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

REPLY TO BRIEFS IN OPPOSITION

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A. This Case Is an Excellent Vehicle for Reconsidering *Abood*.

Respondents cannot plausibly contend that the question presented is not worthy of review given that the Court has twice attempted to resolve it in recent years. *See Friedrichs v. Cal. Teachers Ass'n,* __ U.S. __, 136 S. Ct. 1083 (2016); *Harris v. Quinn*, __ U.S.__, 134 S. Ct. 2618, 2632–34 (2014). So respondents argue this case is not the best vehicle for reconsidering *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). But their two grounds for so arguing are illusory. The case presents no colorable jurisdictional issue because 28 U.S.C. §§ 1331 and 1343(a)(3) certainly provide for jurisdiction over Janus' First Amendment and 42 U.S.C. § 1983 claims. The record contains all the information necessary to resolve the question presented. *See* Pet. 30–34.

1. This Case Presents No Difficult Jurisdictional or Procedural Issues.

The district court "grant[ed] leave for the Employees to file their complaint in intervention and treat[ed] it as the operative pleading, while simultaneously dismissing the Governor's original complaint." Mem. Op. & Order 9, Dist. Ct. ECF No. 116 (Dist. Ct. Order). The court did not, as respondents claim, "grant[ ] the Employees' motion to intervene." AFSCME Br. 9; State Br. 4 (similar). The district court flatly stated that it "[o]bviously . . . cannot allow the Employees to intervene in the Governor's original action because there is no federal jurisdiction over his claims." Dist. Ct. Order 7–8. Rather, the court accepted the Employees' complaint as the sole pleading in the case, which made the Employees plaintiffs, as opposed to intervenors. *Id*. at 8–9.

This decision raises no jurisdictional issues because the district court had jurisdiction to adjudicate the Employees' claim that respondents' agency fee requirement violates their First Amendment rights, as secured by Section 1983 and the Fourteenth Amendment, under: (1) 28 U.S.C. § 1331, which grants district courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States," and (2) 28 U.S.C. § 1343(a)(3), which grants district courts jurisdiction over Section 1983 claims. *See* Second Am. Compl., Pet.App. 9a, 24a (asserting jurisdiction and cause of action, respectively). This jurisdiction existed at the time the action was brought, which was the day the Employees filed their complaint with the district court. Empl. Compl., Dist. Ct. ECF No. 92-2.

The district court recognized that "[t]he Employees' proposed complaint in intervention asserts an independent basis for the court's jurisdiction." Dist. Ct. Order 9. AFSCME itself conceded to the district court that:

> The three employees have, in their proposed complaint in intervention, asserted an independent basis for the Court's jurisdiction. * * * The Court may therefore grant the employees leave to file their complaint in intervention as the operative pleading, while at the same time dismissing the Governor's claims.

Union Defs.' Joint Reply 12, Dist. Ct. ECF No. 115. All respondents conceded to the Seventh Circuit that

"the district court had federal question jurisdiction under 28 U.S.C. § 1331" over the Employees' second amended complaint. Appellees' Joint C.A. Br. 3. *Harris* and *Friedrichs* rested on this jurisdictional basis.[1] There simply is no colorable jurisdictional issue here.

At most, the district court's decision could have presented a *procedural* question of whether the court correctly exercised its discretion to accept the Employees' complaint as the operative pleading, instead of making them refile it under a new case number. But the Court need not concern itself with even that minor issue. Respondents did not appeal the district court's decision to the Seventh Circuit, and thus failed to preserve their objections to the district court treating the Employees' complaint as the operative pleading. *See Greenlaw v. United State*s, 554 U.S. 237, 244–45 (2008) ("[I]t takes a cross-appeal to justify a remedy in favor of an appellee" because "an appellate court may not alter a judgment to benefit a nonappealing party.").

Even if the issue were before the Court (which it is not), the district court's procedural decision is correct for the reasons cited by that court, Dist. Ct. Order 8–9, by the Seventh Circuit, Pet.App. 3a, and by the seven other circuits that have unanimously held an

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[1] *See* Pet.App. at 56a, *Friedrichs v. Cal. Teachers Ass'n*, 14-915 (Jan. 26, 2015) (citing 28 U.S.C. §§ 1331 and 1343 as jurisdictional basis); J.A. at 16, *Harris v. Quinn*, 11-681 (Nov. 22, 2013) (same).

intervenor's complaint can be made the operative pleading if the court has independent jurisdiction over that complaint. *See Village of Oakwood v. State Bank*, 481 F.3d 364, 367–68 (6th Cir. 2007); *Benavidez v. Eu*, 34 F.3d 825, 830–31 (9th Cir. 1994); *Arkoma Assocs. v. Carden*, 904 F.2d 5, 7 (5th Cir. 1990); *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc.*, 472 F.2d 893, 895–96 (10th Cir. 1973); *Atkins v. State Bd. of Educ.*, 418 F.2d 874, 876 (4th Cir. 1969); *Fuller v. Volk,* 351 F.2d 323, 328–29 (3d Cir. 1965); *Hackner v. Guar. Trust Co.*, 117 F.2d 95, 98–99 (2d Cir. 1941).

These decisions are consistent with *United States ex rel. Texas Portland Cement Co. v. McCord*, which involved a proposed intervenor whose claim could not proceed as an independent cause of action. 233 U.S. 157, 164 (1914). The statute in *McCord* granted a "right of action" to creditors only if certain conditions were met, which included providing notice to other creditors. *Id.* at 160–63. The plaintiff failed to satisfy one of those conditions. *Id.* at 163. The Court held that a prospective intervenor could not proceed as an independent action because he too failed to satisfy a statutory condition. *Id.* at 164. ("Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors."). *McCord* says nothing about whether a court can accept and adjudicate an

intervenor pleading that can proceed as an independent action. *See Hackner*, 117 F.2d at 99.[2]

In fact, *McCord* says nothing about "jurisdiction." The word appears nowhere in the decision. That is for good reason. *McCord*'s holding was not jurisdictional in nature, but concerned whether the parties perfected a "right of action" under the statute. 233 U.S. at 162–63. "It is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.,* the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

AFSCME asserts that the Seventh Circuit ruled on this issue "without the benefit of adversarial briefing by the parties." AFSCME Br. 16. That assertion not only is false,[3] but galling, for it was AFSCME that changed positions at the last minute. AFSCME told the district court that *McCord* was inapposite because the court had jurisdiction over the Employees' complaint, and thus could accept it as the operative pleading. Union Defs.' Joint Reply 11–12, Dist. Ct. ECF No. 115. AFSCME then told the Seventh Circuit

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[2] *Hofheimer v. McIntee* similarly is distinguishable because the Seventh Circuit held that a party could not "be substituted as sole plaintiff" because he did not have an independent "cause of action." 179 F.2d 789, 792 (7th Cir. 1950).

[3] Pet. C.A. Reply Br. 6–7 (explaining why the district court's acceptance of the complaint did not affect its jurisdiction).

that the district court had jurisdiction over the Employees' complaint, and did not appeal its acceptance as the operative pleading. Appellees' Joint C.A. Br. 3. It was only *two days* before oral argument that AFSCME belatedly cited *McCord* as a supplemental authority, and thereafter devoted its oral argument to new assertions based on that case. *See* AFSCME 28(j) Letter, C.A. ECF No. 31 (Feb. 27, 2017).

The Court need not grapple with AFSCME's last ditch gambit if it grants review because, again, the issue: (1) was not preserved on appeal, and (2) does not affect the lower court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) to adjudicate Janus' First Amendment and Section 1983 claims.

2. The Record Contains All Information Necessary for the Court to Reconsider *Abood* and the Constitutionality of Agency Fees.

Respondents, after having moved the district court to dismiss the complaint and the Seventh Circuit to affirm its dismissal, Pet.App. 5–7, now assert that the complaint is an insufficient record upon which to decide the case. Their change of heart comes too late. If Respondents wanted to offer evidence to defend *Abood*, they should have done so at the district court. They chose not to. Respondents cannot now rely on their own litigation decision to avoid review. If that tactic were tolerated, unions could prevent any *Abood* challenge from reaching the Court simply by moving to dismiss the complaint, and then later as-

serting it is an insufficient record upon which to reconsider *Abood*.

This case has an excellent record upon which to reconsider *Abood* for the reasons stated in the Petition, 30–34. Among other things, the record features a financial notice explaining AFSCME's agency fee calculation, Pet.App. 28a, and AFSCME's prior collective bargaining agreement with the State, Dist. Ct. ECF No. 145-1.[4] An exhaustive account of AFSCME's recent bargaining with the State, which details the subjects of bargaining and some of their cost to taxpayers, also exists. *See* Pet. 3–4, 32–33. The latter item supports this Court's conclusion that "core issues such as wages, pensions, and benefits are important political issues." *Harris*, 134 S. Ct. at 2632.

This case is thus a suitable vehicle for resolving the question presented. The Court has resolved similar First Amendment questions on the pleadings. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996); *Elrod v. Burns*, 427 U.S. 347, 350 (1976) (plurality). This includes the constitutionality of Illinois' agency fee law as applied to personal assistants in *Harris*, 134 S. Ct. at 2627. The Court attempted to revisit *Abood* on the basis of pleadings in *Friedrichs*. Pet. at 8, *Friedrichs v. Cal. Teachers*

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[4] Illinois' collective bargaining agreements with other unions are also available and subject to judicial notice. *See* https://www.illinois.gov/cms/Employees/Personnel/Pages/PersonnelLaborRelations.aspx.

Ass'n, 14-915 (Jan. 26, 2015). *Abood* itself was decided on the pleadings. 431 U.S. at 213 n.4. It can also be overruled on that basis.

Respondents' argument that the Court needs additional evidence to engage in a balancing test to determine the scope of chargeable fees[5] is predicated on errors of law: namely, that a balancing test governs the inquiry and that each union activity is separately analyzed. To the contrary, to survive exacting First Amendment scrutiny, respondents must prove that Illinois' agency fee law, as a whole, "serve[s] a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012)). If respondents cannot meet this burden then, just as in *Harris*, Illinois' agency fee requirement is unlawful in its totality.

Evidence concerning the ostensible benefits union obtain for employees in bargaining, *see* AFSCME Br. 23, is also immaterial under *Harris* because agency fees are not the least restrictive means for the State to provide any such benefits. 134 S. Ct. at 2640–41 (holding that the alleged benefits a union obtained for personal assistants did not justify agency fees). If the State wants to provide "protective equipment," or "training," or anything else to certain personnel, AFSCME Br. 23, the State can simply do so. The State

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[5] *See* State Br. 8; AFSCME Br. 23–24.

does not need to force employees to pay AFSCME to ask the State to take actions that the State believes are in the public interest.

To the extent that the constitutionality of agency fees may turn on facts not in this record, the Court should take the case to instruct the lower courts and interested parties as to what facts are relevant. A constitutional rule must first be established before the lower courts can administer it.

The Court should not wait for other cases challenging *Abood* that might reach this Court in future years, as respondents urge. Delaying review will subject Janus and millions of other employees to an ongoing and irreparable violation of their First Amendment right to choose which political advocacy is worthy of their financial support. *See* Pet. 9–13. If *Abood* is wrongly decided, as *Harris* suggests, then the Court should overrule it as soon as possible.

B. *Abood* Conflicts with *Harris* and Other Precedents Governing the Constitutional Scrutiny Applicable to Instances of Compelled Speech and Association.

Turning to *Abood*'s merits, respondents fail to rebut Janus' primary reasons for why *Abood* is wrongly decided: (1) agency fee provisions compel public employees to support political advocacy, for there is no distinction between bargaining with the government and lobbying the government, Pet. 10–12, 16–17; (2) *Abood* failed to subject agency fees either to the strict

scrutiny applicable to regulations of speech or to the exacting scrutiny the Court has applied to compelled expressive associations in cases stretching from *Elrod*, 427 U.S. at 362, to *Harris,* 134 S. Ct. at 2639, Pet. 13–16; and (3) agency fee provisions cannot survive either level of heightened constitutional scrutiny, *id*. at 21–29.

Instead of attempting the impossible task of squaring *Abood*'s analysis with cases that applied heightened scrutiny to instances of compelled speech or association,[6] respondents claim *Abood* is consistent with other cases. They assert *Abood*'s analysis accords with *Pickering v. Board of Education*, 391 U.S. 563 (1968), and is the foundation for *Keller v. State Bar of California*, 496 U.S. 1 (1990), *Board of Regents v. Southworth*, 529 U.S. 217 (2000), and two agricultural subsidy cases, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). *See* AFSCME Br. 18–21; State Br. 13–14.

Respondents' argument was rejected in *Harris*. The Court held that *Abood* was not based on a *Pickering*

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[6] An exception is *United States v. United Foods, Inc*., 533 U.S. 405 (2001), which AFSCME alleges is consistent with *Abood*. To the contrary, the Court explained in *Knox* that *United Foods* held "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny," 567 U.S. at 310, which is a level of scrutiny *Abood* failed to apply. Pet. 13–16. *Harris* further held "it . . . arguable that the *United Foods* standard is too permissive" for agency fee requirements. 134 S.Ct. at 2639.

balancing test, 134 S. Ct. at 2641–43, and that agency fees are subject to at least exacting scrutiny, *id*. at 2639.[7] The Court also explained that *Keller* and *Southworth* are not dependent on *Abood*, but are consistent with an exacting scrutiny analysis. *Id*. at 2643–44.

The Court stated in *Southworth* itself that it was not applying *Abood* to student activity fees. 529 U.S. at 230 (holding that "the means of implementing First Amendment protections adopted in . . . [*Abood* and *Keller*] are neither applicable nor workable in the context of extracurricular student speech at a university."). The Court cited, as a reason, the "difficulties" it had encountered with administering *Abood*. *Id*. Those same difficulties now justify overruling *Abood* entirely. *See* Pet. 16-20.

Abood did not govern either agricultural subsidy case. *See Johanns,* 544 U.S. at 559–62 (holding *Abood* did not apply because the assessment at issue funded government speech); *Glickman*, 521 U.S. at 468–73 (holding *Abood* did not apply because the marketing program at issue was an economic regulation that did not implicate the First Amendment). The Court even expressly "distinguishe[d]*"* *Abood* in *Glickman*, 521 U.S. at 470 n.14. AFSCME's assertion

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[7] *Harris* also held that Illinois' agency fee requirement, at least as applied to personal assistants, could not survive a *Pickering* balancing test in any event. 134 S. Ct. at 2642-43. The same is true here. A balancing test will not save Illinois' agency fee law.

that "[i]n each such case, the Court applied *Abood's* holding and standard to the particular program at issue," AFSCME Br. 20, is the opposite of what occurred.

At most, *Abood* is the foundation for subsequent agency fee cases in which the Court tried to implement *Abood's* framework, such as *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (plurality opinion), and *Locke v. Karass*, 555 U.S. 207 (2009).[8] These decisions only demonstrate *Abood*'s unworkability, *see Harris*, 134 S. Ct. at 2633; Pet. 18–20, and the doctrinal split in this Court's jurisprudence. Any case that followed *Abood* in failing to apply strict or exacting scrutiny to a compulsory fee will, just like *Abood*, conflict with cases in which the Court applied that scrutiny to an instance of compelled speech or association, *see* Pet. 14–16 (citing cases). The Court should resolve this conflict by taking this case to do what it did in *Harris*, but failed to do in *Abood*: apply heightened First Amendment scrutiny to agency fee requirements.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] AFSCME's repeated assertion that the Court "reaffirmed" *Abood* in these and other cases stretches that word beyond its breaking point because *Abood's* holding was not squarely challenged in the cases that preceded *Harris*.

Respectfully submitted,

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