finance cases establish the scrutiny required for burdens on political speech and expressive-association, including contributions, campaign-finance cases establish the scrutiny

that should have been applied in *Abood* and should be applied here. Those scrutiny levels are discussed next.

A. Speech Burdens Require Strict Scrutiny.

Current campaign-finance law requires that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (Roberts, C.J., joined by Alito, J.)[4]).

The narrow-tailoring requirement mandates least-restrictive means, as set out in this Court's latest word on the strict-scrutiny test in the campaign-finance contest: *McCutcheon*, 134 S.Ct. 1434. As noted in *McCutcheon*, *Buckley* called strict scrutiny "exacting scrutiny," *id.* at 1444 (Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.)[5] (quoting *Buckley*, 431 U.S. at 44-45 ("the exacting scrutiny applicable to limitations on core First Amendment rights of political expression")), and "[u]nder [this] exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest," *id.* (citing *Stable Communications of Cal. v. FCC,* 492 U.S. 115, 126 (1989). *Accord Wagner v. FEC*, 793 F.3d 1, 5 (D.C.

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[4] This controlling opinion ("*WRTL-II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[5] This controlling opinion ("*McCutcheon*") states the holding. *Marks*, 430 U.S. at 193. Justice Thomas would have gone further: "I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail." *McCutcheon*, 134 S.Ct. at 1464.

Cir. 2015) (strict-scrutiny requires least-restrictive-means narrow tailoring.)

This Court's frequent equation of "exacting scrutiny" and "strict scrutiny" was expressly stated in *McIntyre*, 514 U.S. 334, which said that "'a limitation on political expression [is] subject to exacting scrutiny,'" *id.* at 346 (quoting *Meyer v. Grant,* 486 U.S. 414, 420 (1988)), then described this "exacting scrutiny" as "strict scrutiny," *id.* at 346 n.10 ("In *Meyer,* we unanimously applied strict scrutiny to invalidate an election-related law making it illegal to pay petition circulators for obtaining signatures to place an initiative on the state ballot."). Summarizing its discussion of "exacting" and "strict" scrutiny, the *McIntyre* Court concluded by returning to the "exacting scrutiny" formulation: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).)[6]

Regarding what constitutes a "compelling" (or "overriding" or "paramount") interest, the campaign-finance

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[6] "Overriding" is used as a substitute for "compelling" in the *McIntyre* quotation, indicating that "compelling" has the superlative connotation of this and other synonyms substituted for it. In *Abood*, Justice Powell's concurrence substituted "overriding," 431 U.S. at 249 n.3, 262, 264, "paramount," *id.* at 255, 259, and "of vital importance," *id.* at 259. While synonyms help to supply meaning to "compelling" and perhaps serve a literary function by providing word variety, the standardized use of terms in recent campaign-finance cases helps to avoid confusion among those who must parse levels of scrutiny in applying this Court's opinions.

cases are instructive regarding (i) what is and is not compelling and (ii) the fact that what is deemed compelling is not immutable. *Buckley* held that an interest in preventing quid-pro-quo corruption (or its appearance) was sufficiently compelling to justify limits on political contributions. 424 U.S. at 26. But the anti-corruption interest could not justify a limit on independent expenditures for political speech because the independence of the communications removed cognizable quid-pro-quo risk. *Id.* at 33-48. In *Buckley*, this Court also rejected interests in "equalizing the relative ability of individuals and groups to influence the outcome of elections," *id.* at 48-49, and "reducing the allegedly skyrocketing costs of political campaigns," *id.* at 57. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court held that "'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.'" *Id.* at 659 (citation omitted). And *McConnell v. FEC*, 540 U.S. 93 (2003), further broadened the concept of "corruption" from narrow quid-pro-quo corruption to include mere candidate gratitude, political influence, and political access, *see, e.g.*, *id.* at 145 (candidate "gratitude" sufficed for "corruption"). But *Citizens United* narrowed the broadened anti-corruption interest in *Austin* and *McConnell*, overruling both as necessary, returning to *Buckley*'s narrow concept of "corruption" as including only quid-pro-quo corruption (or the appearance of narrowly defined quid-pro-quo corruption) and holding that no compelling interest justifies banning independent corporate speech. 558 U.S. at 336-66.[7]

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[7] An underinclusive law doomed an asserted interest in (continued...)

Regarding narrow tailoring, the campaign-finance cases are also instructive. *Buckley* held that a limit on expenditures for independent speech could not "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," 424 U.S. at 44-45, for two reasons. First, as already noted, independent expenditures lack cognizable quid-pro-quo risk. *Id.* at 47. Second, even assuming an anti-corruption interest, the provision failed to advance that interest after the Court was required to construe "expenditure" to reach only express-advocacy communications, which made the provision easily skirted by not using express words of advocacy. *Id.* at 45.

Finally, this Court has recognized the First Amendment's special protection for political "issue advocacy," which is "*speech about public issues* more generally" than "express advocacy" of the election or defeat of a clearly identified candidate. *WRTL-II*, 551 U.S. at 456 (emphasis added). "Discussion of public issues ... [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression ... 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes

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[7] (...continued)
assuring impartial judges to justify banning them from announcing their opinions on vital issues when campaigning for office. *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("[T]he Court need not decide whether achieving [judicial] 'impartiality' (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose." (citation omitted).).

desired by the people.'" *Buckley*, 424 U.S. at 14 (citation omitted). This high protection extends to expressive-association to advance issues, e.g., the NAACP:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in NAACP v. Alabama, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."

Buckley, 424 U.S. at 15. And "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *WRTL-II*, 551 U.S. at 457.

In sum, in the analogous campaign-finance context, where political speech and expressive-association is highly protected, the most recent word from this Court in *McCutcheon* establishes that burdens on free speech require strict scrutiny, which mandates least-restrictive-means narrow tailoring to a compelling interest.

B. Association Burdens Require Rigorous Review.

Buckley considered limits on political contributions as primarily burdens on the First Amendment right to free association, though it acknowledged that a "free communication" burden also exists. 424 U.S. at 20-21. And it said the scrutiny requires "a sufficiently important interest and ... means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. Crucially, this is a "rigorous standard of review," *id.* at 29, meaning one that the government will have

difficulty meeting.[8] Such rigorous review is mandated by the fact that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14.

McCutcheon reiterated this rigorous review, stating *Buckley*'s test thus: "[I]f a law that restricts political *speech* does not 'avoid unnecessary abridgement' of First Amendment rights, ...it cannot survive 'rigorous' review," *id.* at 1446 (emphasis added; citations omitted). Note that, though *Buckley* minimized the speech aspect of contributions, *McCutcheon* speaks of "restrict-[ing] political *speech*" when considering restrictions on political *contributions*, equating contributions with speech. This is of course correct in "political" contexts, where contributions are both a form of speech and used for speech. And *McCutcheon* requires that "closely drawn" be understood to require narrow tailoring, i.e., "'means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57. *McCutcheon* further described the required tailoring thus:

> Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest

[8] Unlike "compelling interest," "paramount interest," and "overriding interest," "sufficiently important interest" is less precise terminology. "Important" means the interest is not unimportant, but it lacks any other indication of degree, such as the superlatives "paramount" and "overriding" provide. "Sufficiently" indicates no *degree* of importance, merely that an interest suffices in the eyes of a court (in after-the-fact review). So specifying that "rigorous review" is required is helpful in retaining the high scrutiny level.

> served,' ... that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective."

Id. at 1456-57 (citations omitted). That articulated *narrow-tailoring* requirement is often overlooked, including when this scrutiny is labeled "'closely drawn' scrutiny." So this scrutiny is usefully called "rigorous review," which indicates the strength of the test and avoids misleading connotations as to tailoring.[9]

In sum, in the analogous campaign-finance context, the most recent word from this Court in *McCutcheon* establishes that limiting contributions involves both association and speech and requires (at least) rigorous review—little lower than strict scrutiny, with narrow tailoring required.

III.

Strict Scrutiny Is Required in Public-Sector, Agency-Fee Cases.

This Court should clearly establish the scrutiny level in public-sector, agency-fee cases, which involve highly protected issue-advocacy political speech, subsidizing that speech, and expressive-association—all in the context of *compelled* speech, subsidy, and association. *Harris* said "no fine parsing of levels of First

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[9] Amicus believes burdens on political speech, association, and contributions—all at the core of First Amendment protection—should be strictly scrutinized. *See, e.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (disagreeing with majority's refusal to apply strict scrutiny to contribution limits). But reaffirmation of rigorous review in *McCutcheon* is an important step toward fuller protection for political contributions and their inherent speech and association.

Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*." *Harris*, 134 S.Ct. at 2639.

But the Court should "say what the law is," *Marbury*, 5 U.S. at 177, so that lower courts, counsel, unions, public employees, and the public will know what scrutiny the First Amendment requires and apply it. Moreover, the First Amendment counsels against drawn-out guidance requiring "substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws[because t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech ...." *Citizens United*, 558 U.S. at 326-27. And such "serious First Amendment flaws"—regarding *Abood*—were "disclose[d]" by this Court in both *Knox*, 567 U.S. at 308-14, and *Harris*, 134 S.Ct. at 2627-43. So the "inevitable, pervasive, and serious risk" of ongoing First Amendment chill resulting from public-sector, agency-fee agreements relying on *Abood* requires establishing the correct scrutiny level and reconsidering *Abood*, as done in *Citizens United*, 558 U.S. at 336:

> The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. See *WRTL*, [551 U.S.] at 482-483, (ALITO, J., concurring); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). For these reasons we find it necessary to reconsider *Austin*.

When this Court does state the scrutiny level here, the Court should hold that it is strict scrutiny, as defined in *McCutcheon*. *See supra* Part I.A. This Court

acknowledged in *Harris* that "it is arguable that the *United Foods* standard is too permissive." 134 S.Ct. at 2639 (referencing *United States v. United Foods*, 533 U.S. 405, 415 (2001)). The *United Foods* scrutiny, used in *Knox* was commercial-speech scrutiny and "it [was] apparent that the speech compelled in [*Knox* was] not commercial speech." 567 U.S. at 310. Nonetheless, *Harris* used the following scrutiny level (because in *Harris* the commercial-speech scrutiny sufficed): the government has the burden to prove that a challenged "provision ... serve[s] a "'compelling state interes[t] ... that cannot be achieved through means significantly less restrictive of associational freedoms.'"" 134 S.Ct. at 2639 (citations omitted). The *United Foods* test is inadequate here for at least three reasons.

First, this case does not involve commercial speech. "Commercial speech [i]s 'speech that does no more than propose a commercial transaction.'" *Harris*, 134 S.Ct. at 2639 (citation omitted). But in *Harris*, which would have imposed a public-sector, agency-fee agreement on personal assistants (who were held not to be true public employees), this Court held that "the union speech in question ... does much more than [propose a commercial transaction]." *Id.*

Second, if only associational freedom were involved (though more is involved), the proper current test for association burdens involving contributions is set out in *McCutcheon*, which scrutiny (at a minimum) should be applied. *See supra* Part II.B. In *McCutcheon*, this Court established that limiting contributions involves both association and speech and requires (at least) rigorous review—little lower than strict scrutiny, with narrow tailoring required. *Id.* At the least the same scrutiny should apply to *compelled* contributions. "Rig-

orous review" of "political" association (including political speech, *id.*) is necessarily higher scrutiny than commercial-speech review, based on (i) the fact that political speech and association are more at the core of First Amendment protection than commercial speech[10] and (ii) the differences in description of the scrutiny, i.e., *McCutcheon*'s test requires "rigorous review" and "narrow tailoring" while the commercial-speech test does not.

Third, this Court has made it clear that political contributions implicate not just expressive association but also political *speech*. *McCutcheon*, 134 S.Ct. at 1446. *Buckley* dealt with political contributions primarily as association burdens but acknowledged that a "free communication" burden also exists. 424 U.S. at 20-21. And in *Harris*, this Court stated the issue as "whether the First Amendment permits a State to compel personal care providers to *subsidize speech* on *matters of public concern* by a union that they do not wish to join or support." 134 S.Ct. at 2631. (emphasis added). "[S]ubsidiz[ing] speech" on "public concern[s]" goes far beyond mere association and is comparable to what *Abood* held unconstitutional, i.e., financing "the expression of political views" with assessments from objecting public employees. 431 U.S. at 235-36. Yet

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[10] "'At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.'" *Knox*, 567 U.S. at 308 (citation omitted). "'The central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.'" *Id.* (citation omitted).

Harris spoke of compelled payment of public-sector, agency-fees, not just the "political views" fees *Abood* held not subject to compulsion.

In sum, a commercial-speech level of scrutiny is not appropriate here. The foregoing requires, at a minimum, *McCutcheon*'s rigorous review for political contributions, with its narrow tailoring requirement.

But as argued next, strict scrutiny should be applied. This is so for at least five reasons.

First, as just noted above, political *speech* and subsidized political *speech* is involved. As already noted, *Buckley* acknowledged that political contributions involve "free communication," *Harris* said subsidized political speech is involved, and *McCutcheon* spoke of "restrict[ing] political speech" when considering restrictions on political contributions, equating political contributions with political speech. *Citizens United* said political speech burdens require strict scrutiny (and maybe a categorical prohibition):

> Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL,* 551 U.S., at 464, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). [And] it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see *Simon & Schuster,* 502 U.S., at 124, 112 S.Ct. 501 (KENNEDY, J., concurring in judgment) ....

Citizens United, 558 U.S. at 340.

Second, as this Court said in *Harris*, *compelled* subsidizing of speech on public issues is involved, 134 S.Ct. at 2631, which amounts to compelled speech.

Harris also noted that in *Knox* this Court had recited "generally applicable First Amendment standards" for the proposition that "[t]he government may not ... compel endorsement of ideas that it approves." *Id.* at 2639 (citations omitted). "And," *Harris* continued, "'compelled funding of the speech of other private speakers or groups, presents the same dangers as compelled speech." *Id.* Among the cases cited in *Harris* for the no-compelled-speech doctrine were *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977). *Barnette* involved a compelled pledge and flag-salute, during a time of high national-security concern, by school children who viewed such acts as religious idolatry. *Barnette* held that "freedoms of speech" are "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Id.* at 639. And it held *compelled* speech to be beyond government authority, *id.* at 642:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

In *Wooley*, the issue was an objection to a state motto on car license plates, and the level of scrutiny required "compelling" interests and "less drastic means" tailoring. 430 U.S. at 716-17. So compelled speech requires strict scrutiny, as does compelled subsidizing of speech.

Third, compelled *expressive-association* is involved. This Court has protected expressive-associations from

those who would alter the association's speech, *see, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 649 (2000). *Dale* expressly rejected an "intermediate standard of scrutiny" because "New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection," 530 U.S. at 659, and the law would "significantly burden the organization's right to oppose or disfavor homosexual conduct," *id.*, its own expression. Here, public employees would be compelled to associate with a group and its expression, neither of which they want to associate with. So the same "traditional First Amendment analysis," *id.*, should protect their refusal of expressive association.

Fourth, as noted above, this Court and the First Amendment specially protect issue advocacy. *See supra* at 12-13. The "political" speech of unions is their own issue advocacy. Just as one's own issue advocacy is specially protected, one's refusal to participate in and subsidize the issue advocacy of another enjoys the highest scrutiny—required for issue-advocacy burdens.

Fifth, nothing justifies a repeat of *Abood*'s "failure to apply the established First Amendment standards articulated in Elrod v. Burns and Buckley v. Valeo," including any "unarticulated belief that compelled support of a public-sector union makes better public policy than compelled support of a political party," as Justice Powell suggested happened in *Abood*. 431 U.S. at 260 n.14. The First Amendment's high protection for free expression and association, especially involving "political" issues and compulsion, mandates neutral tests of general applicability that are clearly stated in advance and applied without alteration or deference to any par-

ticular policy preferences in each new situation. In particular, "free-rider arguments ... are generally insufficient to overcome First Amendment objections," *Knox*, 567 U.S. at 311 (providing quotation reciting examples), and First Amendment scrutiny should not be bent to accommodate such arguments here. And to the extent that "labor peace" is recited to justify the free-rider "anomaly," *id.*, "it is an anomaly nevertheless," *id.*, and "peace" arguments typically have no place in free-speech and free-expression contexts. *See, e.g.*, *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Hess v. Indiana*, 414 U.S. 105 (1973). And historically, this Court has rejected any "heckler's veto" over free speech. *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966) (peaceful sit-in could not be barred because of potential violence). As this Court said in *Harris* about *Hanson*, "[t]he Court did not suggest that 'industrial peace' could justify a law that 'forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought,' or a law that forces a person to 'conform to [a union's] ideology.'" 134 S.Ct. at 2629 (citations omitted).

Conclusion

As the foregoing illustrates, this Court has used considerable variety in describing the level of scrutiny required to protect core First Amendment rights of political speech, association, and expressive-association, including non-compulsion in any of these. This has led to considerable confusion as lower courts, legal counsel, unions, public employees, and the public all struggle to know what the law is—what the First Amendment requires. Following the example of the campaign-fi-

nance cases, the Court should clearly state the scrutiny level here, using the same language as in the campaign-finance cases. And strict scrutiny should be required in this context, mandating the government to bear the burden of proving least-restrictive-means narrow tailoring to a compelling governmental interest. Or in the alternative, this Court should hold that as a categorical matter no such compulsion is permitted where such core rights are involved.

Respectfully submitted,

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