No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICI CURIAE* THE CENTER ON NATIONAL LABOR POLICY, INC. AND BEN JOHNSON IN SUPPORT OF PETITIONER

MICHAEL J. LOTITO
BRENDAN J. FITZGERALD
LITTLER MENDELSON, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
(415) 677-3135
mlotito@littler.com
bfitzgerald@littler.com

MICHAEL E. AVAKIAN*
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Rd., Ste 610
No. Springfield, VA 22151
(703) 321-9180
mavakian@nationallaborpolicy.org
**Counsel of Record*

QUESTION PRESENTED

Whether the decision in *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.

PARTIES TO THE PROCEEDING

Petitioner, a Plaintiff-Appellant in the court below, is Mark Janus.

Respondents, Defendants-Appellees in the court below, are American Federation of State, County, and Municipal Employees, Council 31; Michael Hoffman, in his official capacity as the Acting Director of the Illinois Department of Central Management Services; and Illinois Attorney General Lisa Madigan.

Parties to the original proceedings below, who are not Petitioners or Respondents, include plaintiffs Illinois Governor Bruce Rauner, Brian Trygg, and Marie Quigley, and defendant General Teamsters/Professional & Technical Employees Local Union No. 916.

CORPORATE DISCLOSURE STATEMENT

Because the *Amici* are not corporations, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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INTEREST OF THE *AMICI*

The Center on National Labor Policy Inc. ("Center") and Ben Johnson submit this *amicus curiae* brief in support of Petitioner Mark Janus. The parties have given blanket written consent to filing amicus curiae briefs.[1]

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities. The Center has filed *amicus curiae* briefs advocating the validity of this public policy interest in other cases before this court, including *Friedrichs v. California Teachers Association*, No. 14-915; *Harris v. Quinn*, No. 11-681; *Granite Rock Co. v. Teamsters*, Local 287, No. 08-1214; *Lehnert v. The Ferris Faculty Assn.-MEA-NEA*, No. 89-1217; and *New York Telephone Co. v. N.Y.S. Department of Labor*, No. 77-961.

Ben Johnson is the former President of the Vermont American Federation of Teachers from 2010-2016. His interest is to improve public understanding that coercive union association with non-members creates dysfunction within the union. Forced agency fees makes unions organizations of compulsion rather

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, their members, or their counsel made a monetary contribution to its preparation or submission.

than attraction.

The amici file this amicus brief to support the Petitioner because the issues being considered are greatly important to their members and to bring to the Court's attention that reinstitution of the Petitioner's First Amendment freedoms will not have an adverse effect on public sector collective bargaining and there will be no adverse impact on public policy and public sector labor law if the Seventh Circuit's decision is reversed.

SUMMARY OF ARGUMENT

Amici file this brief to bring three facts to the Court's attention. *First*, unions often pursue agendas in collective bargaining with which members disagree and do not benefit. *Second*, the extraordinary power the government grants to exclusive union representatives skews the political and policy making process and violates the central tenet of equality of political speech embodied in the First Amendment. *Third*, agency fees are repugnant to the First Amendment because they restrict the right of assembly.

ARGUMENT

DATA AND EXPERIENCE CONFIRM THAT MANY UNIONIZED PUBLIC EMPLOYEES DISAGREE WITH THE LOBBYING EFFORTS AND POLITICAL SPEECH OF THEIR EXCLUSIVE BARGAINING REPRESENTATIVES

Unions have long utilized the money raised from employees in their bargaining units to support political causes and candidates and engage in political speech. In doing so, unions have been able to magnify their ability to engage in political speech by virtue of relying upon the sums paid by bargaining unit members. Since 1990, unions have contributed more than $1.2 *billion* to political causes. During this time, unions' political speech, and the influence it buys, has only increased. In the 2008 election cycle, unions contributed almost $76 million to campaigns and political causes.[2] Then, in the 2012 election cycle, union contributions nearly doubled to more than $141 million to campaigns and committees.[3]

Union political support again increased in the 2016 election cycle. Between January 2015 and

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[2]Labor: Background, Center for Responsive Politics, https://www.opensecrets.org/industries/background.php?cycle=2018&ind=P (last accessed Dec. 1, 2017).

[3] *Id.*

August 2016, unions spent $108 million on the election.[4] This was a 38% increase from the same period prior to the 2012 election, when unions "only" spent $78 million, and it was close to double the amount spent in this period during the 2008 cycle.[5] In total for the 2016 election cycle, unions contributed more than $207 million to political parties, candidates and outside spending groups, with just $8.8 million dollars coming from individual contributions.[6] Over 95% of the contributions made by unions were on behalf of the institutions themselves.

Not only have unions as a whole been active politically, but public sector unions, like Respondent American Federation of State, County and Municipal Employees, Council 31's International Union, the American Federation of State, County and Municipal Employees ("AFSCME"), have been especially so. AFSCME was the second most active public sector

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[4] Brody Mullins, Rebecca Ballhaus and Michelle Hackman, *Labor Unions Step Up Presidential-Election Spending*, Wall Street Journal, Oct. 18, 2016, *available at* http://www.wsj.com/articles/big-labor-unions-step-up-presidential-election-spending-1476783002 (last accessed Dec. 1, 2017).

[5] *Id.*

[6] Labor: Long-Term Contribution Trends, Center for Responsive Politics, https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=P (last accessed Dec. 1, 2017)

union in the 2016 cycle.[7] In total, AFSCME contributed approximately $13.3 million during the cycle, including over $2.5 million to candidates and parties, and over $10.7 million to outside spending groups.[8] Of this $13.3 million, AFSCME contributed just $5,181, or 0.03%, to the Republican Party, their candidates, or conservative groups.[9]

Other public sector unions' contributions were similarly skewed for Democratic and liberal causes. For instance, the National Education Association contributed over $20.4 million during the 2016 cycle, including over $20 million in contributions to Democratic candidates and liberal outside spending groups, but just $285,000 on Republicans.[10] Similarly, the American Federation of Teachers contributed over $12 million to liberal groups and Democratic candidates, but only $6,000 on Republican candidates.[11]

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[7] Public Sector Unions: Top Contributors to Federal Candidates, Parties, and Outside Groups, https://www.opensecrets.org/industries/contrib.php?ind=P04&Bkdn=DemRep&cycle=2016 Center for Responsive Politics, (last accessed Dec. 1, 2017).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

Public sector unions' political speech has continued in the current election cycle. In 2017 public sector unions have spent over $10 million on lobbying activities.[12] AFSCME alone has spent over $2.9 million in the 2018 election cycle, the second-most of any American union. Of this nearly $3 million, AFSCME has contributed just $2,815 to the Republican Party, Republican candidates, or to conservative outside spending groups. Thus, 99.9% of AFSCME's contributions in the current cycle have been to the Democratic Party and liberal causes.

Paradoxically, at the same time that unions have drastically increased their political speech, their membership is falling—as it has for decades.[13] In 2016, approximately, 14.5 million employees belonged to a union, with 7.1 million of these employees working in the public sector. Union members make up 10.7% of the total workforce in the United States but this membership rate, or density, declined .4% from 2015—a reduction of 240,000 workers.[14] For comparison's sake, in 1983, the first year for which this information is available, the union density rate

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[12] Labor, Center for Responsive Politics, https://www.opensecrets.org/industries/indus.php?ind=P (last accessed Dec. 1, 2017).

[13] Union Members Summary, United States Department of Labor Bureau of Labor Statistics (Jan. 26, 2017), *available at* https://www.bls.gov/news.release/union2.nr0.htm (last accessed Dec. 1, 2017).

[14] *Id.*

was 20.1 percent.[15] Public sector unions were not immune to this decline in union membership: in 2016, the percentage of public employees in a union fell by 0.8%, while the percentage of public employees represented by a union fell by 1.1%.[16] At a time when union membership in both public and private sectors continues to decline, unions' political speech has rapidly increased.

More alarmingly, the increased political speech by unions comes at the expense of the candidates and causes that union members themselves support. There is no question that unions often pursue agendas with which represented employees disagree or from which they do not benefit. *See Knox v. SEIU*, 567 U.S. 298, 310 (2012) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984) (finding that, under an agency shop, "'[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree'"). *Abood v. Detroit Federation of Teachers*, 431 U.S. 209, 222 (1977), itself recognized as much ("An employee may very well have ideological objections...moral or religious views...economic or political objections to unionism itself").

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[15] *Id.*

[16] Table 3, Union affiliation of employed wage and salary workers by occupation and industry, United States Department of Labor Bureau of Labor Statistics (Jan. 26, 2017), *available at* https://www.bls.gov/news.release/union2.t03.htm (last accessed Dec. 1, 2017).

Perhaps the most high profile example of this truism can be seen from the results of the 2016 Presidential election. The campaign finance reports relating to the 2016 campaign cycle paint a clear picture as to unions', like AFSCME, institutional spending and campaign support for the Democratic Party and liberal causes, which contributed just $5,181 of $13.3 million to Republicans or conservative groups. Unions, as institutions, overwhelmingly backed the Democratic Party and their candidates, especially Senator Clinton, in the 2016 campaign.

However, the same cannot be said of union members and the households in which they live. According to 2016 election exit polling conducted by American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), Senator Clinton outperformed President Trump in union households by just 8 percent (51 percent to 43 percent), the smallest Democratic advantage since Ronald Reagan defeated Walter Mondale in 1984 and an decrease of 3 percent from President Obama's advantage over 2012 Republican-nominee Senator Mitt Romney.[17] Among union members themselves, Senator Clinton

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[17] Philip Bump, *Donald Trump got Reagan-like support from union households*, Washington Post, Nov. 10, 2016, *available at* https://www.washingtonpost.com/news/the-fix/wp/2016/11/10/donald-trump-got-reagan-like-support-from-union-households/?utm_term=.34fe259c7753 (last accessed Dec. 1, 2017); *see also* Ted Hesson and Marianne Levine, *Unions investigate their poor showing for Clinton*, Politico, Nov. 10, 2016, *available at* https://www.politico.com/story/2016/11/labor-unions-hillary-clinton-mobilization-231223 (last accessed Dec. 1, 2017).

outperformed President Trump by 19 percent, a Republican improvement of 4 percent over 2012. According to AFL-CIO exit polling, 37 percent of union members voted for President Trump in 2016.

This underperformance by Senator Clinton among union households—as compared to 2012—came after unions, including AFSCME, used a "massive campaign" to oppose President Trump:[18]

> For Our Future, a super PAC funded by the AFL-CIO, the American Federation of Teachers, AFSCME, the National Education Association and various other labor unions, had nearly 4,000 canvassers and knocked on 9.5 million doors. UNITE HERE spent more than $4 million to register and turnout both union and nonunion members.[19]

Incredibly, the fact that a significant number of union members voted for President Trump was not unexpected. Following interviews in late 2015 and early 2016, Working America, a labor-affiliated group, found genuine support for Mr. Trump among Democrats.[20] In a typical election, "30 percent of union

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[18] *Id.*

[19] *Id.*

[20] Noam Schieber, *Unions Lean Democratic, but Donald Trump Gets Members' Attention*, New York Times, Jan. 26, 2016, (continued...)

voters…already vote reliably Republican."[21] Despite this evidence of the support of their members, unions, like AFSCME, contributed millions of dollars almost completely in favor of Democrats and liberal causes.

Beyond the 2016 Presidential election, there are numerous examples in which unions have engaged in political speech and conduct not in line with their members' interests. In *Knox*, this Court considered the lobbying and political activities of the SEIU in relation to Propositions 75 and 76. The SEIU charged its members a 25% increase in dues to fight Propositions 75 and 76 even though Proposition 75 would have granted union members more rights under state law. *Knox*, 567 U.S. at 304. Specifically, "Proposition 75 would have required unions to obtain employees' affirmative consent before charging them fees to be used for political purposes." *Id.* The SEIU joined a coalition of other unions which raised over $10 million to fight against the rights of its union members. *Id.* The SEIU's campaign against Proposition 75 succeeded and the proposition failed. The Court specifically noted that absurdity of the Union's conduct, "the effect of the SEIU's procedure was to force many nonmembers to subsidize a political effort designed to restrict their own rights." *Id.* at 316.

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[20](...continued)
available at https://www.nytimes.com/2016/01/30/business/donald-trump-unions.html (last accessed Dec. 1, 2017).

[21] *Id.*

Other times, a union's political attacks on members' rights have been less obvious, but no less impactful. For example, many cities around the country have recently enacted increased minimum wage laws. In many cities, unions lobbied strongly for increases to the minimum wage.[22]

While at first blush this would help workers, often, unions also fought to exempt union employees from the minimum wage increases.[23] For example, the Los Angeles County Federation of Labor ("LACFL") lobbied for an exemption for employers with union contracts in 2015.[24] The LACFL again attempted to have a similar exemption passed when the city of Santa Monica attempted to increase the minimum wage.[25] Similar exemptions were carved out in San Francisco, San Jose, and Oakland.[26]

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[22] Ben Bergman, *Unions Have Pushed for the $15 Minimum Wage, But Few Members Will Benefit*, NPR, Feb. 10, 2015, https://www.npr.org/2015/02/10/384980527/unions-have-pushed-the-15-minimum-wage-but-few-members-will-benefit (last accessed Dec. 1, 2017).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Peter Jamison, *Outrage after Big Labor Crafts Law Paying Their Members Less Than Non-Union Workers*, Los Angeles Times, April 9, 2016, http://www.latimes.com/local/cityhall/la-me-union-minimum-wage-20160410-story.html (last accessed Dec. 1,

(continued...)

Even if unions could articulate a beneficial reason for lobbying to exclude their members from a wage increase, downstream benefits to future collective bargaining likely pale compared to the union dues spent on lobbying the lawmakers in these cities. As one source has stated, "by making unions the 'low-cost option' for businesses seeking to avoid paying better wages, they assert, the exemptions are designed to drive up union membership—and revenue from dues—at the expense of workers."[27] Even union leaders know these carve-outs are unacceptable, "'I just think unions should not be in the business of carving out lower wage standards for ourselves,' said SEIU-United Healthcare Workers West President Dave Regan whose union helped lead the charge for California's new $15 minimum wage."[28] One union hotel employee noted the direct negative impact the union's lobbying has on his life, "It's not right. I've been with the union for 10 years, and I've paid my dues for 10 years…[a]nd in the meantime, I'm losing $12,000 a year."[29]

Even individual union members themselves have felt the negative effects of unions' political

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[26](...continued)
2017).

[27] *Id.*

[28] *Id.*

[29] *Id.*

speech. For instance, Debora Nearman, who filed an amicus brief with this Court to support Petitioner's Petition for Certiorari, experienced the effect of unions' outsized political speech.[30] Mrs. Nearman's husband ran to retain his seat in the Oregon House of Representatives.[31] Mrs. Nearman supported her husband's candidacy, while her union, the Service Employees International Union Local 503, Oregon Public Employees Union, campaigned aggressively against it.[32] Her union formed "The Real Mike Nearman Committee," which was fully funded by public sector unions, and sent her campaign mail in opposition to her husband's candidacy.[33]

As with Mrs. Nearman, in 2014, the National Education Association and/or the Pennsylvania State Education Association used dues to send out political mailings in favor of Democratic mayoral candidate, Tom Wolf. *Trometter v. Penn. Labor Relations Bd.*, 2016 L.R.R.M. (BNA) 292686 (Pa. Commw. Ct. 2016). The specific mailing was addressed to Mary Trometter's husband and told him to "[p]lease join Mary in voting for Tom Wolf for Governor on

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[30] Brief Amicus Curiae of Deborah Nearman, filed July 7, 2017; available at http://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31/ (last accessed Dec. 1, 2017).

[31] *Id.*

[32] *Id.*

[33] *Id.*

November 4th."[34] Mrs. Trometter was angered because she did not plan on voting for Wolf and felt that the union was "exploiting my name and membership for their own political causes."[35] She filed a complaint with the Pennsylvania Labor Relations Board and the union agreed that it should cease sending such letters.[36]

As former VFT President and Amicus Ben Johnson observed, unions follow their own political paths because receipt of agency fees corrupts. Unions should be "organizations of attraction not compulsion." B. Johnson "*Time for Organized Labor to End Forced Dues*," Washington Times (August 22, 2017)https://www.washingtontimes.com/news/2017/aug/22/unions-must-end-forced-dues/.

Clearly, public sector unions have an outsized ability to engage in political speech and do so at the expense of the political affiliations of the individuals they represent. The First Amendment should protect union members from having to associate with and financially support an organization that actively campaigns against their preferred political causes and candidates. Under current law, union members'

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[34] Megan Harris, *Teacher Files Labor Relations Complaint against Union over Political Mailing*, Pittsburgh Tribune Review, Nov. 18, 2014, http://triblive.com/news/adminpage/7182828-74/union-political-dues (last accessed Dec. 1, 2017).

[35] *Id.*

[36] *Id.*

constitutional rights are being met because *Abood* has placed First Amendment rights behind "free-rider" objections. This, as recognized in *Knox*, is improper. This Court should not allow this violation of First Amendment rights to continue.

II.
THE MANDATORY ASSOCIATION OF AGENCY FEE PAYERS AND THEIR DUES CONTRIBUTIONS TO UNIONS BURDEN THE FIRST AMENDMENT RIGHT OF ASSOCIATION BY IMPOSING UPON THE OBJECTORS AN IMPERMISSIBLE AND UNWARRANTED LEGAL INEQUALITY WITH THE UNION IN POLITICAL SPEECH

The outsized power of Unions is not merely poor public policy, it is also violative of the First Amendment. In *Abood*, Justice Powell recognized that "[i]f power to determine school policy were shifted in part from officials elected by the population of the school district to officials elected by the School Board's employees, the voters of the district could complain with force and reason that their voting power and influence on the decisionmaking process [of government] had been unconstitutionally diluted." 431 U.S. at 261 n.15 (concurring in judgment). This same sentiment can, and should, be applied to other public sectors. "To 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." *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm.*, 429 U.S. 167, 175 (1976).

As established below, compulsory unionism is diluting the democratic process, as issues of public policy are increasingly being shifted from subjects now open to debate to the closed doors of the collective bargaining process or confidentiality agreements.[37] "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 18-19 (1964). As the Court knew in *Abood*, this inequality has been achieved. Under Michigan law, when a collective-bargaining agreement conflicts with a "valid municipal ordinance, the ordinance must yield to the agreement." *Abood*, 431 U.S. at 253.

A "union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 567 U.S. at 310. *Abood* itself recognized as much: that "public employee unions attempt to influence governmental policymaking." 431 U.S. at 231. The concurring opinions in *Abood*

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[37] *See* Bill Turque, *D.C. Teachers, Rhee Appear Close to Contract; Both Sides Might Yield Some Ground*, Washington Post, Sep. 11, 2009 (confidentiality agreement cited for no public disclosure of unresolved issues), http://www.washingtonpost.com/wp-dyn/content/article/2009/09/10/AR2009091004312.html (last accessed Dec. 1, 2017).

were to the same effect. Mr. Justice Rehnquist noted that "success in pursuit of a particular collective bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way." *Id.* at 243 (concurring opinion); see *id.* at 257–58 ("Collective bargaining in the public sector is 'political' in any meaningful sense of the word...bargaining extends to...educational philosophy that will inform the high school curriculum.") (Powell, J.).

Illinois grants public unions special privileges and powers to assist their ability to influence public policy. Perhaps most important, the State of Illinois has defined the phrase "to bargain collectively" under the Illinois Public Labor Relations Act to include an obligation "to meet at reasonable times, including meetings *in advance of the budget-making process*, and to negotiate in good faith with respect to wages, hours, and other conditions of employment." 5 ILCS 315/7 (emphasis added).

This privilege grants a union with substantial impact upon the budget, policies and economic decisions made by the public employer and, therefore, the government. Such authority, power and structure closely resembles that of the sovereign itself. The Court has noted that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) (emphasis added). "The collective-bargaining agreement to which a public agency is a party is not

merely analogous to legislation, it has all the attributes of legislation for the subjects with which it deals." *Abood*, 431 U.S. 252–53 (Powell, J.; concurring).

Since *Abood*, the actions of public sector unions have become more intrusive as traditional areas of public policy are usurped into collective-bargaining. As Professor Clyde Summers discussed in *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 Government Union Review 5 (Winter 1980):

> A public employee collective bargaining statute typically carves out a large portion of formerly exclusive legislative and budgetary jurisdiction and requires that the agency share that jurisdiction with unions in the guise of "bagpiping over terms and conditions of employment." In the educational field, such matters as the length of the school day, class size, teacher recruitment and retention policies, wages and fringe benefits and much else is taken to fall within the phrase "':bargaining over terms and conditions of employment." Yet decisions on such matters are decisions of public law and policy. Indeed, collectively they go far to determine the very nature and quality of the benefit the government unit exists to

provide.[38]

For example here, regarding Petitioner, an Illinois state employee within the Illinois Department of Healthcare and Family Services ("IDHFS"), Respondent AFSCME can bargain with IDHFS on statutorily designated subjects, including wages, hours, and other terms and conditions of employment. 5 ILCS 315/7.

Respondent AFSCME engages in the allocation of the IDHFS budget and the entire State of Illinois's budget, which otherwise would be arrived at through the open political process in establishing public policy and spending. Since the requirement of negotiation with Respondent AFSCME exists as a mandate of state law, any agreement between AFSCME and IDHFS, its selections and deletions, amount to the creation of state public policy and therefore becomes a "law" as enforceable against all other citizens had the Illinois legislature enacted it.

All these privileges affect the allocation of public resources, tax revenues, and the choices made by the State of Illinois affect all citizens. *See* E. Viera, *"To break and control the violence of faction," The Challenge to Representative Government from*

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[38] *See generally* Timi Anyon Hallen and James Remy Walther, *Project: Collective Bargaining And Politics In Public Employment*, 19 U.C.L.A. L. Rev. 887 (1972); Arthur S. Miller, *Private Governments and the Constitution* (occasional paper for the Center for the Study of Democratic Institutions, 1959).

Compulsory Public-Sector Collective Bargaining (Lib. Cong. No. 80-65161, 1980), at 30–35.

> Questions of this kind, however, involve political considerations of the most wide-ranging sort, including budget allotments, levels and rates of taxation, the quantity and quality of public services, and the size of the public debt. Therefore, to believe that the political inequality embodied in compulsory public-sector collective bargaining has only a *de minimis*, "merely economic" effect is foolish.

Id. at 34.

This transfer of policy making from the public sphere to the actors in collective bargaining Professor Summers has argued, *supra*, diminishes democracy. He observes that it "divides public authority and redistributes a share of it to private entities -- mainly unions -- who are not elected by nor answerable to the public." Summers, "Public Sector Bargaining," supra at 6. Policy decisions are being made by non-elected officials, who are unanswerable to the electorate for their decisions affecting public monies and public policy. This power and authority must be termed governmental because it became available when Illinois created the statutory scheme providing special powers and privileges to the private-interest, public-sector labor unions that exist nowhere else, including

the private sector.[39]

The agency fee requirement conflicts with Petitioner's choice to exercise his First Amendment right not to become an AFSCME member, stripped him of the right to negotiate his own terms and conditions of employment as an employee of the state under state law, and also deprived him of an equal right to bargain for state resources as an individual citizen—a right guaranteed by law. Petitioner's constitutional rights are infringed when he must provide financial support for the political choices the union negotiates on with his own public employer.

"[C]ontributing to an organization for the purpose of spreading a political message is protected

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[39] Professor Summers also notes that public sector bargaining:

> restructures processes for the exercise of that authority to enable these unions to participate in its exercise according to the traditional mode of union functioning, namely collective bargaining - itself an adversarial process; alters in varying degrees the outcomes of these processes for the exercise of governmental authority and thereby modifies the benefits conferred (and their costs) and brings some discontinuation of benefits (strikes); eliminates or reduces public accountability of participants for their share in these processes and outcomes; and undermines the general conditions for healthy democratic government with society at large.

Summers, "Public Sector Bargaining," *supra* at 6.

by the First Amendment." *Abood*, 431 U.S. at 234. "[T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). The extant scheme of *Abood* allowing the formation of a class of agency fee payers and concomitant demands upon them for their financial support of the union, accomplishes this intrusion and violation of the First Amendment to the Constitution.

When the Court decided *Abood*, state agency shop laws were in their relative infancy. *Abood* attempted to reconcile these laws with the overriding concerns of the First Amendment. However, the *Abood* Court did so without the benefit of a factual record and without the forty years of experience the Court now has. *Abood*, 431 U.S. at 213 & n.4. Importantly, the intervening years and over a dozen similar cases appearing before this Court have shown that *Abood* is an untenable intrusion upon the First Amendment.

The judicial record of this country over the last thirty-five years shows the experiment in *Abood* permitting the infringement of First Amendment rights should no longer be tolerated.

III.
THE FREEDOMS OF ASSOCIATION AND EXCLUSION ARE TWO FUNDAMENTAL UNDERPINNINGS TO THE IDEAL OF LIBERTY IN THE UNITED STATES AND ABOOD IS REPUGNANT TO THEM

Even if the *Abood* decision had not shown it is an untenable intrusion on the First Amendment, the intrusion it allows has always been violative of a citizen's right to assemble with those he chooses.

Citizens of the United States view certain rights as certainties, such as freedom of speech, to practice one's own religion, against self-incrimination, etc. The United States government stands alone in the modern world to constitutionally guarantee its citizens the right to freedom of expression.

In monarchal England in 1670, William Penn was arrested because he "unlawfully and tumultuously did assemble and congregate... together, to the disturbance of the peace of the... king." Specifically, his crime was associating with Quakers. Penn was put to trial for exercising what is today considered an inalienable right, the right to freedom of association. Edwin J. Peterson, *A Person to Remember, Or. St. B. Bull* (June 1994) at 40. Though Penn was eventually released, he was arrested numerous times for exercising rights the Constitution of the United States lists in its First Amendment.

Whatever success the organization of employees into labor organizations may achieve, those numbers should not be attained through state coercion to impose state interests upon Constitutional rights. The importance of the First Amendment, and its position within the Bill of Rights, is not an accident. "The First Amendment is first…because it articulates the first freedom and the nature of that freedom … the First Amendment gets to the essence of what it is to be a human. Dr. Owen Anderson, *Why the First Amendment is 'first in importance'*, Washington Times, Dec. 12, 2016, http://www.washingtontimes.com/news/2016/dec/12/why-the-first-amendment-is-first-in-importance/ (last accessed Dec. 1, 2017). James Madison, the author of the First Amendment, stated in a speech to the Virginia Ratifying Convention, "… there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." James Madison, *Speech to the Virginia Ratifying Convention*, June 16, 1788 at http://thefederalistpapers.org/founders/madison/james-madison-speech-at-the-virginia-convention-to-ratify-the-federal-constitution (last accessed Dec. 1, 2017). While these rights are decreed as "self-evident" and "inalienable" for all people, they are certain only in practice. Where the United States government makes an oath to its citizens to uphold these natural rights through the words of the Constitution, other countries uphold them through statute, relegating rights to privileges a government allows its people to enjoy, as opposed to recognizing that such rights are

inherent by the very nature of personhood.

Freedom of association is therefore inseparably related to freedom of speech. Possibly the greatest outside observer of the American system, Alexis de Tocqueville noted in his book, *Democracy in America*, Volume 1, Chapter XII, Saunders and Otley (1935), that:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society. The greatness of America lies not in being more enlightened than any other nation, but rather in her ability to repair her faults.

From the beginning of the republic, protecting fundamental rights has been a major issue. Alexander Hamilton, in Federalist Paper No. 84, argued that listing the rights of the people would imply that only the listed rights were protected. About listing rights he wrote that "[i]t is evident … that they have no application to constitutions professedly founded upon the power of the people … Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular

reservations." Alexander Hamilton, *The Federalist Papers: No. 84*, July 16, July 17, August 9, 1788. In response to the notion that rights flowing from the right to speech would be implied, John Page of Virginia replied, "[i]f the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." 1 ANNALS OF CONG. 731-32 (Joseph Gales ed., 1834).

Despite Hamilton's concerns, the Bill of Rights was penned and exists physically in ink and parchment, clearly listing certain rights. Page was referring to the arrest and imprisonment of William Penn years earlier. *Peterson*, *supra*. In his argument, Page noted that without the right to assemble and to congregate with like-minded individuals of one's own choosing, the right to freedom of speech would be nigh worthless. Essentially, if a governing body could regulate association, it could regulate assembly and speech, and all things related. American abolitionist, Frederick Douglass, once said, "to suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker." Frederick Douglass, *A Plea for Free Speech in Boston* (1860), archived at http://perma.cc/R2C2-ZYD7 (last accessed Dec. 1, 2017). Justice Hugo Black wrote in *Associated Press v. United States*, "The First Amendment...rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The Court has regularly cited Thomas Jefferson for his statements on free speech, free association, and political rights, such as "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 12 (1947) (holding "general programs," such as bussing, police, and fire services to parochial schools did not violate the First Amendment because the services served no religious function and did not directly support the schools in any way) and *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 n.15 (1986) (holding that procedural safeguards are necessary to prevent compulsory subsidization of ideological activity by non-union employees who object thereto while not restricting the union's ability to require any employee to contribute to the cost of collective-bargaining activities) and *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (holding membership in an association may be compulsory to employment, but members do not give up their right to disagree with and choose not to fund certain activities to which they are opposed).

This Court has dealt with issues surrounding freedom of association for two centuries, setting an imperative to protect and defend the rights of individuals against the monolith of the majority. In *De Jonge v. State of Oregon*, 299 U.S. 353 (1937), the Court held that federal protection of the right of peaceful assembly for lawful discussion was extended to the states. In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court held that the convictions of

students arrested for peaceful demonstrations against segregation were overturned because the state could not "make criminal the peaceful expression of unpopular views." And, in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), the Court held that Shopping mall owners may prohibit demonstrators from assembling in their private malls since the First Amendment applies to public, not private property.

Inherent in the underlying philosophy of the right to associate with whom one so chooses is the right to exclude. Without the right to exclude, it would be impossible for a person to actively assert his right to associate based on his own choices. A person may exclude himself from associating with those he does not wish to. Justice Brennan in *Roberts v. United States Jaycees* stated there is "no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

In the same case, Justice O'Connor filed an opinion concurring in part and concurring in the judgment in which she defined "the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." A voice, in the general sense, is the vehicle through which expression occurs, in whatever form it may take. Following Justice O'Connor's rationale, the inability of one to refrain from association with those he/she does not wish to limit the right of one to freely express one's self. *Id.* at 633.

The right to exclude is well documented in American jurisprudence and in the corpus of the American court system. In every such instance, the primary concern of the right to exclude involves the ability of a group to uphold its internal integrity from outside forces. The Court in *NAACP v. State of Alabama ex rel. Patterson* affirmed its decision in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958). As part of its strategy to enjoin the NAACP from operating, Alabama required the NAACP to reveal to the State's Attorney General the names and addresses of all the NAACP's members and agents in the state. The Court determined such a requirement would in effect suppress the ability of people to legally associate with the NAACP. In his opinion, Justice Harlan explained one's privacy is "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. The Court held there would have to be some "overriding valid interest of the State" to justify the intrusion into right of freedom of association. *Id.* at 459. One's privacy of personal action and association is directly tied to his enjoyment of liberty. Every encroachment on one right encroaches the other.

It is clear from the foregoing that the payments made by the private sector unions allow them to

engage in political speech and lobbying efforts contrary to the political beliefs and positions of many members. The forced association of agency fee payers with their politically-motivated, public sector unions allows these unions to falsely take advantage of the agency fee payers they represent and engage in outsized political speech. This forced association infringes upon these agency payers' First Amendment-protected freedoms of association and exclusion. It is, therefore, clear that the 35-year *Abood* experiment is repugnant to the basic principles of the Unites States. It is time for this forced association, if it should have even been permitted in the first place, to end and for *Abood* to be rejected.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed and remanded.

Respectfully submitted,

MICHAEL E. AVAKIAN*
THE CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road, Suite 610
North Springfield, VA 22151
(703) 321-9180
mavakian@nationallaborpolicy.org
** Counsel of Record*

MICHAEL J. LOTITO
BRENDAN J. FITZGERALD
LITTLER MENDELSON, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
(415) 677-3135
mlotito@littler.com
bfitzgerald@littler.com

Attorneys for *Amici*

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