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 ILLINOIS STATE WORKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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SEPTEMBER 11, 2015 — *COUNSEL FOR AMICI CURIAE*

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are employees of the State of Illinois who have been forced to pay union fees against their will as a condition of employment under Illinois law.

Mark Janus, an employee of the Illinois Department of Healthcare and Family Services, and Marie Quigley, an employee of the Illinois Department of Public Health, are in bargaining units exclusively represented by the American Federation of State, County and Municipal Employees Council 31 ("AFSCME Council 31"). Neither is a member of the union, but both have been required to pay agency fees to the union for years under Illinois law.

Brian Trygg, an employee of the Illinois Department of Transportation, is in a bargaining unit exclusively represented by General Teamsters/ Professional & Technical Employees Local Union No. 916. Mr. Trygg is not a member of the union, but he has nonetheless been required to pay compulsory fees to the union.

The amici are plaintiffs in a federal lawsuit challenging their coerced payment of union fees on the same First and Fourteenth Amendment grounds on which Petitioners challenge their coerced payment of union fees. The United States District Court for the Northern District of Illinois has stayed the amici's case pending this Court's decision in the

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[1] In accordance with Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel for the amici affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

present case, which is virtually certain to control the outcome of their case. *See* Minute Entry, *Janus v. AFSCME Council 31*, No. 1:15-cv-1235 (N.D. Ill. Jul. 8, 2015). In addition, Mr. Trygg has spent more than five years in state administrative and court proceedings attempting to protect his right not to pay union fees on religious grounds. The amici therefore have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

The rule established by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), does not and cannot protect workers who are not union members from paying for unions' political and ideological speech in violation of their First Amendment rights.

As Petitioners have argued, *Abood* forces nonmembers to pay for political speech because all union speech, even in collective bargaining, is inherently political. This is especially evident in Illinois, where pension benefits fought for by public-sector unions have created a fiscal crisis that affects other government services and is at the center of the state's political debates.

And even if *Abood* were correct that the Constitution allows governments to force nonmembers to pay for unions' collective bargaining on their behalf, nonmembers would still face an unreasonable risk that their fees will be used to fund political and ideological speech that is not germane to collective bargaining. That is because workers have no way to determine what exactly the union is spending their fees on and because, even if workers have that information, it is difficult or impossible to determine whether a charge was proper. Moreover, the costs of challenging a union's expenditures are

prohibitive, ensuring that unions will almost always get away with improperly charging nonmembers for political and ideological activity.

The experience of amicus Brian Trygg shows the unreasonable lengths to which workers must go to protect their rights. To exercise his right to not pay union fees on religious grounds, Mr. Trygg has had to pursue administrative and court proceedings for more than five years.

Thus, *Abood* has created a situation in which it is virtually certain that many workers will be forced to pay for union political and ideological speech in violation of their First Amendment rights. Because *Abood* has failed to provide meaningful protection for workers' First Amendment rights, it is unworkable and should be overturned.

ARGUMENT

The regime established by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), under which government employees like the amici who do not want to support a union can nonetheless be forced to pay agency fees for union expenses that are "germane" to collective bargaining on their behalf, does not and cannot protect workers from being forced to pay for political and ideological speech with which they disagree.

I. Unions' collective bargaining is political speech, as Illinois's experience illustrates.

As an initial matter, nonmembers are forced to pay for political speech because, as Petitioners argue, public-sector unions engage in political speech even when they bargain with a governmental entity on employees' behalf. (*See* Pet. Br. 22-28.) As this Court has recognized, a public-sector union inevitably

"takes many positions during collective bargaining that have powerful political and civic consequences." *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2289 (2012). The "core issues" over which public-sector unions negotiate include "wages, pensions, and benefits," which are "important political issues," especially "[i]n the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed." *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014).

This is particularly apparent in Illinois, where the state's enormous unfunded pension liability – the product of public sector unions' bargaining and influence – is one of the most pressing political issues. *See id.* at 2632 n.7 (citing Daniel DiSalvo, *The Trouble With Public Sector Unions*, NAT'L AFF., Fall 2010, at 15). As of November 2014, the state had a $111 billion unfunded pension liability (a 75% increase from five years earlier) and $56 billion in debt for public retirees' other benefits. In addition, it spent more money from its general fund on pensions than on primary and secondary education. *Illinois's Pension Absurdity*, WALL ST. J., Nov. 29, 2014, at A12, *available at* http://goo.gl/Usw3x2; *see also* David Von Drehle, *Why Illinois is Going Bankrupt*, TIME, Jan. 18, 2013, http://goo.gl/Q77WQq. The state's pension spending, and the prospect of even greater spending to meet the state's future obligations, now threatens to crowd out funding for core government services. Elise Hu, *Illinois Pension Crisis: This Is What Rock Bottom Looks Like*, NPR (June 15, 2013, 7:00 AM), http://goo.gl/RohAuo.

Illinois's crisis illustrates that collective bargaining does not occur in a vacuum. Increased

employee pay or benefits must be paid for through increased government revenues or reduced government spending on other things. Indeed, the amici object to paying union fees – and brought their own First Amendment lawsuit challenging them – precisely because they disapprove of the effect that union bargaining activities have on the Illinois state budget, which they believe is contrary to the interests of Illinois citizens.[2] First Amended Complaint at ¶¶ 42-50, *Janus v. AFSCME Council 31*, No. 1:15-cv-1235 (N.D. Ill. June 1, 2015).

II. The amici and many other government employees have no reasonable way to determine whether their union fees are funding political or ideological activity.

Even if forcing nonmembers to pay for collective bargaining could be justified, nonmembers would still face an unreasonable risk – indeed, the virtual certainty – that some of their money will be used to support political speech that is *not* germane to bargaining on their behalf, for which they should not be charged even under *Abood*. *See Abood*, 431 U.S. at

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[2] Because they disagree with the positions the union takes in bargaining, the amici and others like them cannot "free ride" on the union's bargaining. The free-rider argument incorrectly assumes that workers care only about their own narrow pecuniary self-interest. In fact, many workers have other values that sometimes take priority over their financial interests. It might be true that, other things being equal, nearly everyone would prefer to have more money rather than less; but it is obviously not true that everyone would prefer to have more money *regardless of the consequences for other people in their community, state, or country*. Accordingly, even if the government did have a compelling interest in preventing free riding (which it does not), forcing workers like the amici to pay union fees would not serve it.

235-36. That is partly because many government employees, including the amici, cannot know whether their union is improperly spending their agency fees on prohibited political or ideological activities because they have no access to meaningful information about how the union spends their fees.

In theory, government workers should receive that information because this Court required public-sector unions to provide it to them in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). In that case, the Court held that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that . . . potential objectors be given sufficient information to gauge the propriety of the union's fee" and that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee – and requiring them to object in order to receive information – does not adequately protect the careful distinctions drawn in *Abood*." *Hudson*, 475 U.S. at 306.

In practice, however, workers often do not receive "sufficient information to gauge the propriety of the union's fee." For example, the last "*Hudson* notice" provided by the union that amici Janus and Quigley are forced to support, AFSCME Council 31, simply listed general categories of expenditures – such as "Organizing supplies" and "Advertising" – with a total amount spent in each category, the amount for each category deemed "chargeable," and no further information. First Amended Complaint at ¶¶ 37-38 & Exhibit 3, *Janus* (No. 1:15-cv-01235).

Mr. Janus, Ms. Quigley, and others forced to pay money to AFSCME Council 31 thus received no

information that would allow them to determine whether the union actually spent their agency fees on items that were properly chargeable. For example, they have no way to know whether the "advertising" they paid for was somehow germane to collective bargaining on their behalf or whether it was impermissible lobbying of the electorate. *See Knox*, 132 S. Ct. at 2294.

Given the lack of information, workers have no reason to be confident that their union has limited its agency fee spending to the representation activities permitted under *Abood*. This is because unions decide for themselves which expenditures are chargeable to nonmembers. As the Court has observed, a union's auditors "typically do not make a legal determination as to whether particular expenditures are chargeable," but instead "take the union's characterization for granted and perform the simple accounting function of ensuring that the expenditures which the unions claims it made for certain expenses were actually made for those expenses." *Id.* (internal marks omitted).

"Thus, if a union takes a very broad view of what is chargeable – if, for example, it believes that supporting sympathetic political candidates is chargeable and bases its classification on that view – the auditors will classify these political expenditures as chargeable." *Id.*; *see also Harris*, 134 S. Ct. 2618, 2633-34 (collecting cases). And a union can do this confident that nonmembers like the amici will almost certainly never find out because their *Hudson* notice is insufficient.

To find out what the union is spending their fees on, the amici would, at a minimum, have to initiate

and participate in an arbitration proceeding, a process this Court has called a "painful burden." *Knox*, 132 S. Ct. at 2294 n.8. "[R]equiring them to object in order to receive information" like this is exactly what the Court has prohibited as insufficient to protect workers' First Amendment rights. *Hudson*, 475 U.S. at 306.

Of course, if a union fails to comply with the requirements established in *Hudson*, nonmembers can sue in federal court under 42 U.S.C. § 1983, and occasionally they do. But even if such a lawsuit could help a worker obtain more detailed information,[3] prosecuting that lawsuit is an even more "painful burden" than going through arbitration. As the Court has recognized, "litigating such cases is expensive." *Harris*, 134 S. Ct. 2633. For example, the attorneys' fees and expenses awarded in *Knox* were $1,021,176.00 and $15,412.93, respectively. *Knox v. Chiang*, No. 2:05-cv-02198-MCE-CKD, 2013 U.S. Dist. LEXIS 79230, *37-39 (E.D. Cal. June 5, 2013).

Legal aid organizations and pro bono attorneys can provide representation in some cases – as Petitioners' counsel has in this case and the amici's counsel has in their challenge to Illinois agency fees – but there are far too many public-sector unions across the country for such organizations and attorneys to police their compliance with *Hudson,* let alone to challenge all improper uses of agency fees. AFSCME alone, for example, "has approximately

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[3] It might not. *See, e.g., Jibson v. Mich. Educ. Ass'n-NEA*, 30 F.3d 723, 732 (6th Cir. 1994) (ruling that *Hudson* does not "require[] an explanation of the reasons why nonmembers are required to pay a particular share of each of the major categories of union expenditures").

3,400 local unions and 58 councils and affiliates," with each local designing its own structure and setting its own dues. *About AFSCME*, http://perma.cc/48QL-BYMK. The International Brotherhood of Teamsters has 1,900 affiliates in the United States, Canada, and Puerto Rico. *Who Are the Teamsters?*, http://perma.cc/2TFU-XHCL.

Thus, many workers have no realistic or reasonable means to learn how their compulsory fees are spent, and therefore are never in a position to challenge any expenditures of their funds as improper. In this way, *Abood* does not and cannot protect workers' First Amendment rights.

III. It is unreasonably difficult for workers to determine which union expenditures are constitutionally chargeable to them.

Even if a government employee does receive a more detailed breakdown of the items on which the union spends his or her agency fees, it can still be difficult or impossible for the worker to know whether amounts for which he or she was charged were constitutionally permissible.

To be chargeable to nonmembers under *Abood*, a union activity "must (1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). Courts perform this analysis – which is "highly fact specific," *Scheffer v. Civil Serv. Emps. Ass'n, Local 828*, 610 F.3d 782, 788 (2d Cir. 2010) – on a "case-by-case" basis. *Lehnert*, 500 U.S. at 519. Because this

test is "open-ended," determining whether an expenditure is chargeable "may not be straightforward," even for courts. *Harris*, 134 S. Ct. at 2633.

If this analysis is difficult for courts, it is far more difficult, if not impossible, for a worker. It could only be easy if an expenditure were clearly labeled by the union as one the Court has specifically deemed not chargeable, such as a contribution to a political candidate's campaign committee. *See Abood*, 431 U.S. at 235-36. Unions seldom make it that easy.

Even where this Court has deemed a type of expenditure non-chargeable, unions have nonetheless maintained that similar expenditures are still chargeable, and lower courts have sometimes agreed – creating great uncertainty for any worker considering whether it is worthwhile to object to any given union expenditure. For example, in *Ellis v. Ry. Clerks*, 466 U.S. 435, 451-53 (1984), the Court ruled that union organizing activities are not chargeable, in part because any "free-rider problem" related to organizing "is roughly comparable to that resulting from union contributions to pro-labor political candidates."

Yet unions have continued to force workers who do not want to support a union at all – let alone help expand it – to pay for organizing activities, and some courts have concluded that a union may do so in some instances. *See Scheffer*, 610 F.3d at 789-90 (government workers could be charged for organizing of private-sector workers who perform similar work to eliminate competition); *UFCW v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc) (organizing a competing employer's workers germane to collective

bargaining and therefore chargeable); *Bromley v. Mich. Educ. Ass'n-NEA*, 82 F.3d 686, 696 (6th Cir. 1996) ("defensive organizing" not chargeable). Similarly, this Court held that public-sector unions' lobbying expenses (apart from collective bargaining on workers' behalf) are not chargeable in *Lehnert*, 500 U.S. at 522 (plurality); *accord id.* at 559 (Scalia, J., concurring); but disputes about whether lobbying expenses are chargeable have nonetheless persisted. *See, e.g., Knox*, 132 S. Ct. at 2294-96 (reversing Ninth Circuit decision that unions could charge nonmembers for "lobbying . . . the electorate"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997) (union's expenses in lobbying federal agencies not chargeable); *United Nurses & Allied Prof'ls*, 359 NLRB No. 42, at *7 (Dec. 13, 2012) (lobbying expenses chargeable if the "specific legislative goal [is] sufficiently related to the union's core representational functions").

How is a worker to know whether any given activity, or a given percentage of an activity, is properly chargeable to him or her? In fact, a worker cannot know without pursuing arbitration or litigation because *no one* really knows until an arbitrator or court rules on the matter. Indeed, a nonmember would virtually *always* have to pursue arbitration or litigation just to ensure that the union is not charging him or her for non-chargeable activities. And if a union provided *Hudson* notices annually, the worker would have to do so every year, endlessly fighting arbitration and litigation battles.

The First Amendment cannot tolerate such a burden on workers' fundamental right not to support political and ideological speech with which they

disagree. *Cf. Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (First Amendment prohibits "laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day"). Thus, *Abood* provides public-sector workers with no reasonable, realistic means of protecting their First Amendment rights.

IV. The experience of amicus Brian Trygg shows the unreasonable lengths to which government workers must go to protect their rights.

The experience of amicus Brian Trygg, a civil engineer who works for the Illinois Department of Transportation, illustrates the unreasonable lengths to which workers must go simply to protect their right not to support causes they deeply oppose.

In December 2009, Mr. Trygg learned that a Teamsters union local would thereafter be representing employees in his job classification, adding them to an existing collective bargaining agreement with the state. *Trygg v. Ill. Labor Relations Bd.*, 9 N.E.3d 1244, 1247 (Ill. Ct. App. 2014). A letter from the Teamsters he received at that time promoted union membership and made no reference to his right to pay only agency fees or to any right not to pay union fees based on his religious beliefs. *Id.* at 1248. Nonetheless, within 90 minutes of learning of the unionization, Mr. Trygg sent an email notifying his supervisor that he did not want to join the Teamsters and that, based on his religious beliefs, he wanted to pay his agency fees to a charity, not the union. *Id.* at 1247. Within days, he also sent

a letter to the Teamsters stating his religious objection to paying union fees. *Id.* at 1248.

In response, the union sent an email inquiring as to what his religious belief are, which tenets or teachings of his religion prohibit him from paying union fees, and what charity he would like to pay instead of the union. *Id.* Mr. Trygg emailed answers within three hours, but the union never responded, and the state began taking agency fees from his paychecks. *Id.*

On December 28, 2009, Mr. Trygg initiated administrative proceedings against the state agency that processes his department's payroll and the union, in which he sought to ensure that workers receive notice of their right of nonassociation on religious grounds and to end his own forced payments to the union. *Id.* at 1249-51. The administrative process took more than three years, and the Illinois Labor Relations Board ultimately dismissed his charges. *Id.*

After the Board dismissed his charges in May 2013, Mr. Trygg filed a *pro se* appeal in the Illinois Court of Appeals. *Id.* at 1251. Approximately one year later – after Mr. Trygg briefed the case himself – the appellate court ruled in his favor, concluding that the Board should not have dismissed his charges, and remanded the case for further administrative proceedings. *Id.* at 1253-56.

Finally, on July 1, 2015 – *more than five years* after Mr. Trygg filed his charges – an administrative law judge granted the relief he sought, ordering, among other things, that the state and the union add language to their collective bargaining agreement requiring the union to inform employees of their

right to nonassociation. *Trygg*, I.L.R.B. Nos. S-CA-10-02, S-CB-10-024 (July 1, 2015), available at http://goo.gl/f03Lbn. Even now, however, an administrative appeal of part of that ruling remains pending.

It is self-evident that most state workers who object to paying union fees on religious, political, or ideological grounds do not have the time or ability to go through everything Mr. Trygg went through to protect their rights. And Mr. Trygg's experience illustrates that unions cannot be relied upon to follow the law where the financial stakes for a worker are relatively low and the only enforcement mechanism is administrative or legal action by a worker. Illinois law required the union's collective bargaining agreement to provide a mechanism to notify workers of their right of nonassociation on religious grounds, but the Teamsters' agreement did not comply with this requirement. *Trygg*, 9 N.E.3d at 1253-54 (applying 5 ILCS 315/6(g)). The only reason the union will now follow the law (assuming the administrative law judge's ruling stands) is because someone happened to notice and care enough to follow through with the lengthy administrative and legal proceedings. Most of the time, that will not happen, and a union will be able to get away with violating workers' rights.

Again, it is not reasonable to impose this burden on workers just to give unions a benefit to which they "have no constitutional entitlement" in the first place. *Knox*, 132 S. Ct. at 2291 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007)).

V. Because *Abood* does not and cannot protect workers' First Amendment rights, it is unworkable.

As shown above, it is unreasonable to expect government workers to take all the steps necessary to find out what their union is spending their money on, determine whether a court is likely to consider any of the union's expenditures improper, and then pursue costly administrative or legal proceedings to protect their rights. Even for an employee who highly values First Amendment rights and strongly opposes a union's political and ideological speech, the effort would make little economic sense.

While nonmembers have little financial ability to challenge improper union expenditures of their agency fees, unions, on the other hand, have a strong incentive to categorize questionable and improper expenditures as chargeable, confident that they will almost never be challenged. *See* Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309, 1395 (2006) (information asymmetry gives unions "greatest incentive to blur the ideological, social, and purely private purposes that may be embedded in compulsory union dues"). For example, if a union takes a $400 agency fee from 10,000 nonmember public-sector employees each year, and 25% of that fee is not properly chargeable, the unconstitutional excessive charge will cost each employee only $100 but will give the union $1 million in extra revenue.

Thus, *Abood* has created a situation in which it is virtually certain that many workers will, in fact, be forced to pay for union political and ideological

speech in violation of their First Amendment rights – even though this Court has held that the First Amendment cannot tolerate forcing government workers to pay for political or ideological speech with which they disagree, no matter how small the amount or how temporarily the funds are held. *Hudson*, 475 U.S. at 305 (dissenters' funds may not be misused even temporarily and "[t]he amount at stake for each individual dissenter does not diminish this concern"); *cf. Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion) ("[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.").

Accordingly, even if *Abood* were correct that the Constitution allows the government to force workers to pay fees for collective bargaining on their behalf, *Abood* has nonetheless proved unworkable because it has failed to provide meaningful protection for workers' undisputed First Amendment right not to pay for unions' political and ideological speech that is not germane to collective bargaining. *See Payne v. Tennessee*, 501 U.S. 808, 839-40 (1991) (Souter, J., concurring) (precedent unworkable where it "threatens . . . to produce such arbitrary consequences and uncertainty of application as virtually to guarantee" results far from those intended). The only way to actually protect government workers' First Amendment rights is to overturn *Abood* and not force them to pay fees to a union at all.

CONCLUSION

For the reasons set forth above and in the Petitioners' brief, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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