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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court upheld a state law compelling public school teachers to either join the teacher's union or pay the union an "agency fee." More recently, this Court criticized the decision in *Abood* as "questionable on several grounds" and based on unwarranted assumptions. *Harris v. Quinn*, 134 S.Ct. 2618, 2632, 2634 (2014). Because permitting compelled fees for what can only be described as political activity strikes at the core of the First Amendment right meant to preserve "our Nation's commitment to self-government" (*Knox v. SEIU, Local 1000*, 567 U.S. 298, 308 (2012), the question presented in this case is as follows:

Should the Court overrule its prior decision in *Abood v. Detroit Board of Education* and instead hold that the First Amendment precludes government mandates that public employees pay a fee to a private association for purposes of lobbying state and local elected and administrative officials.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is the public interest arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for freedom of speech and association enshrined in the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases concerning the constitutionality of compelled speech and association, including *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016); *Harris v. Quinn*, 134 S.Ct. 2618 (2014); and *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012).

SUMMARY OF ARGUMENT

The purpose of many provisions of the First Amendment is to preserve our Nation's commitment to self-government. *Knox*, 567 U.S. at 308. Protections for Free Speech, Assembly, and Petition all argue against the constitutionality of a requirement

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[1] Pursuant to this Court's Rule 37.2, all parties have filed blanket consents to amici with the Clerk of the Court. Notice of this brief was given to all parties more than 10 days prior to filing.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

that public employees pay a private association against their will to lobby elected and administrative state and local officials. For issues related to public employees, there is no distinction between "bargaining" and "lobbying."

This lobbying activity involves the quintessential political task of allocating scarce government resources. Under a system of republican self-governance, there is no basis for compelling citizens to finance the speech of one advocate in the debate over the allocation of public resources.

ARGUMENT

I. The First Amendment Was Intended to Protect Against Compelled Political Support.

The "agency shop fee" law at issue in this case forces public employees, as a condition of their employment, to pay for union lobbying of legislative and executive government officials. This requirement is coupled with state recognition of the union as the "exclusive representative" of the employees. The intent and effect of the law is to privilege the voice of powerful labor unions on the critical issue of state budgets and deficits. *See Knox v. SEIU*, 567 U.S. at 303; *Harris v. Quinn*, 134 S. Ct. at 2643. The state budget in Illinois is especially important. Some reports estimate that the state is running a deficit of more than $125 billion, once under-funded public employee pensions are included in the calculation.[2]

This Court has always understood compulsory fees such as those mandated by this law as hitting at

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[2] "Illinois marked 14th straight budget deficit in FY 2015: audit," reuters.com/article/us-illinois-audit-idUSKCN0X22DF (last visited July 3, 2017); *see Harris*, 134 S. Ct. at 2632 n.7.

the core of the First Amendment's protection of speech and association. *Knox*, 567 U.S. at 314; *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977). Nonetheless, this Court in *Abood* ruled that the state's interest in dealing with only one voice lobbying legislative and executive officials (termed "labor peace") outweighed core individual First Amendment rights. *Abood*, 431 U.S. at 222, 228. More recently, however, this Court noted that the rationale underlying the ruling in *Abood* is, at best, questionable. *Harris*, 134 S. Ct. 2632.

The *Harris* Court demonstrated the flaws underlying the *Abood* decision by tracing the development of this line of cases beginning with *Railway Employees v. Hanson*, 351 U.S. 225 (1956). This Court concluded that "the First Amendment analysis in *Hanson* was thin, and the Court's resulting First Amendment holding narrow." *Harris*, 134 S. Ct. at 2629. Nonetheless, the Court relied on that "thin" analysis in cases like *Lathrop v. Dohohue*, 367 U.S. 820 (1961) (plurality opinion). *Harris*, 134 S. Ct. at 2624. Indeed, the *Harris* Court found the dissents in *Lathrop* to be more persuasive on the scope of the First Amendment that the lead opinion in *Hanson*. *Harris*, 134 S. Ct. at 2629.

In his dissent in *Lathrop v. Donohue*, Justice Black noted: "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). For the most part, this Court has come to accept Justice Black's point of view, ruling that government compelled support of ideological causes violates the

First Amendment.[3] *Knox v. SEIU Local 1000*, 132 S. Ct., at 2295; *United States v. United Foods, Inc.*, 533 U. S. 405, 411 (2001); *Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943).

Public employees bound by agency shop fee arrangements remain excluded from this First Amendment protection. This Court's cases have offered public employees, like the petitioners here, only limited, procedural protection. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986); *Abood*, 431 U.S., at 237. These decisions fail to appreciate the conceptual difficulty of separating lobbying for political ends from bargaining in the public employee context. *Harris*, 134 S. Ct. at 2632-33. In reality, there is no difference.

II. Public sector "bargaining" is indistinguishable other lobbying activity.

Contracts between private employers and unions representing private sector employees are private decisions generally disciplined by market forces. Clyde

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[3] Amici here use the term "ideological" in its broadest sense. As this Court noted in *Abood v. Detroit Board of Education*, 431 U.S., at 231-32: "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."

Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003). Errors in analysis by the employer can lead to the employer going out of business. That result is tempered, however, by the fact that competitors in the private sector can continue to provide the goods or services or new firms can rise to fill the gaps.

Public sector contracts are quite different. Such contracts are not private decisions. Instead, the contract itself is an instrument of government. *Id.* 442. The decision to spend more money on home health care workers means either higher taxes or a decision to spend less money on other public services. The State of Illinois cannot go out of business when it spends too much money (as it seems to have done for the last several years (*Harris*, 134 S. Ct. at 2632 n.7)).

In Illinois and in other states, the employee has two roles that are likely in conflict. As employee, the worker may enjoy the benefit of higher wages, richer benefits, or shorter hours. As a citizen and taxpayer, however, the employee's interests are quite different. The citizens of Illinois must worry about whether the state can continue to pay its bills. They may also worry about the services that must be cut to address a budget caused by higher wages and more expensive benefits. What will the state cut back to meet these demands? Healthcare, parks, roads, bridge maintenance, or assistance to the poor? These decisions are not "private contract" choices. Instead, they are the type of decisions in which all citizens expect to have a voice.

The District of Columbia Circuit noted this problem two decades ago in *Miller v. Airline Pilots Associ-*

ation, 108 F.3d 1415 (D.C. Cir. 1997). The precise issue was whether the union could compel dissenters to contribute toward the cost of lobbying on safety related issues. *Id*., at 1422. The court explained that while all pilots may be interested in the airline safety, they will not all agree on the cost of that safety: "The benefits of any regulation include trade-offs." *Id*. That issue of trade-offs is present in every lobbying campaign by public employee unions. Teachers may want higher pay, but are they willing to accept the trade-off of larger class sizes? Will they be willing to subject their own children to those larger class sizes? How is it that only one side of this debate, the public employee union's position, is privileged by the ability to coerce payments from dissenters to support the lobbying?

This Court recognized the difficulty of distinguishing between lobbying and bargaining in *Lehnert v. Ferris Faculty Association*. The plurality opinion agreed that dissenting employees can be compelled to finance lobbying the government to win ratification of a negotiated agreement. *Id*., 519-20. The Court then tried to draw a line between this type of lobbying and other lobbying that might advance the interests of employees more generally, finding that dissenting employees could not be compelled to pay for the latter. *Id*., at 520. There is, however, no meaningful difference between the two types of legislative measures in terms of their effect on employees as employees and employees as citizen/taxpayers. *See* Rafael Gely, et al., *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"*, 14 Employee Rts. & Emp. Pol'y J. 93 (2010).

Simply put, state and local governments are different from private firms. That difference is critical. We do not rely on government as merely one participant in the market that produces widgets. Courts have long understood that government is fundamentally different from the private sector. *See Unified School District v. Wisconsin Public Employment Relations Commission*, 81 Wis.2d 89, 259 N.W.2d 724, 730 (1977); *State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d 415, 417 (Fla. 1992). We give our government the power to compel payments in the form of taxes so that it can deliver public services. These public services range from police and fire protection to licensing of drivers to road maintenance to care for the poor. How much in taxes government will compel and what balance of services it will deliver with those tax receipts are all decisions that we leave to the political process. *See Gibraltar School Dist. v. Gibraltar MESPA-Transportation*, 505 N.W.2d 214, 223 (Mich. 1993). The Constitution protects the right of citizens to band together to participate in this process or petition government as individuals. They may not, however, coerce others to finance their political activities.

Public sector bargaining is a political process that concerns the allocation of scarce government resources. *See* Summers at 443. There is no meaningful distinction between an employee group lobbying for a salary increase, a business lobbying for a loan or tax credit, or a taxpayer association lobbying for lower tax rates. All of these groups seek to influence government to accept their policy preference and advance their particular financial goals. There is no basis for granting one group the power to compel financial support from citizens who oppose or are even simply neu-

tral toward those policy goals. Indeed, this Court recognized that the business's shareholders who dissent from the lobbying program are free to withdraw their investment from the firm – neither the corporation nor the state may compel them to support the business's lobbying program. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

III. Compelling public employees to pay agency shop fees is contrary to the original understanding of the First Amendment.

Evidence of congressional intent or ratification arguments concerning the Free Speech Clause is scarce, at best. There was clear consensus that the measure prohibited "censorship" but there was debate about the extent to which government could punish speech after it was published. That debate is revealed in the sources recounting the debates over the Sedition Act of 1798. *See* History of Congress, February, 1799 at 2988; *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress, p. 934 (1794)). But did the founding generation intend the First Amendment to protect against compelled speech? For that answer, we must resort to the "practices and beliefs of the Founders" in general. *McIntyre v. Ohio Election Comm'n*, 514 US 334, 361 (1995) (Thomas, J., concurring).

While there was no discussion of compelled support for political activity, there was significant debate over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. This Court has often quoted Jefferson's argument "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."

Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5 The Founders Constitution, University of Chicago Press (1987) at 77; quoted in *Keller v. State Bar*, 496 U.S., at 10; *Chicago Teachers Union v. Hudson*, 475 U.S., at 305, n.15; *Abood*, 431 U.S., at 234-35 n.31; *Everson v. Board of Education*, 330 U.S. 1, 13 (1947). Jefferson went on to note "[t]hat even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

James Madison was another prominent voice in the Virginia debate, and again this Court has relied on his arguments for the scope of the First Amendment protection against compelled political support: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments, in 5 The Founders Constitution at 82; quoted in *Chicago Teachers Union*, 475 U.S., at 305, n.15; *Abood*, 431 U.S., at 234-35 n.31.[4]

Although these statements were made in the context of compelled religious assessments, this Court

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[4] The amount of compelled support is irrelevant to the constitutional injury. As Madison noted, even "three pence" is too much to compel. Madison, Remonstrance, *supra* at 82. Jefferson noted that freedom of conscience is violated when people are taxed to pay simple living expenses for their own pastors. Jefferson, Religious Freedom, *supra* at 77, *see also Pacific Gas & Electric Co.*, 475 U.S. at 24 (Marshall, J. concurring).

easily applied them to compelled political assessments in *Chicago Teachers* and *Abood*. This makes sense. Jefferson himself applied the same logic to political debate. In his first Inaugural Address, Jefferson equated "political intolerance" with the "religious intolerance" he thought was at the core of the Virginia debate. Thomas Jefferson, First Inaugural Address (1801), in 5 The Founders Constitution at 152. The theme of his address was unity after a bitterly partisan election, and the goal he expressed was "representative government"—a government responsive to the force of public opinion. *Id.*; Thomas Jefferson Letter to Edward Carrington (1787), in 5 The Founders Constitution at 122 (noting, in support of freedom of the press, "[t]he basis of our government [is] the opinion of the people"). How is government to be responsive to public opinion unless individuals retain the freedom to reject politically favored groups?

Madison, too, noted the importance of public opinion for the liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison, and the process for the formation of that opinion is important. James Madison, Public Opinion (1791), in 2 The Founders Constitution at 73-74. Madison argued that free exchange of individual opinion is important to liberty and that is why he worried about the size of the nation: "[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty." *Id.* The concern was that "real opinion" would be "counterfeited." *Id.*

Madison's concern for "counterfeited" opinion was based on his fear that the voice of the individual would be lost as the nation expanded. There are other ways

to lose the voice of the individual, however. Compelling the individual to support a political organization he opposes is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he despises. He is forced to pay for the counterfeiting of public opinion, distorting democracy and losing his freedom in one fell swoop.

This is exactly what the union, in collaboration with the state, accomplished here. The caregivers are forced to support financially a political organization they oppose. They are forced not only to acquiesce, but to support financially the creation of "counterfeit" public opinion. This is flatly incompatible with the First Amendment, with its "respect for the conscience of the individual [that] honors the sanctity of thought and belief." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

Freedom of conscience and the dignity of the individual—these are the foundations underlying the liberty enshrined in the First Amendment. They lay at the core of Jefferson's and Madison's arguments that have influenced the separate opinions regarding the Freedom of Speech of Justices Black (*Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J. dissenting)), Douglas (*Pollak*, 343 U.S. at 468-69 (Douglas, J. dissenting)), and Stone (*Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) ("The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit")), to name but a few. Justice Black stated the proposition perhaps most succinctly: "The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish,

not as the Government commands." *Machinests*, 367 U.S. at 788 (Black, J., dissenting).

This Court recognized these principles in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There, Justice Jackson, writing for the Court, observed that "Authority here is to be controlled by public opinion, not public opinion by authority." Yet reaching this conclusion was not easy for the Court. Just three years earlier the Court upheld a compulsory flag salute law in *Minersville School District v. Gobitis*. That decision prompted Justice Stone to observe that "[t]he very essence of the liberty … is the freedom of the individual from compulsion as to what he shall think and what he shall say." *Id*. at 604 (Stone, J. dissenting).

Since *Minersville*, Justice Stone's dissent has been vindicated. This Court has ruled that the freedom of conscience protected by the First Amendment was violated in compelled flag salutes (*Barnette*, 319 U.S. at 641), required membership in a political party (*Elrod v. Burns*, 427 U.S. 347, 356-57 (plurality) (1976)), compelled display of state messages on license plate frames (*Wooley v. Maynard*, 430 U.S., at 713), required distribution of other organization's newsletters (*Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 17-18 (1986)), and compelled contributions for political activities (*Abood*, 431 U.S. at 233-35; *Keller*, 496 U.S. at 16). The First Amendment protects public employees from being forced by their government to support the political activities of the state, labor unions, and others.

CONCLUSION

There is simply no basis for distinguishing between a union lobbying for increased wages for public

employees, a business lobbying for a tax credit, or a taxpayer organization lobbying for a tax decrease. Allowing a labor union to use the power of the state to compel dissenting employees to pay for the union's political activities advances public employment labor peace no more than allowing the business or the taxpayer association to compel dissenters to contribute toward their political activities. This Court should grant certiorari and overrule its decision in *Abood*.

DATED: July, 2017.

Respectfully submitted,

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