No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

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

BRIEF OF THE FREEDOM FOUNDATION AND DR. JOHN BALZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Freedom Foundation ("Foundation") is a nonprofit organization based in the states of Washington and Oregon whose mission it is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation focuses on public sector labor reform through litigation, legislation, education, and community activation. Among other endeavors, the Foundation is actively engaged in several lawsuits with multiple SEIU Locals in Washington and Oregon aimed at enforcing the rights of home health care providers ("providers") not to pay any compulsory union fees under *Harris v. Quinn*, 134 S. Ct. 2618 (2014). The unions have aggressively resisted *Harris* and the Foundation's attempts to enforce it. As a result, the Foundation possesses intimate and detailed knowledge about these unions' efforts to resist and undermine the constitutional rights acknowledged in *Harris* and at stake in the instant case. The Foundation also filed the original complaint with the Washington Public Disclosure Commission, which ultimately led to a separate lawsuit, *Washington v. WEA*, which was consolidated with *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007), before this Court. The Foundation also filed an *amicus* brief in *Davenport*.

Dr. John Balz is a behavioral science practitioner with expertise in "choice architecture," which concerns identifying and changing features of an environment

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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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All counsel of record have consented to this filing through blanket consents filed with the Court.

for the purpose of influencing human decisions and behavior. It is the science of how decision-making is influenced, consciously and unconsciously, by the ways choices are structured. Dr. Balz holds a B.S. in political science from Northwestern University, an M.A. in American Studies from the University of Texas-Austin, and a M.A. and Ph.D. in political science from the University of Chicago. He served as the lead researcher of the New York Times best-selling book *Nudge*, which provides a blueprint for applying behavioral science principles to the fields of public policy and politics. He drafted two chapters of the book, one on Medicare Part D and the second on school choice.[2] Dr. Balz is currently the Director of Planning at VML, a global digital advertising agency, where he leads strategic planning for the Kimberly-Clark family care business. His prior experience includes serving as Vice President of ideas42, as a Senior Strategic Planner at the global advertising firm Foot, Cone, and Belding, and as a Behavioral Marketing Manager at Opower, a leading environmental technology company. The views expressed here represent his views and not those of any organization.

SUMMARY OF ARGUMENT

The Freedom Foundation's experience with attempting to enforce providers' rights under *Harris* has made one thing abundantly clear: unions will use opt-out exaction schemes to resist and undermine any holding by this Court that overrules *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and frees public employees from compelled union fees. Whether this Court does or does not overrule *Abood*, it should make abundantly clear that it is unconstitutional to employ

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[2] RICHARD THALER AND CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

opt-out schemes to frustrate the constitutional rights of nonmembers not to pay for a unions' nonchargeable expenses, whatever their scope. It is a "bedrock" constitutional principle that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. Opt-out exaction schemes defy this bedrock principle.

This brief highlights two realities. Section I illustrates, by documenting one Washington union's crusade to resist and undermine *Harris*, the unfortunate reality that will arise post-*Friedrichs* in full-fledged public sector employment if this Court fails to rule opt-out exaction schemes[3] unconstitutional. Section II applies the science of choice architecture to show three reasons why opt-out exaction schemes *per se* unconstitutionally and involuntarily compel public employees to financially support speech with which they disagree. First, unions have no constitutional right to initially seize nonchargeable fees from employees, so there is no lawful taking from which employees should have to opt out. Second, opt-out exaction schemes, *by definition*, create a significant risk that employees will be compelled, knowingly or unknowingly, to subsidize speech they do not support. Third, opt-out exaction schemes fail exacting scrutiny because opt-in regimes *necessarily* offer a method of collection significantly less restrictive of First Amendment rights. Further, no government interest whatsoever, let alone a compelling government interest, is served by allowing unions to seize from

[3] "Opt-out exaction scheme" as used in this brief refers to the process of requiring nonmembers and former members to object, in order to avoid the seizure of fees exceeding constitutionally-chargeable costs from public employees.

nonmembers, absent their explicit and unambiguous consent, any monies that this Court has held may not be constitutionally demanded. This Court should thus deem opt-out exaction schemes unconstitutional, and hold that the First Amendment demands affirmative consent from public employees before states and unions can exact monies from them for expenses the payment of which this Court has held is unconstitutional to compel, whatever the amount.

ARGUMENT

The essence of the right acknowledged in *Harris* is the *choice* to decide freely and voluntarily if one wishes to financially support a union, free of governmental involvement. At a minimum, states and unions must have in place "procedural safeguards" to *prevent* compelled subsidization of nonchargeable activities by employees, by insuring the process is "carefully tailored to minimize the infringement." *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2291 (2012) (any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights). However, past cases, by "historical accident" and without real analysis, *Knox*, 132 S. Ct. at 2290, "have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all." *Id*. at 2293. Far from *preventing* compelled subsidization of nonchargeable activities, however, opt-out schemes *cause* compelled subsidization. If common sense does not compel this conclusion, choice architecture science certainly does. Opt-out schemes *per se* constitute an unconstitutional infringement of the First Amendment because they do not satisfy the "high standard" unions

must meet to freely and voluntarily collect money from nonmembers for nonchargeable purposes. *Id*. at 2291.

I. PUBLIC-SECTOR UNIONS USE OPT-OUT EXACTION SCHEMES TO UNDERMINE FULL-FLEDGED PUBLIC EMPLOYEES' CONSTITUTIONAL RIGHTS, JUST AS SEIU 775 HAS DONE TO UNDERMINE THE CONSTITUTIONAL RIGHTS OF QUASI-PUBLIC EMPLOYEES UNDER *HARRIS V. QUINN* NOT TO PAY ANY FEES.

In *Harris*, this Court held that the First Amendment prohibits states from forcing providers, who are not full-fledged state employees, to financially support a union at all. *Harris*, 134 S. Ct. at 2644. To evade *Harris*'s holding, unions rapidly implemented comprehensive schemes to continue in practice what this Court prohibited in principle: seizing union fees from nonmembers without their consent. Section A shows the extent of one union's efforts to resist and undermine this Court's ruling in *Harris* (and the State's complicity in doing so).[4] Sections B and C examine, using choice architecture analysis applied to opt-out schemes employed by SEIU 775NW ("SEIU") and the California Teachers Association ("CTA"), how opt-out exaction schemes continue to infringe on workers' First Amendment rights.[5]

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[4] SEIU's conduct is relevant because *Harris* did for quasi-public employees what Petitioners propose to do for full-fledged public employees by requesting that *Abood* be overruled. SEIU's response is an indicator of how full-fledged public employee unions will respond to an adverse ruling here.

[5] Most other states have faced similar union responses to legal reforms aimed at enhancing public employee freedoms. *See, e.g.*, Sean Higgins, *Michigan union finds new way to fight teachers' efforts to leave it*, Washington Examiner, (Aug. 21, 2015,

A. SEIU's aggressive, unopposed, and comprehensive opt-out efforts (and the State's complicity) undermine public employees' constitutional choice, acknowledged in *Harris v. Quinn*, to choose freely and voluntarily whether to financially support a union.

SEIU currently represents more than 30,000 quasi-public employees called individual providers ("IPs") in Washington,[6] who are statutorily deemed public employees "solely for the purposes of collective bargaining." Wash. Rev. Code 74.39A.270. Prior to *Harris*, SEIU automatically seized union dues from IPs' wages with or without their consent. *Id*. at 41.56.113(b)(i). After *Harris*, SEIU continues to do the same under the guise of an opt-out scheme.

After this Court decided *Harris*, SEIU unilaterally deemed every IP in Washington, who had not previously objected to paying compulsory dues pre-*Harris*, to be a union member from whom full union dues would be automatically seized. *See* Letter, at 7 ("SEIU Healthcare 775NW's Constitution and Bylaws automatically grants you membership . . . . While you need not sign a membership card, we strongly encourage you to do so") ("Mailer 1").[7] Therefore, thousands of IPs

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12:01 AM), http://www.washingtonexaminer.com/michigan-teachers-union-tricks-members-into-staying/article/2570590.

[6] IPs, who provide in-home care services to the elderly and disabled, are paid through subsidy reimbursements provided by the State. IPs are essentially identical to the petitioners in *Harris*.

[7] Letter from David Rolf, President, SEIU 775NW to Individual Providers (December 18, 2014), available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%20membership%20packet%20post-Harris%20-%20reduced.pdf.

who had never joined SEIU prior to *Harris* were deemed to be full dues-paying SEIU members by self-serving fiat, merely because they had failed to object prior to *Harris*.[8] According to SEIU, this sleight-of-hand automatically deprived thousands of nonmember IPs of *Harris*' guarantees.

In August 2014, SEIU sent all IPs a different letter[9] ("Mailer 2"), the first five pages of which were pro-union marketing. *See* Mailer 2, at 1-5.[10] On the sixth page, SEIU finally "informs" IPs of their constitutional right acknowledged in *Harris*. *Id*. at 6. Page six outlines SEIU's opt-out scheme, which must be properly and timely followed by IPs to exercise their *Harris* freedoms, but then cautions IPs that they will lose their right to vote on the contract, and that "less than one half of one percent" of providers have decided to cease funding SEIU. *Id*. In SEIU's reckoning, this hidden opt-out scheme surrounded by warnings satisfies its *unilateral* contractual obligation to provide IPs "notice" of their constitutional rights. *See* Current

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[8] Non-objecting "members," therefore, become subject to the extensive rules and regulations set forth in SEIU's Constitution and Bylaws available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%20current%20bylaws.pdf, because SEIU "does not differentiate among its members based on whether they have filled out a membership application or card." Adam Glickman Declaration, at ¶ 13, *infra*.

[9] Letter from SEIU 775NW to Individual Providers (August 2014), available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20member%20mailer.pdf.

[10] Letter from SEIU 775NW to Individual Providers (August 2014), available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20member%20mailer.pdf.

Collective Bargaining Agreement ("Current CBA") § 4.1(B).[11]

In a case seeking a return of wages SEIU wrongfully seized from IPs, SEIU's Secretary-Treasurer and Director of Public Affairs, Adam Glickman, submitted a revealing Declaration. Declaration of Adam Glickman in Support of SEIU Healthcare 775NW's Opposition to Plaintiffs' Motion for Class Certification, *Centeno et al. v. Quigley*, et al., No. 2:14-cv-00200-MJP (W.D. Wash. Filed Feb. 11, 2014) ("Glickman Decl.").[12] Glickman states that SEIU "does not differentiate among its members based on whether they have filled out a membership application or card." *Id*. ¶ 13. Glickman also states, "SEIU 775 has treated all IPs as Union members as long as they are paying full union dues. There is no requirement that an IP complete or sign any document to be a Union member if the IP is paying monthly union dues." *Id*. ¶ 8.[13]

Glickman admits that, at the time of the Declaration (March 13, 2015), 18% of the bargaining unit had not signed membership cards or consented to dues deduction. *Id*. ¶ 11. This means SEIU exacts full fees from at least 6,120 IPs who have never actually joined the union or affirmatively consented to *any* aspect of union membership or dues deduction. Glickman also reveals that *SEIU exacted money from 43,000 total IPs over*

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[11] Available at http://www.ofm.wa.gov/labor/agreements/13-15/nse_hc.pdf.

[12] Available at http://www.myfreedomfoundation.com/sites/default/files/documents/Glickman%20Decl.%20in%20Centeno.pdf.

[13] Further, SEIU's decision to automatically opt providers into full membership and deprive objecting IPs of rights is completely up to SEIU, as "[t]he State of Washington plays no role in SEIU 775's internal membership decisions." *See* Glickman Decl. ¶ 9.

the previous three years who had not consented to membership or dues deduction. *Id*. ¶ 26. Unions like SEIU enjoy substantial financial windfalls by employing opt-out exaction schemes. This would be bad enough in normal business situations, but when First Amendment rights are at stake, this is unacceptable.

As Glickman stated, SEIU seizes wages from IPs without their consent, presenting them with a *fait accompli*, and then engages in an aggressive campaign to ensure SEIU is able to continue its seizures. For example, SEIU representatives lie to IPs at mandatory training sessions (post-*Harris*) by telling them they are forced to pay a portion of their wages to SEIU. *See* Video[14] and Article. "Video Footage Shows SEIU Lying to Individual Providers in State Mandated Training," Maxford Nelsen (July 7, 2015).[15] SEIU never mentions *Harris* at these sessions. SEIU also bombards IPs with Mailers requiring IPs to waive their legal right to recover wages SEIU wrongly exacted pre-*Harris*, and deceptively suggesting that the IP's signature is a mere technicality that does not alter legal rights or limit one's ability to revoke SEIU membership. *See* Letter, 1-2 ("Mailer 3")[16] ("I'm writing

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[14] Available at https://www.youtube.com/watch?v=xs3PutxeylI&feature=youtu.be.

[15] Available at http://www.myfreedomfoundation.com/blogs/liberty-live/video-footage-shows-seiu-lying-to-individual-providers-in-state-mandated-training.

[16] Letter from Peggy Meyers to Individual Providers (August 2014), available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%202014%20Nonmember%20Letter%20-%20redacted.pdf. There is one signature line, but it operates in three ways. First, it acts as affirmative consent to union

you today, because it appears we don't have a membership card on file for you"); *see also* Mailer 1, *supra*, at 1-2 (which contains a pre-filled signature card).[17]

Finally, SEIU marshals its considerable resources to ensure it is the only group that possesses IPs' contact information so it alone can control the information IPs receive, thus keeping IPs ignorant of their constitutional and statutory rights. For example, SEIU sued Washington's Department of Social and Health Services ("DSHS") and the Freedom Foundation to prevent DSHS from disclosing to the Freedom Foundation public records containing IPs' names and birth dates, which would allow the Freedom Foundation to inform IPs of their newly acknowledged constitutional rights under *Harris*—something the State refuses to do. *See* Complaint for Declaratory and Injunctive Relief Under 42.56.540, *SEIU Healthcare 775NW v. DSHS, et al.*, No. 14-2-01903-1 (Thurston County Super. Ct., filed October 1, 2014)[18] SEIU lost in the trial court, acquired a Stay,[19] opposed direct review by the

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membership. Second, it authorizes the State to deduct fees from the IP's paycheck (which is a separate legal requirement). Third, it operates to waive the IP's legal right to pursue past wages wrongfully exacted by SEIU pre-*Harris*.

[17] Available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%20nonmember%20appeal.pdf.

[18] Available at https://www.myfreedomfoundation.com/sites/default/files/documents/2014-10-%2001%20SEIU%20new%20complaijnt.pdf.

[19] *See* A Ruling by Commissioner Schmidt (Wa. Ct. App. Div. 2 November 3, 2014), available at https://www.myfreedomfoundation.com/sites/default/files/documents/Order%20Granting%20Stay%20%2811-3-14%29.pdf.

Washington Supreme Court in order to further stall disclosure of the records,[20] and even keeps IPs themselves from acquiring the information through separate Public Records Act requests.[21]

The new 2015-2017 CBA, executed one year after *Harris*, gives SEIU total control over what information related to constitutional rights is given to IPs, including the notice of rights under *Harris*, and its continuation of the opt-out scheme. *But see Hudson*, 475 U.S. at 307 n. 20. The Current CBA sets forth an exaction scheme that begins immediately deducting wages from new IPs. Current CBA § 4.1(A).[22] The Current CBA then establishes an opt-out exaction scheme that includes a "notice" requirement and escrow account:

> The Union shall notify each home care worker covered by this Agreement that he or she is not required to join or financially support the Union. New home care workers will be notified as soon as possible, but no later than fourteen (14) days from the Union receiving the home care worker's contact information. The Union shall escrow the fee paid by new home care workers in an interest-bearing

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[20] S*ee* Answer by SEIU Healthcare 775NW to Statement of Grounds for Direct Review, *SEIU Healthcare 775NW v. DSHS, et al.,* No. 91048-1 (January 2, 2015), available at https://www.myfreedomfoundation.com/sites/default/files/documents/2015%2001%2002_ANS_Stmt%20Grds%20Dir%20Rev_final.pdf.

[21] *See* Order. *See* A Ruling by Commissioner Schmidt (Wa. Ct. App. Div. 2 Aug. 26, 2015), available at https://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20v.%20DSHS.pdf.

[22] Available at http://www.ofm.wa.gov/labor/agreements/15-17/nse_homecare.pdf.

> account. The fee shall remain in this account until the home care worker is notified of the opportunity to opt-out and given thirty (30) calendar days to do so. If the home care worker objects to paying the fee within thirty (30) days of the notification from the Union, the Union Shall, within twenty (20) days of receiving the notice from the home care worker, refund the fee with interest (at the rate of interest it has received.). The Union will notify the Employer to cease further deductions . . . .

Current CBA § 4.1(B). The State thus cedes to SEIU the responsibility to inform new IPs of their constitutional right not to pay any monies to SEIU *after* the illegal deductions have commenced. Yet, SEIU is *the party financially interested in preventing IPs from objecting*. Predictably, SEIU obscures its "notice." *See* Mailer 2, at 6. SEIU also limits the manner in which new IPs may object. *See* Current CBA § 4.1(B); *see also* Mailer 2, at 6.[23]

New IPs never see a paycheck reflecting their full earnings because the State immediately begins exacting funds from their wages. The State forwards the money to SEIU, where it is placed in a so-called escrow account. SEIU then retains the segregated funds (along with their accrued interest) if the new IP fails to object within thirty days. The CBA does not explain whether new IPs can successfully object *after* the initial thirty days, which IPs, apparently, cannot do.

The State also actively assists SEIU with recruiting IPs and acquiring IPs' signatures. The State "provide[s]

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[23] Available at http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20member%20mailer.pdf.

fifteen (15) minutes for a Union representative to meet with the individual provider(s) participating in the contracting appointments" with DSHS, Current CBA § 2.3, which occur when someone becomes an IP *and* every time the IP acquires a new client. "The State will also provide fifteen (15) minutes for a Union representative to meet with the individual providers" during initial mandatory orientations. Current CBA § 2.3. SEIU is additionally entitled to make presentations to IPs on "Union issues" at State-mandated training sessions conducted by a SEIU Training Partnership. *Id*. § 15.13(A).[24] And if that is not enough, the Current CBA further requires that all state websites "individual providers might reasonably access" have to contain a link to SEIU's website, all state orientation materials distributed to IPs must contain union membership applications, and the online payroll website must include SEIU notifications. *Id*. §§ 2.5-2.8. At a minimum, IPs are confronted by SEIU in person, online, or on paper *every* time they interact with the State. And to ensure no IP escapes without being harassed, the State includes SEIU materials with each paycheck mailed to IPs. However, there is no requirement that *Harris guarantees* be mentioned or explained at any time or place.

Finally, the State regularly discloses to SEIU an unconscionable amount of the IPs' personal information. This includes an IP's physical and mailing address, home and cellular phone numbers, email addresses, birth date, gender, marital status, primary preferred language, hire date, unique independent provider number, program or service code, wage rate, amount paid during the current month of payment, hours worked, and cumulative lifetime hours worked. *Id*.

[24] The taxpayers are even forced to fund these interactions.

§ 5.1. The State even discloses IPs' social security numbers to SEIU. SEIU then uses this information to inundate providers with information aimed at further curtailing their rights.

In short, SEIU's post-*Harris* conduct in Washington demonstrates the extreme lengths to which unions will go to exact monies from public employees in a post-*Abood* world. The Court need not speculate about the consequences of overruling *Abood* but not invalidating opt-out exaction schemes. Like SEIU and the thousands of Washington care providers it has abused, public sector unions will turn to opt-out exaction schemes to continue forcing public employees to support unions, even if such support cannot be compelled. This Court should look to Washington's experience, and declare opt-out exaction schemes unconstitutional.

B. "Choice architecture" analysis shows opt-out exaction schemes cause compelled subsidization of speech with which employees disagree.[25]

Choice architecture science shows that significant numbers of IPs who would not otherwise voluntarily fund unions do so as a result of SEIU's default opt-out exaction scheme. Dr. Balz analyzed documents related to opt-out policies employed by SEIU and CTA, respectively. It is his opinion that principles from behavioral science and choice architecture are especially relevant

[25] This choice architecture analysis is applied *infra*. The basic principles of all opt-out schemes, not just SEIU's, are applicable to all arguments in this brief.

to these policies.[26] His professional opinion concerning these opt-out exaction schemes is presented below.

The default option is the first, and most important, aspect of a decision-making system because the choice architect must design a default outcome that results when an individual does nothing. Two primary choice structures are opt-in and opt-out, which are commonly found in enrollment contexts. Structures employed by SEIU and CTA represent an opt-out structure in which an individual participates, or is given an option, regardless of whether that individual actively has made that choice.

SEIU's policy uses default options that affect two decision points. The first decision point is whether an employee joins the union as a member. The default option is membership. The second decision point is whether the employee financially supports the union. SEIU's default membership option is that IPs pay full union dues unless they object.[27]

Figure 1[28] outlines the seven potential outcomes for employees resulting from these two decision points.

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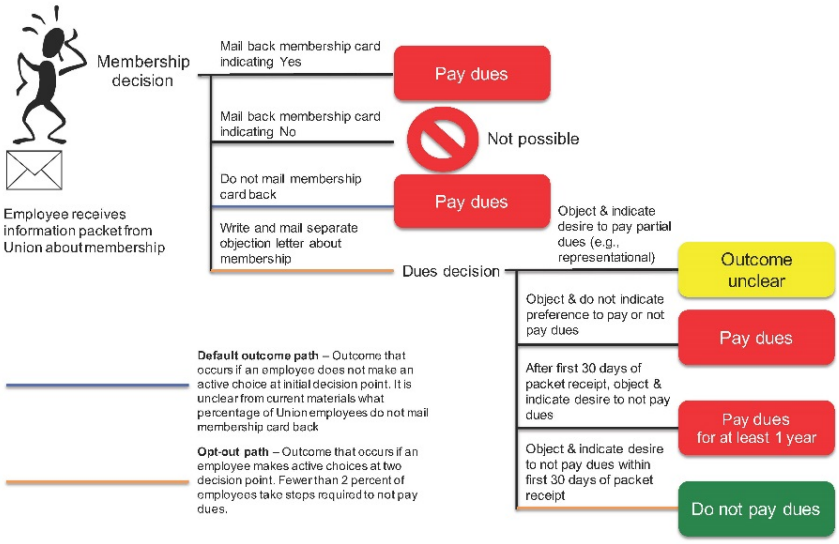
[26] Dr. Balz' professional opinion is based on his educational background and his professional experience designing, implementing, and testing behavioral tactics across a variety of industries in physical and digital formats. He reviewed SEIU's policy for the purpose of expressing his opinion on the choice architecture issues involved in it.

[27] An employee who would like to support the union for activities they might support–such as representational activities–but not support other activities–is not provided direction if and how they might make this choice.

[28] Available at http://www.myfreedomfoundation.com/sites/default/files/documents/Choice-Architecture_Dues.pdf.

All but one of these outcomes result in financially supporting SEIU's nonchargeable activities, whether it be under *Harris* or a portion currently under *Abood*. Only 2% of employees reach this outcome, according to a declaration in *Centeno, et al. v. Quigley, et al.*, No.: 2:14-cv-00200-MJP (W.D. Wash. filed Feb. 11, 2014) by Adam Glickman, Secretary-Treasurer and Director of Public Affairs for SEIU. Glickman Decl. ¶ 25. Most importantly, the outcome that results from the default option (designated with a blue line in Figure 1 is financially supporting the union activities which this Court has ruled cannot be required.

Fig. 1: Choice architecture of paying SEIU 775 union dues



The choice of a default option is important because of the human tendency toward inertia or non-action. This tendency is known in behavioral literature as the "Status Quo Bias," whereby people continue to participate in a program for a long period of time regardless

of whether their initial enrollment happened through an opt-in or an opt-out structure.

The power of default options has been shown in a wide range of areas. Well known is a 2001 study of individuals' participation in 401(k) retirement plans that showed the occurrence of considerable differences in enrollment between opt-in and opt-out structures.[29] That study of automatic enrollment at a Fortune 500 firm showed that under an opt-in structure, 37.4 percent of recent hires enrolled in their employer's 401(k) program compared to 85.9% under an opt-out structure. In a separate study involving three firms, researchers found participation rates under opt-in structures falling between 26% and 43% after six months and 57% and 69% after three years. Under an opt-out structure, participation rates exceeded 85%.[30]

The difference between the two structures is not indicative of employee preferences, rather, it is because of the choice architecture, especially when one considers survey responses in which people say they want to save for their retirement. According to a recent survey issued by the Washington D.C. non-profit America Saves, the overall interest level in saving money across all ages is 71% with young people indicating the strongest interest at 77%.[31]

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[29] Brigitte Madrian and Dennis Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149, 1149-87 (2001).

[30] James Choi, David Laibson, Brigitte Madrian, and Andrew Metrick, *Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance*, 16 TAX POLICY AND THE ECONOMY 67, 67-114 (2002).

[31] Press Release, America Saves, New Personal Savings Index Measures Perceived Savings Interest (71%), Effort (62%),

Default options have also been shown to affect organ donation rates. European governments have adopted different opt-in/opt-out structures for organ donation programs. A study of eleven European countries found that organ donor program enrollment rates under opt-in policies ranged between 4.25% and 27.5% while rates rose to between 85.9% and 99.98% in countries with opt-out policies.[32]

In the area of energy, Dr. Balz saw how the power of default options influenced enrollment. A 2013 study from the Department of Energy of nineteen smart grid programs that recruited customers to enroll found an average recruitment rate of 84% among opt-out structures compared to 11% for opt-in structures. The highest opt-in participation rate was 27%, while the lowest opt-out participation rate was 78%.[33]

The influence of an opt-out structure on union employee behavior is evident through review of payroll contributions in Kentucky to the National Education Association ("NEA"), as outlined in *FEC v. NEA*, 457

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and Effectiveness (58%) (Nov. 4, 2013), available at http://www.americasaves.org/images/1142013psirelease.pdf.

[32] Eric Johnson and Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338-39 (2003). Justifying these differences on the basis of socio-cultural norms requires explaining why enrollment rates in Germany and Austria, Sweden and Denmark, and Belgium and the Netherlands differ so dramatically despite their similar cultural heritages. It is Dr. Balz's opinion that an explanations based on socio-cultural differences as opposed to choice architecture is not credible.

[33] Department of Energy, "Analysis of Customer Enrollment Patterns in Time-Based Rate Programs: Initial Results from the SGIG Consumer Behavioral Studies," Department of Energy, Washington D.C., 2013.

F. Supp. 1102, 1109 (1978). To collect financial contributions, the NEA used a procedure known as the "reverse check off" system. When an employee signed a membership application, the NEA set a default option for dues payment to the NEA itself and contributions to the NEA political action committee ("PAC"). *Id*. at 1103-04. That automatic deduction included $1 specifically for NEA's PAC.[34] *Id*. Employees who did not want to pay the $1 had to submit a separate written request for a refund. In choice architecture language, financial contributions followed an opt-out structure with a default option to financially support NEA's PAC. *Id*.

The reverse check off choice architecture with an opt-out structure for financial contributions to NEA's PAC made it easier for NEA to collect monies from members. NEA's counsel told the court that the union did send letters asking people to mail back a financial contribution: "Individual building representatives were told with all your other tasks, try and get a dollar from these people if they are willing to contribute, or two dollars for the state funds." *Id*. at 1109. "The fact of the matter is it didn't work, not because people were coerced or not coerced. It has never worked with us if it is dues or insurance or anything else." *Id*.

Under the reverse check-off choice architecture with an opt-out structure for financial contributions to NEA's PAC, 91% of members contributed money. *NEA*, 457 F. Supp. at 1108. According to the FEC and the Court, the "high success rate raises a strong inference that a substantial number who used payroll deduction for their dues did not know the additional dollar contribution also was being deducted." *Id*.

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[34] This is similar to SEIU's signature line, which acts as affirmative consent to multiple things. *See*, *supra*, n. 16.

As with the earlier mentioned 401(k) enrollment study, the influence of the opt-out structure on behavior was large in size and immediately noticeable. The Kentucky NEA adopted the reverse check-off choice architecture with an opt-out structure for financial contributions. *Id*. In the preceding year, 1974, the largest number of members to contribute in one period was 2,854, and the largest amount of money contributed in a three-month period was $5,740. *Id*. By comparison, in the first year of the opt-out structure of reverse check-off, at least 21,463 members contributed in one period. *Id*. In the first year, the largest amount of money contributed was $82,081. *Id*. This large spike is similar to what researchers have found in other enrollment patterns where the choice architecture switches from opt-in to opt-out.

As detailed in I(A), *supra*, SEIU's opt-out structure with a default option for full membership and payment of full dues, means that IPs hand over money to SEIU from the moment of hire in an amount determined by SEIU, even, as noted, after *Harris* held such seizures unconstitutional. If an employee does not object within thirty days, SEIU keeps the entire amount of dues (plus interest) and the employee waives a right to challenge that proportion for the remainder of the year.

SEIU also sends employees, upon hire, a packet that includes information about the benefits of membership and a membership card for the employee to sign and mail back. Under SEIU's opt-out structure, employees do not have to sign and mail back the card to become members. Employees who do nothing—for example, employees who never open the packet—are defaulted into full *membership* in SEIU, not just into the full payment of dues.

The initial six-sided packet employs a variety of behavioral tactics commonly used to influence behavior in one particular direction, which in this case is joining SEIU and paying full fees. *See* Mailer 2. Only at the end is there a "Legal Notice" that reads, in part: "If you do not respond to this notice we will take it to mean you wish to provide financial support to the Union and will be charged through a payroll deduction." *Id*. at 6. In locating the "Legal Notice," the union applied a concept from psychology literature known as a *channel factor*. First coined in 1951, *channel factor* refers to features of an environment or steps a person takes that can open or close future behavior.[35] Channel factors, therefore, can make it easier or harder to act.[36]

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[35] The seminal study of channel factors was conducted at Yale University, with a health campaign encouraging students to get a tetanus shot. One group of students was given information about the risks of tetanus, the benefits of a shot, and where to go to get inoculated. Another group was given the same information, as well as a map showing how to get to the building. Three percent of people who received information about the shot got inoculated compared to 28% of people who received the map. The impact of that small additional information is referred to as a channel factor. From an outsider's perspective, the additional value of this piece of information appears minimal. Finding out how to get to the building does not require a large investment in time or resources. But from the perspective of the decision maker, this small hurdle is actually significant, and inhibits their chances of a shot. Howard Leventhal, Robert Singer, & Susan Jones, *Effects of Fear and Specificity of Recommendation Upon Attitudes and Behavior*, 2 J. PERSONALITY & SOC. PSYCHOL. 20, 20-29 (1965).

[36] Other factors include the first side of the packet, which highlight SEIU's activities and accomplishments in readable format and photos. They describe SEIU's accomplishments without giving employees a clear picture of which ones were paid for with the non-representational portion of dues, or informing them that

Paperwork is a common source of channel factors. It can inhibit action because of humans' limited attention spans and their mental capacities to process information, both of which lead to tendencies to procrastinate or accept any terms the paperwork propounds. Channel factors can make the default option even more powerful and difficult to overcome. Here, SEIU, by positioning this information at the back of its packet, makes it more difficult for IPs to know about and exercise their rights under *Harris* to not pay full union dues.

SEIU makes it more difficult, still, by alerting employees that withdrawing membership means a loss of voting rights, and that "less than one half of one percent of caregivers have chosen to give up their rights and withdraw from membership." *Id*. In behavioral science, this sentence is an example of influencing through the use of a social norm. Opower, the energy technology company where Dr. Balz served as a behavioral marketing manager, used this tactic in reports it mailed to people which showed how their electricity and natural gas use compared with the average use of people in similar homes. The intent of the tactic was to nudge high energy users to reduce their usage.

Similarly, here the intent of the social norm is to nudge employees who are considering opting out to become members simply by telling them that other people before them have joined. At the top of the membership form is the following simple declaration: "1. Yes, I want to join with other long-term care workers for a stronger voice for quality care, living wages, and good benefits." *See* Mailer 3, at 2. The details of membership terms and wage deductions appear in the fine

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they have the option to pay dues that do not include the non-representational portion and still receive certain benefits.

print. *Id*. The benefits an objecting IP retains after objecting are not included in the packet.

Making forms easier to complete increases the completion rate. A well-known example is an experiment involving the form for the free application for federal student aid, also known as FAFSA. Streamlining the form by pre-populating parts[37] of it with personal information and including numerical estimates about the size of aid applicants could receive, along with the costs of nearby public colleges, increased its completion rates from 28 to 36 percentage points—more than 28%—compared to applicants who followed the standard form.[38] That increase was notable because the design of the experiment ensured that applicants of the streamlined and the standard form had similar interest levels in wanting federal aid. The increase in completion rate was a function of the form, not the person's preferences.

Further, SEIU deducts full fees from employees' first paycheck and holds it in an escrow account for thirty days regardless of whether they have completed and returned the form. This choice architecture prevents an employee from seeing a larger paycheck, minus the dues payment and a clear statement of how the size of that check would change with a contribution. Behavioral researchers have identified a tendency

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[37] The Union uses this tactic—a pre-populated form—in follow-up communications to members who have not signed and returned membership cards. The follow-up communication also includes a postage-paid envelope designed to make it easier to complete the process by mailing back the card.

[38] Eric Bettinger, Bridget T. Long, Philip Oreopoulos, & Lisa Sanbonmatsu, *The Role of Application Assistance and Information in College Decisions: Results from the H&R FASFA Experiment*, 127 Q. J. ECON. 1205, 1205-42 (2012).

among people to avoid losses—referred to as loss aversion. This choice architecture mitigates any pain employees might feel from anticipating a future smaller paycheck and influence their decision not to contribute fees in order to save money.

The power of these multiple behavioral nudges combine together to tilt against employees with personal preferences not to support the union. Although employees may hold such preferences, behavioral science research indicates that as in the case of retirement savings, a human tendency toward procrastination can inhibit action and advantage the default option, especially when such action requires an active search for additional information and the taking of steps, like the union examples here.

The differences between these two procedures—for paying or not paying fees—indicate SEIU's enrollment document is not a level, unbiased statement about its activities. It is a purposeful tool that nudges employees toward membership and non-members toward paying a fee equal to dues in defiance of *Harris*. As a result, choice architecture science shows that significant numbers of employees are paying money to unions that they would not otherwise voluntarily give.

C. "Choice architecture" analysis shows California's and the CTA's opt-out exaction scheme causes compelled subsidization of speech with which employees disagree.

Choice architecture science highlights that significant numbers of California teachers fund unions who would not otherwise voluntarily do so absent the CTA's default opt-out exaction scheme. Dr. Balz analyzed documents that relate to the CTA's opt-out policies. It is his opinion that principles from behavioral science and choice

architecture are especially relevant to these policies.[39] His professional opinion is as follows.

Dr. Balz reviewed the letter from CTA to agency fee payers about opting out of financial support for political activities. App. Vol. II, 355-63. He also reviewed the form employees can use to opt out of financial support for political activities. *Id*. at 663-64. For those employees who do not opt in to membership, CTA defaults them into paying fees at the rate of 100% of dues, including the political portion. *Id*. at 358. The CTA employs opt-out choice architecture to secure financial support for its political activities. Requesting to have that portion of fees not used for political activities requires challenging action on the part of the employee. *Id*. It is a process containing two noteworthy channel factors.

First, opting out requires a careful reading of three and a half single-spaced pages of text regarding the benefits of membership with full financial support and about how to opt out if an employee would like to do so. *Id*. at 355-63. Contrast this communication format with one Dr. Balz sees and uses in his professional advertising work, which breaks out key information with large headlines and easily understood sentences. (Similar to SEIU's Mailer 3, *supra*.) An example for CTA's materials might be a single-page letter with the headline "3 easy steps to a refund," or "3 easy steps to only pay for activities you support." The "3 easy steps" approach is intended to help a person take action.

[39] Dr. Balz' professional opinion is based on his educational background and his professional experience designing, implementing, and testing behavioral tactics across a variety of industries in physical and digital formats. He reviewed CTA's policy for the purpose of expressing his opinion on the choice architecture issues involved in it.

CTA's letter provides teachers no such assistance to opt out of financially supporting political activities. *Id*.

Second, CTA's letter repeatedly refers to political activities as "non-chargeable," an unintuitive term that does not help employees assess how those funds would be used. *Id*. The letter makes a brief reference to the political activities these fees support at the bottom of page one, *id*. at 356, but uses the term "non-chargeable" fees throughout. *Id*. at 355-63. CTA determines what proportion of dues is earmarked for those political activities.

Teachers who object to paying non-chargeable fees are narrowly restricted as to when they can do so. They must follow a submission process that requires mailing back to the union an opt-out form postmarked no later than one month after the date printed on the letterhead. *Id*. at 358. Those who wish to challenge CTA's division of fees into chargeable and non-chargeable activities must review a packet of audited financial statements of CTA's activities to make a difficult calculation. *Id*. They must request an arbitration hearing and physically travel to locations during limited windows of time. *Id*. at 358-59. CTA's letter offers windows covering fifteen days in February and March 2013, with hearings held in two locations, Burlingame and Los Angeles. App. Vol. II, 359.

Choice architecture analysis indicates CTA's enrollment document is not a level, unbiased statement about its activities. Instead, it is a tool that nudges teachers toward membership and non-member teachers toward paying a fee equal to dues. As a result, significant numbers of teachers are paying money they would not otherwise voluntarily pay. They are paying money to CTA for activities with which they disagree and would prefer not to support financially.

II. OPT-OUT SCHEMES ARE UNCONSTITUTIONAL.

A. Unions have no constitutional right to seize nonchargeable fees from public employees in the first place, so there is no lawful taking from which employees should have to opt out.

Opt-out schemes are inherently unconstitutional because unions lack the lawful authority to seize nonchargeable fees, whatever the amount, from nonmember public employees in the first place.[40] "[U]nions have no constitutional entitlement to the fees of nonmember employees." *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007). Unions may exact fees from nonmembers only pursuant to an "unusual" and "extraordinary" act of "legislative grace," *Knox*, 132 S. Ct. at 2291 (internal citations omitted), that grants a union "the power, in essence, to tax government employees." *Davenport*, 551 U.S. at 184. Yet, these acts of "legislative grace" are illegal when they compel the subsidization of nonchargeable expenses. *Abood*, 431 U.S. at 236-37.

Where such a union tax is unlawful, therefore, a state cannot force its employees to fund a union by any means, including an opt-out exaction scheme. A union has no lawful authority to seize fees from a nonmember for an expense that is not chargeable to the nonmember under the First Amendment. A union without the right to exact money from employees also lacks the right to exact money from employees absent objection. For example, it is illegal for a person to walk into a car

[40] SEIU's scheme to automatically consider IPs members without affirmative consent, does not make them so in the eyes of the law.

dealership and begin taking cars unless and until the dealership owner objects. This would be theft.[41] It is not necessary for the owner to object to what is, at its core, a wrongful seizure of his own property. The unlawfulness of that seizure does not lie in the burden imposed on the employee to opt out. It lies in the seizure itself. The seizure of nonconsenting individuals' monies to subsidize speech that a State may not compel in the first place is prohibited by the First Amendment (not to mention theft statutes and the common law of conversion).

B. Opt-out exaction schemes create a risk that employees will be compelled to subsidize speech they do not support.

This Court has recognized that "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox*, 132 S. Ct. at 2290. That risk is intolerable, because "First Amendment values are at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors." *Id*. at 2295-96.

Knox's conclusion is correct. Opt-out exaction schemes create an obvious risk that employees will subsidize speech with which they disagree. That much has even been admitted by one teachers' union. *See Seidemann v. Bowen*, 499 F.3d 119, 125-26 (2d Cir. 2007) (opt-out requirements allow unions to "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively").

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[41] This is true even if the thief temporarily stores the cars in a storage unit.

Indeed, unions have long known the power of opt-out schemes. To induce political contributions from union member teachers, the NEA utilized an opt-out scheme one federal district court ruled violated the Federal Election Campaign Act of 1971 because its method of solicitation was not "calculated to result in knowing free-choice donations." *FEC v. Nat'l Educ. Ass'n*, 457 F. Supp. 1102, 1109 (1978) (citing *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 439 (1972)). In *National Education Ass'n*, the NEA employed a "reverse check-off" system that required teachers who signed a membership card to contribute $1.00 to the NEA's political action committee unless a teacher objected by sending NEA a separate written request for a refund. *Nat'l Educ. Ass'n*, 457 F. Supp. at 1103-04. The primary evidence relied upon by the court was the change in a collection rate that occurred when NEA's Kentucky affiliate began using an opt-out scheme. (Evidence cited by Dr. Balz. *See* § I(B), *supra*.) The affiliate's contribution rate rose from 2,854 contributors under an opt-in regime to 21,463 contributors under the new opt-out regime—an increase of 91%. *Nat'l Educ. Ass'n*, 457 F. Supp. at 1108. The court stated that "[s]uch a dramatic change suggests inadequate information to the members that the additional amount for political contributions was voluntary." *Id*. The court also cited NEA counsel's own words, *id*. at 1108-09, and concluded that "something other than a willingness by the member to be associated with the union's political activities operates to make reverse check-off so advantageous to the union's funding mechanism." *Id*. at 1108. *National Education Ass'n's* evidence and court analysis harmonizes with choice architecture science. Unions employ opt-out schemes specifically because they result in financial windfalls

not available through "knowing free-choice donations." *Pipefitters*, 407 U.S. at 439.

According to choice architecture analysis, *all* opt-out schemes *necessarily* create the unacceptable risk that at least some employees will be compelled to subsidize speech with which they disagree, *and the utilization of opt-out exaction schemes prevents knowing who those employees are*.

Further, keeping exacted monies in an escrow account prior to affirmative membership consent, an objection, or no action at all, *see* § II(B), *supra*, *increases* the barrier to opting out. It is irrelevant *where* IPs' money goes after it is deducted from their paycheck. The *deduction* itself constitutes the unconstitutional action. The *deduction*, the inability to receive the full amount earned, "creates a risk that the fees" IPs pay "will be used to further political and ideological ends with which they do not agree." *Knox*, 132 S. Ct. at 2290. This is so because the deduction, which occurs in the first paycheck, significantly increases the chance they will never opt out, regardless of how long their money (knowingly or unknowingly) remains in escrow.

Knox applied to assessments imposed upon public employees who had already exercised their choice to opt out of union membership, 132 S. Ct. at 2290, but choice architecture analysis shows that it is a certainty that many who disagree with the union's speech do not fall into that category (*i.e.*, those who already opted out). According to choice architecture, many will never opt out. *These* workers' constitutional rights must be protected as well, because if a risk of infringement on a right must be borne at all, the "obvious" answer is that it must be borne by those "whose constitutional rights are not at stake." *Knox*, 132 S. Ct. at 2295. Infringement on these employees' First Amendment

rights, by utilizing opt-out exaction schemes, "cross[es] the limit of what the First Amendment can tolerate." *Knox*, 132 S. Ct. at 2291

C. Opt-out exaction schemes fail exacting scrutiny because they are not narrowly tailored to serve a compelling government interest.

Opt-out exaction schemes constitute a "substantial impingement on First Amendment rights." *Knox*, 132 S. Ct. at 2293. "[M]easures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest." *Id*. Opt-out schemes achieve neither.

1. Opt-out exaction schemes do not, and cannot, serve a compelling state interest.

A state cannot have a compelling interest justifying a money collection scheme that inevitably results in the compelled subsidization of nonchargeable expenses for a private entity, which, as shown previously, *see* §§ I(B)-(C), *supra*, and II(B), *supra*, opt-out exaction schemes necessarily cause. First, as argued in § II(A), *supra*, unions do not have a right to compel collection for nonchargeable expenses in the first place. If a union lacks authority to seize nonchargeable fees, it necessarily lacks authority to seize nonchargeable fees absent an objection.

In other words, if "labor peace" and "free riders" are not sufficient to render a union fee chargeable to non-members in the first place, how can they justify requiring employees opt out of paying for nonchargeable expenses? They cannot, because unions should have no legal power to seize employee wages and spend them on

nonchargeable expenses. A union's power to exact money from employees without affirmative consent is inextricably linked to, and limited by, the scope of chargeable expenses, if any. The power to seize agency fees begins and ends with a compelling government interest. And neither "labor peace" nor the government's interest in "avoiding free riders" has any constitutionally-cognizable connection to nonchargeable union expenditures.

Second, even if independently analyzed, neither the "labor peace" nor "free rider" rationale justifies opt-out schemes. An opt-out scheme does not further "labor peace" in any way. Rival unions will not arise as a result of holding opt-out schemes unconstitutional. In any event, "a union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked." *Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014). Nor is the "free rider problem" a compelling rationale for opt-out requirements. The fact that union speech allegedly benefits a worker "does not alone empower the state to compel the speech to be paid for." *Id*. at 2636-37. Exclusivity fails to serve as a compelling state interest because, as noted above, "A union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked." *Id*. at 2640. An alleged need to fund an exclusive bargaining agent simply does not justify an extraction scheme that inevitably results in the unknowing subsidization of particular ideas of public concern by employees who oppose them. An interest that does not justify compulsory fees also cannot justify opt-out schemes, whose only purpose is to frustrate an individual's right not to pay compulsory fees.

The battle for opt-out schemes was lost for unions (and states complicit with them) at the compulsory fee

stage. Unions have no legal right to seize employee wages and spend them on nonchargeable expenses. The only possible compelling state interest served by methods that exact money from employees without their affirmative consent is the payment of fees it is legal to force upon employees—which, by definition, are *not* nonchargeable expenses. As such, opt-out schemes prevents knowing who those employees are.

2. Alternatively, opt-out exaction schemes are not narrowly tailored because they are significantly broader than necessary to serve a compelling state interest.

"Procedural safeguards" are necessary to prevent compelled subsidization of nonchargeable activities by employees. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986). These procedures "must satisfy a high standard." *Knox*, 132 S. Ct. at 2291. The First Amendment "requires that the procedure be carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 302-03. Thus, the methods of exaction that serve a compelling state interest are constitutional only insofar as the interest "cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 132 S. Ct. at 2291. Choice architecture analysis proves that opt-out exaction schemes are unconstitutional for the very reason that opt-in exaction methods are, *by definition*, significantly less restrictive of associational freedoms because they guarantee that those associational choices are freely and voluntarily made. In the least, opt-in regimes are significantly less restrictive of employees' First Amendment rights. As shown in ¶¶ I(B)-(C) and II(B), *supra*, opt-out exaction schemes, as compared to opt-in regimes, necessarily and significantly increase the likelihood many public employees will be compelled

to subsidize speech with which they disagree. Opt-out exaction schemes utilized to collect monies for non-chargeable expenses are, therefore, unconstitutional.

CONCLUSION

This Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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