No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION,

Respondent.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The *amicus curiae* addresses the second of the two questions presented by the petition for certiorari:

Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing political or ideological speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the *Cato Supreme Court Review*. Cato participated in both *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Knox v. SEIU*, 132 S. Ct. 2277 (2012). The instant case concerns Cato because it raises vital questions about the ability of government to burden private citizens' exercise of their First Amendment rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons suggested in *Harris v. Quinn*, 134 S. Ct. 2618, 2632–33 (2014), the First Amendment does not permit government to compel public employees to associate with a labor union and subsidize

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[1]Pursuant to Rule 37.2(a), all parties received at least 10 days notice of the *amicus curiae's* intent to file, and letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

its speech on matters of public concern. The Court should therefore grant certiorari on the first question presented by the petition and repudiate its aberrant decision to the contrary in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

But the focus of this brief is the second question presented by the petition. Even if the Court does not go so far as to overrule *Abood*, it should *finally* undertake "the careful application of First Amendment principles" to the question of whether government may require that public employees affirmatively object to subsidizing nonchargeable speech by labor unions. *Knox v. SEIU*, 132 S. Ct. 2277, 2290 (2012). The Court's prior cases implicitly assumed the constitutionality of such schemes, but without "'careful application of First Amendment principles.'" *Id.* (quoting *Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986)). Undertaking such scrutiny reveals that opt-out requirements are by no means "'carefully tailored to minimize the infringement' of free speech rights" because they present an unacceptable risk—really, a certainty—"that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* They therefore "cross[] the limit of what the First Amendment can tolerate." *Id.* at 2291. The Court's review is warranted to definitively resolve an important First Amendment issue that affects the speech rights of millions of public-sector workers.

Moreover, the absence of concrete guidance from this Court has led to confusion in the lower courts over the subsidiary question of whether dissenting public employees may be required to navigate opt-out procedures year after year even after they have registered their dissent. The Court's review is warranted to end this conflict in authority.

Accordingly, the Court should grant certiorari on the second question presented by the petition to ensure that a decision overruling *Abood* serves, as a practical matter, to restore the rights of public employees who disagree with a union's political or ideological speech. Granting certiorari on that question would also preserve a narrower basis for decision that, while insufficient on its own to remedy the full extent of the injury to public employees' rights that this Court's previous decisions have mistakenly sanctioned, would go a long way to preventing the most offensive abuses.

STATEMENT

1. California law allows a labor union to become the exclusive bargaining representative for public-school employees in a bargaining unit such as a school district upon evidence of the support of a majority of employees in that unit. Cal. Gov't Code § 3544(a). Thereafter, if the labor union institutes an "organizational security arrangement" (known elsewhere as an "agency-shop" agreement), employees in the unit must, "as a condition of continued employment, be required either to join the [union] or pay the fair share service fee." Cal. Gov't Code § 3546(a).

The "fair share service fee" is usually the same amount as union dues. App. 4a–5a.

2. Non-member employees required to pay this fee may "receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative." Cal. Gov't Code § 3546(a). These are typically political or ideological activities. App. 43a–44a. *See also* App. 64a–66a (describing activities that include opposing ballot initiatives and donating funds to candidates and political parties).[2] The union calculates the non-chargeable fee-reduction amount annually and then, in the fall, sends a "*Hudson* notice" to non-members. Cal. Code Regs. tit. 8, § 32992(a), App. 36a–37a. To avoid subsidizing the union's political or ideological activities, non-members must affirmatively opt-out within the prescribed time period following distribution of the *Hudson* notice—which lasts as little as 30 days. Cal. Code Regs. tit. 8, § 32993, App. 37a–38a.

3. Non-members who do not wish to subsidize the union's political or ideological activities must register their objection each year. Cal. Code Regs. tit. 8, §§ 32992(a), 32993. Failure to register objection

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[2] As this petition seeks review of a decision affirming judgment on the pleadings, the Court accepts as true the complaint's well-pleaded factual allegations. *See, e.g.*, *Beal v. Mo. Pac. R. R. Corp.*, 312 U.S. 45, 51 (1941).

within the time allowed means that they are required to pay the full "fair share service fee" and subsidize those activities for that year. *Id.*; Cal. Gov't Code § 3546(a); App. 71a.

4. The individual petitioners are public-school teachers subject to "organizational security arrangements" that require them to pay "fair share service fees" to affiliates of Respondent California Teachers Association. App. 5a. They have resigned their union memberships and object to subsidizing labor unions' political or ideological activities. *Id.*

5. The individual petitioners claimed, *inter alia*, that, "[b]y requiring [them] to undergo 'opt out' procedures to avoid making financial contributions in support of 'nonchargeable' union expenditures, California's agency-shop arrangement violates their rights to free speech and association under the First and Fourteenth Amendments to the United States Constitution." App. 6a (quoting complaint). The annual opt-out process, they alleged, "is unnecessarily burdensome and time consuming and is susceptible to resistance and pressure from the unions and their members." App. 44a. *See also* App. 80a–81a (describing union membership form seemingly designed to trick teachers into waiving their opt-out right); App. 83a (form).

6. The district court granted judgment on the pleadings in favor of respondents, holding that their challenge to California's opt-out scheme was foreclosed by *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992). App. 7a–8a. As

the district court described, *Mitchell* "held that the First Amendment did not require an 'opt in' procedure for nonunion members to pay fees equal to the full amount of union dues under an agency-shop arrangement." App. 8a.

7. The court of appeals summarily affirmed the district court's judgment, also citing *Mitchell*. App. 1a–2a.

ARGUMENT

I. The Acceptance of Opt-Out Requirements Is "a Historical Accident"

As the Court explained in *Knox*, the constitutional legitimacy of opt-out requirements is, somewhat surprisingly, a question of first impression. "[A]cceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." 132 S. Ct. at 2290.

The issue was first broached in *Machinists v. Street*, 367 U.S. 740, 760 (1961), a challenge by dissenting employees to union exactions for political purposes under the Railway Labor Act. Construing that Act to avoid serious constitutional doubt, the Court "den[ied] the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes," as opposed to expenditures for negotiating and administering collective-bargaining agreements and resolving disputes. *Id.* at 768–69 & n.17.

Although that holding resolved the central legal question, it presented a problem regarding the remedy, given that the collective-bargaining agreement required all workers to pay full union dues but an injunction against all union political expenditures would violate the rights of the other union members. *Id.* at 771–73. In light of those circumstances, the Court suggested that relief "would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Id.* at 774. But it also observed that, under the statutory scheme, "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Id. See also Ry. Clerks v. Allen*, 373 U.S. 113, 119–20 (1963) (applying affirmative-objection requirement in identical circumstances).

Although this was little more than an "offhand remark" without constitutional significance, "later cases such as *Abood* and *Hudson*…assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter." *Knox*, 132 S. Ct. at 2290. *Abood* confronted, *inter alia*, the issue of whether a state law that requires public employees, as a condition of employment, to subsidize union activities unrelated to collective bargaining violates their First Amendment rights. 431 U.S. at 233. The Court answered that question in the affirmative, holding that the union's expenditure of "funds for the expression of political

views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" must be "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235–36.

That holding again raised the question of the proper remedy for the dissenting employees. To that end, the Court looked to its "prior decisions" under the Railway Labor Act—*Street* and *Allen*. Its reasoning for providing the dissenting employees with an opt-out remedy, including the totality of its constitutional analysis, consumes a single sentence: "Although *Street* and *Allen* were concerned with statutory rather than constitutional violations, that difference surely could not justify any lesser relief in this case." *Id.* at 240. In this way, *Street's* dicta suggesting that an opt-out scheme would suffice in certain circumstances under the Railway Labor Act was simply assumed to state a constitutionally sufficient standard.

As the Court proceeded in later cases to define the line between chargeable and non-chargeable expenses and to evaluate procedures for dissenting employees to object, it continued to assume the constitutionality of opt-out schemes, without giving the matter any further thought. Notably, *Hudson* considered the ways in which opt-out *procedures* must be "carefully tailored to minimize the infringement" of ob-

jecting employees' First Amendment rights. *Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986). It held that a public-sector employee who chooses to pay an agency fee in lieu of joining a union and paying full dues is entitled to "an adequate explanation of the basis for the [agency] fee" that they are required to pay and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Id.* at 310. But it did not pause to consider the more basic question of whether an opt-out *requirement* could satisfy the same First Amendment scrutiny that it applied to opt-out *procedures*.

The Court only identified this oversight in *Knox*: "Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction." 132 S. Ct. at 2290. Applying constitutional first principles, *Knox* recognizes that those prior cases, by implicitly "permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, … approach, if they do not cross, the limit of what the First Amendment can tolerate." *Id.* at 2291. That belated realization underscores the urgency of finally confronting the constitutionality of opt-out schemes, rather than acquiescing in the violation of dissenting employees' fundamental rights.

II. *Knox* Demonstrates That Opt-Out Requirements Cannot Withstand "Careful Application of First Amendment Principles"

Opt-out schemes cannot be reconciled with *Knox* and the First Amendment precedents it marshals. Put simply, the requirement that public employees affirmatively object to subsidizing a union's political or ideological activities is in no way "'carefully tailored to minimize the infringement' of free speech rights," as the First Amendment requires. *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303). This Court's review is necessary to carry *Knox's* reasoning—which reflects First Amendment imperatives—to its logical conclusion.

Knox reviewed the procedures to protect the rights of dissenting public-sector workers who were charged an "Emergency Temporary Assessment to Build a Political Fight–Back Fund." *Id.* at 2285, 2287. Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Id.* at 2291. Instead, it considered the question *ab initio*.

Its reasoning shows that opt-out schemes like California's here are constitutionally untenable because they violate dissenting public-sector employees' free speech rights. The First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Id.* at 2291

(quoting *Hudson*, 475 U.S. at 303). This means that "measures 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.* The government's recognized interest in permitting a union to collect fees from nonmembers is solely to prevent them "'from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Id.* at 2289 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007)). That interest, of course, does not extend to exacting non-chargeable expenses, such as expenditures for political or ideological activities, from dissenting non-members. *Id.* at 2290. Instead, that is the "infringement of free speech rights" which must be "minimized."

Applying these principles, the Court held that a public-sector union imposing a special assessment or dues increase "may not exact any funds from nonmembers without their affirmative consent." *Id.* at 2296. An opt-out scheme, the Court recognized, "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 2290. And that risk is heightened due to the likelihood "that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues." *Id.* Against these risks, there is simply no "justification for putting the burden on the nonmember to opt out of making such a pay-

ment." *Id.* Instead, any such risks must be borne by "the side whose constitutional rights are not at stake"—that is, the labor union. *Id.* at 2295. Thus, rather than presume non-members' willingness to fund a union's political or ideological activities, the law requires their affirmative consent. After all, the courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)).

Every single word of the Court's analysis in *Knox* applies equally to unions' regular assessment of agency fees that include non-chargeable expenses from non-members. Opt-out schemes require non-members, whose First Amendment rights are at stake, to bear the risk of subsidizing political or ideological activities with which they may disagree and to bear the burden (often quite considerable, as the facts of this case illustrate) of complying with onerous and confusing opt-out procedures year after year, long after their objection has been made clear. The union, meanwhile, has no rights at stake but nonetheless enjoys the presumption of financial support from those who have already rejected joining it as members. This state of affairs obviously violates the rule that a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Knox*, 132 S. Ct. at 2290 (quoting *Hud-*

son, 475 U.S. at 305). Instead, as in *Knox*, any risk must be borne by the union.

If nonmembers may be made to pay fees to a public-sector union at all, the requirement that they affirmatively and repeatedly object to subsidizing its political or ideological activities "cross[es] the limit of what the First Amendment can tolerate," *id.* at 2291, and cannot be reconciled with *Knox* and this Court's other First Amendment precedents. The Court should correct its mistaken assumption that such schemes pass constitutional muster.

III. The Circuits Are Split on the Subsidiary Question of Whether Dissenting Workers Must Object Year After Year

The Court's failure to seriously scrutinize the constitutionality of opt-out schemes has left the lower courts in confusion over the application of First Amendment principles to the collection of fees for nonchargeable expenses.

In particular, the courts of appeals are divided over whether dissenting employees may be required to register their objections every year. The Sixth Circuit and D.C. Circuit have both rejected challenges to annual objection requirements, each devoting all of a sentence of reasoning to the matter. *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) ("Since *Hudson* places the burden of objection upon the employees…, we do not consider [the annual-objection requirement] unreasonable…."); *Abrams v. Comm'ns Workers of Am.*, 59 F.3d 1373, 1383 (D.C.

Cir. 1995) ("[T]he annual renewal requirement is permissible in light of the Supreme Court's instruction that 'dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'"). *Cf. Mitchell v. L.A. Unified Sch. Dist.*, 963 F.2d 258, 261 (9th Cir. 1992) ("[N]onunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs.").

By contrast, the Fifth Circuit's thoughtful opinion in *Shea v. International Association of Machinists and Aerospace Workers* holds that annual objection requirements fall short of the *Hudson* standard that procedures for exacting funds from non-members "*be carefully tailored to minimize the infringement*" of their free speech rights. 154 F.3d 508, 514 (5th Cir. 1998) (per Garwood, J.) (quoting *Hudson*). The court observed that the annual objection requirement "can interfere with an employee's exercise of his rights, because if he fails to again object, he must pay the equivalent of full union dues and thereby support the union's political activities." *Id.* at 515. And far from promoting any legitimate governmental interest, it "serves only to further the illegitimate interest of the [union] in collecting full dues from nonmembers who would not willingly pay more than the portion allocable to activities germane to collective bargaining." *Id.* Accordingly, the court rejected the requirement as "an unnecessary and arbitrary inter-

ference with the employees' exercise of their First Amendment rights." *Id.*

Following *Shea* are the Second and Seventh Circuits. *Seidemann v. Bowen*, 499 F.3d 119, 125–26 (2d Cir. 2007) (discussing *Shea* and observing that the only countervailing interest proffered by the union was its desire "to take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members"); *Tavernor v. Ill. Fed'n of Teachers*, 226 F.3d 842, 849 (7th Cir. 2000) (per Wood, J.) ("No sooner does the objector complete one round than, like Sisyphus with his rock, he must begin anew with another.").

A decision resolving the constitutionality *vel non* of opt-out schemes that faithfully applies *Knox's* reasoning would end this conflict in authority. But even a decision that considers and ultimately upholds such schemes in general could either directly address the subsidiary subject of the circuit split or enunciate principles to guide the lower courts' application of the First Amendment to different aspects of fee-exaction systems. Review is therefore warranted to promote clarity and uniformity in the law.

IV. Opt-Out Requirements Violate the First Amendment Rights of Millions of Public Workers

The constitutionality of opt-out scheme is worthy of the Court's consideration, due to the self-evident importance of the First Amendment rights at stake, *see Locke v. Karass*, 555 U.S. 207, 222 (2009) (Alito,

J., concurring), and the large number of citizens whose rights have been inadvertently compromised by the Court's unconsidered implicit approval of opt-out requirements.

The number of pubic-sector workers subject to agency-shop agreements, which almost always employ opt-out requirements, is staggering. According to the Bureau of Labor Statistics, 33 percent of state government workers, and 46 percent of local government workers are represented by labor unions. That amounts to, respectively, 2.1 million state government workers and 4.8 million local government workers—or, in total, nearly 7 million workers. Of those, about 570,000 workers (comprising about 8 percent of those whose jobs are covered by a collective bargaining agreement) have declined union membership. Bureau of Labor Statistics, News Release, Union Members—2014, Jan. 23, 2015.[3]

These figures provide good reason to believe that the burden of opt-out requirements has artificially suppressed objections, thereby forcing workers to subsidize political and ideological activities with which they may disagree, in violation of their speech and associational rights. It is no secret that unions' political expenditures overwhelmingly favor the Democratic Party and its candidates. *See, e.g.*, Center for Union Facts, American Federation of Teachers—Political Spending, Dec. 12, 2013 (reporting

[3] Available at http://www.bls.gov/news.release/pdf/union2.pdf.

that 98 percent of the AFT's millions in federal contributions goes to Democrats).[4] Yet polls consistently report that about a quarter of state and local employees subject to collective-bargaining agreements identify as Republicans, with another 30 percent or so identifying as independent. *See, e.g.*, Gallup, Political Party Identification Among Unionized and Nonunionized Workers in the U.S., Mar. 24, 2011.[5] In this way, approval of opt-out requirements has led to a situation where more than three million public-sector workers are indirectly subsidizing a political party that they have refused to join, with one million of those identifying as members of the opposite party.

The only explanation is the one once offered by a teachers' union, in a moment of candor: opt-out requirements allow unions to "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively." *Seidemann*, 499 F.3d at 125–26. In other words, public-sector unions are colluding with state and local governments to exact political funding from unwilling employees who may not know how to satisfy convoluted opt-out procedures or are reluctant to bear the burden of doing so. Certiorari is warranted to bring an end to this cynical and wholesale violation of First Amendment rights.

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[4] Available at https://www.unionfacts.com/union/American_Federation_of_Teachers#political-tab.

[5] Available at http://www.gallup.com/poll/146786/democrats-lead-ranks-union-state-workers.aspx.

V. This Case Is the Perfect Vehicle To Address the Constitutionality of Opt-Out Requirements

This case is an excellent vehicle for addressing whether government may, consistent with the First Amendment, require that public employees affirmatively object to subsidizing nonchargeable speech by labor unions. That question is presented directly, as a pure matter of law, the case having been dismissed on the pleadings. This posture also means that there are no disputes of fact at this stage, because the Court must accept as true the complaint's well-pleaded factual allegations. *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 51 (1941). And the factual setting of this case is representative of all circumstances where public-sector employees are required to affirmatively object to subsidizing a labor union's political or ideological activities. The Court can therefore squarely address the constitutionality of opt-out schemes—the question it raised but left open in *Knox*—without concern that its holding will be limited or complicated in any respect. And, for the same reason, its decision would provide broadly applicable guidance to the lower courts.

Finally, even a ruling in favor of petitioners would not require the Court to overrule any of its precedents. As *Knox* recognized, this question has never received any "focused analysis" from the Court and has never been directly decided; instead, the result has simply been assumed. 132 S. Ct. at 2290. While the Court has decided related issues, *see, e.g.*, *Hud-*

son, *supra*, that presents no reason for hesitation here. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

CONCLUSION

Because public-sector workers do not surrender their First Amendment rights when they accept their jobs, *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality), the petition should be granted.

Respectfully submitted,

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MARCH 2015