No. 14-915

IN THE
Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,
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 *AMICI CURIAE* GLENN J. SCHWORAK AND JAMES E. MITCHELL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This brief addresses both questions presented by petitioners:

1. Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

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STATEMENT OF INTEREST[1]

Glenn J. Schworak and James E. Mitchell respectfully submit this brief as *amici curiae* in support of petitioners. *Amici* are both public employees and work as Senior Systems Analysts for the Oregon Department of Consumer and Business Services. *Amici* are nonmembers of their union, Service Employees International Union Local 503, Oregon Public Employees Union ("SEIU"), but are required to make "payments-in-lieu-of-dues" to SEIU, which are equal to full member dues and pay both chargeable and nonchargeable expenses.

Amici are nonmembers because they oppose positions advanced by SEIU in collective bargaining. They believe SEIU's collective bargaining positions are contrary to their on-the-job interests. *Amici* also oppose SEIU's political ideology and political activities outside of collective bargaining. Specifically, due to *Amicus* Mitchell's Catholic religious views, he opposes SEIU's position on abortion and their financial support of pro-choice political candidates. Both *Amici* object to being required to financially support and associate with an

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the brief's preparation or submission. All parties have filed blanket *amicus* consent letters. Monetary contributions to the preparation of this brief were made by Seneca Sustainable Energy, LLC; Andrew W. Miller; Freres Lumber Co., Inc.; and Swanson Group, Inc.

organization that opposes their personal political and religious views.

SEIU sends "*Hudson* notices" to *Amici* every February that are seven pages long and single-spaced. The notices primarily encourage *Amici* to join the union, but also include information regarding opting out of paying nonchargeable expenses. This information is placed in the middle of the seven pages and states nonmembers should deliver opt out letters via certified mail within 30 days.

The state automatically deducts $124 every month ($1,488 annually) from *Amici's* paychecks for required payments-in-lieu-of-dues. *Amici* have taken affirmative steps to opt out and last year they were each reimbursed 19% of their union payments, which was approximately $300. SEIU does not provide information regarding which expenditures it classifies as chargeable and nonchargeable; thus, *Amici* cannot confirm that SEIU's classifications are correct. Based on the level of SEIU's political involvement, *Amici* question the accuracy of SEIU's classifications.

SUMMARY OF ARGUMENT

It is a "bedrock 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 v. Quinn*, 134 S. Ct. 2618, 2644 (2014). An exception to this principle was created in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) that permits

the compelled subsidization of political speech uttered in collective bargaining. *Abood* recognized that unions engage in political speech during collective bargaining because "public employee unions attempt to influence governmental policymaking." 431 U.S. at 231. However, *Abood* distinguished speech in the context of collective bargaining from speech regarding "other ideological causes not germane to its duties as collective-bargaining representative" and allowed compelled funding of the former. *Id.* at 235. Thus, unions may require nonmembers to subsidize collective bargaining speech (chargeable expenses) but not non-collective bargaining speech (nonchargeable expenses).

The line *Abood* attempted to draw between collective bargaining political speech and non-collective bargaining political speech is a legal fiction and results in compelled subsidization of ideological causes not germane to collective bargaining. Although the line between the two types of speech has always been somewhat hazy, today Oregon unions explicitly take positions on legislative proposals within the parameters of collective bargaining because unions view the bargaining table as a more favorable forum in which to achieve their legislative goals. As such, there is no meaningful way to separate chargeable and nonchargeable expenses and *Abood* should be overruled.

If this Court upholds *Abood*, it still should declare the opt out regime unconstitutional because it results in nonmembers subsidizing ideological issues with which they disagree. Oregon unions are

extremely politically active. In fact, in 2008, Oregon teacher unions contributed $357 per teacher to influence campaign elections, more than unions spent in any other state and well above the national average of $22 per teacher. Betsy Hammond, *Oregon Is The Top State For Teachers Union Political Influence In 2008*, THE OREGONIAN, July 14, 2010. Data shows that teacher unions' campaign contributions do not reflect the political preferences of approximately half of Oregon teachers. This combined with burdensome opt out procedures and a lack of information regarding the nature of union contributions results in nonmembers subsidizing political causes they oppose.

ARGUMENT

I. Oregon Allows Agency-Shops.

Similar to the California laws under review, Oregon law allows public employers and unions to require public employees, as a condition of employment, to either join the union representing employees or pay the equivalent of dues to that union.

Oregon's Public Employee Collective Bargaining Act ("PECBA") allows a certified union to become the exclusive bargaining representative for "all employees in an appropriate bargaining unit." ORS 243.650(8). Public employers covered by the PECBA include, among others, the State of Oregon, cities, counties, school districts, community colleges, public hospitals, mass transit districts, and special districts. ORS 243.650(20). A public employee is an

employee of a public employer but does not include elected officials, confidential employees, supervisory employees, or managerial employees. ORS 243.650(10). For purposes of collective bargaining only, family child care providers and home care workers paid by a public agency are public employees. Or Const, Art XV, § 11(2)(f); ORS 657A.430(2).

Public employers and unions that are exclusive bargaining representatives are authorized to enter into "fair-share agreements," pursuant to which "employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization. . . ." ORS 243.650(10). A required payment-in-lieu-of-dues, also known as an agency fee, is "an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive representative of the employees." ORS 243.650(18). These compulsory agency fees imposed upon nonmembers "must be equivalent to regular union dues and assessments, if any, or must be an amount agreed upon by the public employer and the exclusive representative of the employees." *Id.* Typically, agency fees are 100% of full union dues.

Because the First Amendment prohibits compelling nonmembers to support union activities that are not germane to its duties as collective bargaining representative, unions must allow nonmembers the opportunity to recover the portion of their agency fee that pays for these "nonchargeable"

expenses. *Abood*, 431 U.S. at 235-36. Annually unions must send nonmembers a "*Hudson* notice" that sets forth the percentage of the agency fee spent on chargeable and nonchargeable expenses. *Teachers v. Hudson*, 475 U.S. 292, 304-07 (1986). To recover the portion of the agency fee spent on nonchargeable expenses, nonmembers must take steps to "opt out" and request a rebate of those funds.

Nonmembers may not opt out of paying chargeable expenses, which ostensibly covers the cost of union bargaining and representation. "Collective bargaining" is defined as the mutual obligation of the public employer and the union to meet and confer regarding employment relations for the purpose of negotiating a written contract. ORS 243.650(4). Oregon law requires public employers to negotiate all matters of "employment relations," which "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." ORS 243.650(7)(a). As unions have explained, "The reality of bargaining is that most matters relate in some way – directly or in a more attenuated fashion – to these mandatory categories even if they also involve some management prerogative." *Public Employees and Oregon's Scope of Bargaining, A Labor Perspective,* LABOR EDUCATION AND RESEARCH CENTER MONOGRAPH, UNIVERSITY OF OREGON, p. 45 (18th ed. 2007). In addition to the broad scope of matters that must be negotiated, public employers and unions may agree to collectively bargain regarding any subject that would not require commission of an unconstitutional or

illegal act. *Springfield Educ. Ass'n v. Springfield Sch. Dist.*, 1 PECBR 347 (1975), *aff'd in part* 24 Or App 751, 547 P2d 647 (1976), *recon.* 25 Or App 407 (1976), 549 P2d 1141, *aff'd*, 290 Or 217, 621 P2d 547 (1980).

II. Unions Combine Collective Bargaining And Other Ideological Causes Not Germane To Their Duties As Collective Bargaining Representatives.

A. Unions Believe Most Public Policy Issues are Germane to Collective Bargaining.

Abood held the Constitution requires that union expenditures for "ideological causes not germane to its duties as a collective-bargaining representative" "be financed from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36. This holding begs the question: What is germane to a union's duties as a collective bargaining representative? *Abood* declined to answer this important question, but recognized that the line between collective bargaining activities, for which contributions may be compelled, and ideological activities, for which contributions may not be compelled, is "[somewhat hazy]." *Id.* at 236.

The blurred line *Abood* drew is essentially meaningless because unions can rationalize a connection between representing employees and most political issues. For example, in 2014 Oregon unions

supported a ballot measure to issue driver licenses to undocumented immigrants because it would allow "all eligible Oregonians to safely and legally drive to work." 2014 Oregon Voter Pamphlet, Measure 88, Arguments in Favor, p. 64. The unions opposed a ballot measure that would have allowed all voters to vote in a nonpartisan primary election because "[w]orking people often participate less in primary elections because they are busy." *Id.*, Measure 90, p. 102. In 2015, AFSCME Council 75 supported a legislative proposal to regulate toxins in toys because the union represented "workers [who] believe this bill is a good step in keeping toxins out of our environment . . . ." Oregon State Legislature, 2015 Regular Session, Floor Letters, SB 478, AFSCME. Unions have also entered the climate change debate and support legislative proposals to mandate low carbon fuels because "Oregon must address the pollution that will destabilize our climate and undercut our natural resource based economy, while safeguarding prosperity and opportunity for all working families." *Id.*, SB 324, AFSCME. Given these justifications for taking positions on legislative issues that have no reasonable nexus to wages, benefits, and working conditions, it is difficult to imagine a political issue that the union would consider not germane to its duties as exclusive representative. *Abood* allows unions to charge nonmembers for these non-collective bargaining policy choices, in violation of the First Amendment.

B. Unions Take Positions on Legislation in Collective Bargaining.

Abood's focus on the forum of the speech, rather than the nature of the speech itself, allows unions to impermissibly redefine and expand the forum to include legislative activity, which is clearly outside the scope of what *Abood* considered to be chargeable collective bargaining activity. *See Abood* at 222 (examples of collective bargaining include negotiating a medical benefits plan, negotiating the right to strike, negotiating a wage policy, seeking a clause in a collective bargaining agreement proscribing racial discrimination). In Oregon, unions used to comport with the chargeable/nonchargeable paradigm by separating collective bargaining and legislative activities. However starting in 1993, unions became more creative in achieving their political goals and, admittedly, began bringing legislative matters into collective bargaining negotiations because unions viewed the bargaining table as a more favorable forum for them. This caused collective bargaining and political legislative activities to become inextricably intertwined.

For example, in 1993 the Oregon Legislature proposed several bills that would have privatized certain public agencies. Tim Nesbitt and Greg Schneider, *State Bargaining Adjusts To The Growing Shadow Of Measure 5*, LABOR EDUCATION AND RESEARCH CENTER MONOGRAPH, UNIVERSITY OF OREGON, p. 134-35 (13th ed. 1994). In order to obtain a pay raise for certain employees in collective bargaining, SEIU, then known as the Oregon Public

Employees Union, agreed to support the privatization legislative proposals outside of negotiations. *Id.* Similarly, unions concede that legislative proposals to consolidate and reconfigure state agencies that aim to reduce state spending had, and will continue to have, a direct impact on the demands unions make at the bargaining table. *Id.* at 134. This union concession reflects a political reality: unions do not separate their legislative activities from their collective bargaining activities. According to unions,

> [I]f problems related to reorganization, privatization, or the composition of the workforce are kept from the bargaining table, the potential for misunderstanding and conflict increases. At the table, mutual solutions are readily available . . . . the best path to effective labor relations is through more bargaining over more issues, not through handcuffing the process or excluding issues from the bargaining table.

Id. at 137.

Unions have continued the trend of mixing bargaining and lobbying. As recently explained by Tim Nesbitt, past president of the Oregon AFL-CIO, "Changing circumstances are forcing unions to look beyond 20th century labor laws to deal with the challenges of a 21st century economy. That means more legislating than bargaining and more emphasis on political campaigning than workplace organizing." Tim Nesbitt, *Labor Unions and Oregon's New New*

Deal, THE OREGONIAN, Aug. 27, 2015. Unions view this expanded role for exclusive representatives to be necessary because

> [t]o try to make jobs better for any significant number of low-wage Oregon workers through workplace elections and collective bargaining would be a fool's errand for Oregon's unions, whose traditional organizing efforts have been netting them at most a few thousand new members a year. But the sick leave and retirement benefits mandated by the Legislature this year will reach hundreds of thousands of Oregon workers, as would a further increase in the minimum wage.

Id. This approach is not unique to Oregon, but is occurring in petitioners' state as well, as noted by Tim Paulson, executive director of the San Francisco AFL-CIO: "We are going to expand the idea of collective bargaining. You can have collective bargaining through legislation. You can have collective bargaining through ballot measures." Harold Meyerson, *At AFL-CIO Convention, Labor Embraces The New America,* WASHINGTON POST, Sept. 10, 2013.

Abood recognized that the "process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities." *Id.* at 236. However, the

Court did not extend the process to include political campaigning and legislating for represented public employees. Such an extension is unconstitutional and unworkable for several reasons. First, Oregon law requires labor negotiations to be "conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session." ORS 192.660(3). Unions violate this requirement when bargaining occurs through legislation. Second, traditional collective bargaining allows employees to see the agreements negotiated between unions and employers because such agreements are reduced to writing. This provides a level of transparency and accountability even if employees ultimately take issue with the agreements. There is no requirement that legislative agreements orchestrated between unions and the government be reduced to writing and this can leave employees in the dark about the unions' legislative deals.

Finally, and most importantly, this approach allows unions to conflate chargeable collective bargaining expenses with nonchargeable lobbying expenses with no meaningful method of separation. Nonmembers are thus forced to subsidize union speech about public policy choices with which the nonmember may disagree. This cannot withstand constitutional scrutiny. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (citations omitted); *Citizens*

United v. F.E.C., 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny' ….") (citation omitted).

III. The Opt Out System is Unconstitutionally Burdensome to Nonmembers.

A. The Opt Out System is Premised on the Unreasonable Assumption That Nonmembers Want to Pay Nonchargeable Expenses.

Oregon unions put the onus on nonmembers to affirmatively object to paying nonchargeable expenses. This process assumes that nonmembers want to pay for union ideological causes not germane to collective bargaining and, thus, defaults all nonmembers into paying for such causes. The more reasonable assumption is that nonmembers do not want to pay for nonchargeable expenses because nonmembers have already voiced their opposition to the union by not joining. Why would an employee choose to be a nonmember if they wanted to financially support the union's ideological causes? Moreover, as the Court observed, "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Knox v. Serv. Emps. Int'l Union,* 132 S. Ct. 2277, 2290 (2012).

In order to minimize the burden on nonmembers, the default should be the option most

likely to be preferred by nonmembers; thus an "opt in" system should be required. An opt in system - assuming that nonmembers do not want to subsidize nonchargeable expenses - also accomplishes the objective of "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood* at 237. If this Court decides to uphold compelled subsidization of chargeable expenses, an opt in system would continue to require nonmembers to pay such expenses. And an opt in system would protect nonmembers' right to support union political speech, if they so choose, because a union may accept political contributions at any time and a failure to timely opt in is correctable. On the other hand, nonmembers who miss the deadline for opting out contribute to political speech they do not support. Even nonmembers who timely opt out have their rights violated because "the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full." *See Hudson* at 305; *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984). Defaulting nonmembers *out* of contributing to nonchargeable expenses is the option most likely to be preferred by nonmembers and would protect against constitutional violations that cannot be undone.

Not only is the assumption that nonmembers want to pay nonchargeable expenses contrary to reason, it also conflicts with publically available data regarding employees' political preferences. Approximately 52% of Oregon teachers are registered

Democrats, 25% are registered Republicans, and 24% are unaffiliated or belong to minor political parties.[2] Since 2006, Oregon teacher unions have contributed over $4 million to political candidates and approximately 98% of that amount has gone to Democratic candidates, approximately 2% has gone to Republican candidates, and .12% has gone to Independent/Other candidates.[3] This means teacher unions give almost all of their political campaign contributions to Democratic candidates in spite of the fact roughly half of the teachers they represent are not Democrats. *Amici* recognize that the law allows teacher unions to make these contributions (*see, e.g., Citizens United*); however, these contributions are at

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[2] Data is based on current teacher licenses and the Oregon Voter File. All teachers must be licensed by the Oregon Teacher Standards and Practices Commission. ORS 342.121. Counsel for *Amici* received the names of all teachers with a current license pursuant to a public records request on Aug. 18, 2015. Teachers' names were then matched to the Oregon Voter File, which contains the party affiliation of voters. A total of 45,449 teachers were matched to their party affiliation and 23,497 (51.7%) were Democrats, 11,184 (24.6%) were Republicans, and 10,768 (23.69%) were unaffiliated or belonged to other minor parties.

[3] Data is based on ORESTAR (Oregon Elections System for Tracking and Reporting), which requires all political expenditures to be electronically reported on a publically available database. https://secure.sos.state.or.us/orestar. Since 2006, when ORESTAR was created, teacher unions and teacher union PACs have contributed a total of $4,021,801 to candidates. Of that amount, $3,948,732 (98.18%) went to Democratic candidates, $68,318 (1.7%) went to Republican candidates, and $4,750 (.12%) went to Independent/Other candidates.

odds with the political preferences of almost half of teachers and this "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.

B. Nonmembers Are Denied The Opportunity To Object To Nonchargeable Expenses Because They Are Given Insufficient Information Regarding Union Political Expenditures.

As in initial matter, SEIU makes the opt out process unnecessarily cumbersome by instructing nonmembers to use certified mail and limiting the opt out period to 30 days. Although SEIU may technically comply with the constitutional requirement to send out annual *Hudson* notices, the union puts information on how to opt out in the middle of a seven-page single spaced letter. Perhaps this is why many nonmembers do not know they have the right to refrain from subsidizing nonchargeable activities. According to a 2015 survey conducted by the Association of American Educators and the Nevada Policy Research Institute, 29% of Oregon union households[4] are unaware that employees may opt out of paying all of their union dues without losing their job. http://employeefreedomweek.com/survey-results/. In addition, unions do not provide

[4] Survey included private sector and public sector union households.

information regarding the nature of the expenditures they classify as chargeable and nonchargeable, which prevents nonmembers from confirming the accuracy of classification determinations without filing a lawsuit against the union.

This lack of information results in employees not knowing what political speech they are subsidizing with their union dues. Nonmembers have access to ORESTAR and can see that since 2006 unions have contributed over $37 million to political action committees ("PACs"). However, it is difficult to understand which political issues the unions are supporting because most contributions go to pass-through organizations. For example, in 2014 the teacher union Oregon Education Association ("OEA") contributed $700,000[5] to Defend Oregon PAC,[6] then Defend Oregon contributed $300,000[7] to the Yes on 91 PAC. Ballot measure 91 subsequently passed and legalized the recreational use of marijuana in Oregon.

There is no rational public policy reason for a teacher union to support the recreational use of a federally banned substance. Moreover, this issue has

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[5] ORESTAR database, https://secure.sos.state.or.us/orestar. Transaction # 1871200 ($275,000) on Oct. 10, 2014; # 1871199 ($175,000) on Oct. 10, 2014; # 1890048 ($200,000) on Oct. 20, 2014; and # 1899539 ($50,000) on Oct. 24, 2014.

[6] ORESTAR PAC Id. # 13130.

[7] ORESTAR database, https://secure.sos.state.or.us/orestar. Transaction # 1867210 ($100,000) on Oct. 12, 2014, and # 1888243 ($200,000) on Oct. 22, 2014.

nothing to do with a legitimate collective bargaining topic. Assuming the union properly classified this expenditure as nonchargeable, nonmember teachers still were not told that they must opt out in order to not financially support recreational drug use. Teachers would have had to research not only OEA's political expenditures, but also the political expenditures of PACs to which OEA contributed, to know their union supported Ballot Measure 91. Such research is time consuming, confusing, and burdensome. The Constitution requires this expenditure – and others that are not germane to its duties as collective bargaining representative – to be "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Abood* at 236. Nonmembers are denied the opportunity to object when they are not given sufficient information about nonchargeable expenses.

CONCLUSION

Amici curiae Glenn J. Schworak and James E. Mitchell urge the Court to overrule *Abood*.

Respectfully submitted,

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