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

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
MARK W. DELAQUIL
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for the Amicus Curiae

QUESTION PRESENTED

This brief addresses the following question:

Whether a state violates the First Amendment when it requires public employees to affirmatively object to subsidizing a labor union's political or ideological speech, rather than require the union to obtain employees' affirmative consent to subsidize such speech?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory and Regulatory Provisions

Other Authorities

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 stated 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 its speech on matters of public concern. The Court should therefore overrule its aberrant decision to the

---

[1]Pursuant to 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. Letters from the parties consenting to the filing of this brief are filed with the clerk.

contrary in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

But the focus of this brief is the second question presented. Whether or not the Court overrules *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 labor unions' political or ideological speech. *Knox v. SEIU*, 132 S. Ct. 2277, 2290 (2012).

Knox's reasoning controls this inquiry and should be carried out to its logical conclusion. The Court's prior cases implicitly assumed the constitutionality of such "opt-out" schemes, but without recognizing or inquiring into the First Amendment interests implicated by them. *Id.* 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.* at 2291 (quoting *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986)). Opt-out requirements therefore "cross[] the limit of what the First Amendment can tolerate." *Id.*

The need for careful application of First Amendment principles to this issue is acute. Empirical evidence indicates that hundreds of thousands of public-sector workers are currently subsidizing unions' political speech that conflicts with their own beliefs

and positions. This is due, in large part, to the burden of exercising opt-out procedures as grudgingly administered by the labor unions whose money is on the line.

In fact, the opt-out scheme administered by Respondents is designed to ensnare dissenting teachers who inadvertently fail to register an objection during the prescribed opt-out period, as well as those who subsequently come to oppose the union's political speech. A teacher, for example, might assume that the California Teachers Association's political and ideological speech is confined to issues relating to education and public schools and may well be surprised to learn partway through the school year that it engages in advocacy on abortion, immigration reform, and other controversial issues. Yet that teacher is required to subsidize the union's speech on those matters—with funds deducted from her paycheck week after week—until the next opportunity to opt out. This is a plain-as-day violation of the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. A decision flipping the presumption—from opt out to opt in—would correct this wholesale infringement of First Amendment rights and put labor unions on an equal footing with all other groups that rely on truly voluntary contributions.

Finally, this issue is not presented in the alternative and would become even more important if the

Court were to overrule *Abood*'s holding that government workers may be compelled to support a labor union as a condition of their employment. Repudiating opt-out requirements will be essential to give effect to a decision that restores dissenting workers' First Amendment rights by overruling *Abood*.

STATEMENT

1. California law recognizes the "right" of labor unions to represent public school employees, whether or not those employees want to be represented by a labor union. Cal. Gov't Code § 3543.1(a), Pet. App. 29a. To that end, it 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), Pet. App. 31a. Thereafter, if the labor union institutes an "organizational security arrangement" (known colloquially 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), Pet. App. 33a–34a. The "fair share service fee" is usually the same amount as union dues. *Id.*; Pet. App. 4a–5a. By default, union dues and (for non-members) "fair share service fees" are automatically deduced from employees' paychecks throughout the year and transferred to the union. Cal. Gov't Code § 3546(a), Pet App. 33a–34a; Cal. Educ. Code §§ 45061, 45061.5, Pet. App. 24a–25a.

2. Non-member employees required to pay the "fair share service 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), Pet. App. 33a–34a. These are typically political or ideological activities. *See, e.g.*, Pet. App. 43a–44a. 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, Pet. App. 36a–37a. *See also* J.A. 355–61 (California Teachers Association's 2012 *Hudson* notice).

3. Non-members who do not wish to subsidize the union's political or ideological activities must register their objection each year, within a prescribed time period (typically the statutory minimum of 30 days) following distribution of the *Hudson* notice. Cal. Code Regs. tit. 8, §§ 32992(a), 32993, Pet. App. 36a–38a. Failure to register objection within that time period means that they are required to pay the full "fair share service fee" and subsidize the union's political and ideological activities for that year. Cal. Gov't Code § 3546(a), Pet App. 33a–34a. *See also* Pet. App. 71a.

4. Respondent California Teachers Association and its local affiliates who are also Respondents here do no more than the minimum required by law to inform teachers about their legal rights and how the

opt-out process works. *See* Pet. App. 80a–81a. For example, CTA's extensive online "help center" contains no information on opting out. *See* CTA, Help Center.[2] CTA's membership-enrollment form is designed to give the impression that teachers can be dues-paying union members without subsidizing the union's political or ideological activities, prominently featuring a box that members may check to decline to allocate a portion of their dues to the CTA's political action committee. Pet. App. 80a–81a, 83a. Teachers who check the box, however, still pay full union dues, including the non-chargeable portion used to fund political and ideological activities. Cal. Gov't Code § 3546(a), Pet. App. 33a–34a.

5. The labor union Respondents in this case undertake extensive political and ideological activities funded, in part, by fees paid by non-members who have not registered an objection. From 2000 through 2009, Respondent California Teachers Association made over $211 million in political expenditures, including $26 million to oppose a school-voucher initiative. Pet. App. 64a. CTA also spends money to engage in political advocacy on controversial issues unrelated to education; for example, it spent $1 million in opposition to Proposition 8, an initiative to bar same-sex marriage, Pet. App. 65a, and has made substantial expenditures in opposition to measures to restrict or regulate abortion. Ballotpedia, Califor-

[2] Available at http://www.cta.org/en/About-CTA/Help-Center.aspx.

nia Teachers Association (reporting political expenditures).[3] It lobbies on legislation involving such issues as campaign-finance regulation, health insurance, the minimum wage, immigration law, electronic cigarettes, and illegal drugs. *See* CTA, CTA Bill Positions.[4]

6. Likewise, the National Education Association, which is CTA's national affiliate and receives a portion of the fees collected by CTA's local affiliates, Pet. App. 60a–61a, also engages in substantial political and ideological activities, deeming only approximately 40 percent of its expenditures to be "chargeable" to non-members who object to subsidizing such activities. Pet. App. 63a. In addition to making tens of millions of dollars in political contributions each cycle (nearly all of which goes to Democratic candidates and organizations supporting Democratic candidates) and millions of dollars in independent expenditures (nearly all opposing Republican candidates), NEA engages in widespread political advocacy on a variety of issues. *See* OpenSecrets.org, National Education Ass'n (reporting political expendi-

---

[3] Available at http://ballotpedia.org/California_Teachers_Association.

[4] Available at http://www.cta.org/Issues-and-Action/Legislation/CTA-Bill-Positions.aspx (updated Sept. 8, 2015).

tures for 2014 cycle).[5] For example, NEA actively supports firearms restrictions, the Affordable Care Act, and "deferred" immigration enforcement, and it participates in international relations and foreign policy debates. Pet. App. 66a. *See generally* NEA, More Issues.[6]

7. The individual Petitioners are teachers in districts subject to agency-shop agreements who have resigned their union memberships and object, *inter alia*, to paying the non-chargeable portion of their agency fees each year. Pet. App. 5a. They claimed 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." Pet. 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." Pet. App. 44a.

6. The district court granted judgment on the pleadings in favor of Respondents, holding that Petitioners' challenge to California's opt-out scheme was

---

[5] Available at http://www.opensecrets.org/orgs/summary.php?id=d000000064&cycle=2014.

[6] Available at http://www.nea.org/home/18526.htm.

foreclosed by *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992). Pet. 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." Pet. App. 8a.

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

ARGUMENT

I. Requiring Petitioners To Opt Out from Subsidizing Respondents' Political and Ideological Activities Unconstitutionally Burdens Petitioners' First Amendment Rights

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 demands. *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303). This Court should carry *Knox*'s reasoning—which reflects First Amendment imperatives—to its logical conclusion.

A. As *Knox* Demonstrates, Opt-Out Requirements Cannot Withstand "Careful Application of First Amendment Principles"

The Court's decision in *Knox* holds that requiring government employees to take affirmative steps to avoid funding a labor union's political and ideological speech violates the First Amendment because it is not "'carefully tailored to minimize the infringement' of free speech rights" inherent in such a scheme. 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303 (1986)). That holding controls here.

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*, undertaking the "careful application of First Amendment principles" lacking in prior cases. *Id.* at 2290.

The first of those principles is that courts "do not presume acquiescence in the loss of fundamental rights." *Id.* (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999)). Accordingly, "[o]nce it is recognized…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?" *Id.* Requiring such subsidy payments by default "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.* 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" and may not support the union's speech. *Id.* But any risk regarding funding must be borne by "the side whose constitutional rights are not at stake"—that is, the labor union. *Id.* at 2295 (citing *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984)). A state may not therefore presume that its citizens acquiesce in subsidizing a labor union's political and ideological activities and may exact such subsidies only with their affirmative consent. *Id.* at 2295.

Knox also applies the First Amendment principle 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 requires 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 only recognized interest in permitting a union to collect fees from non-members is to prevent them "'from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bar-

gaining 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 funds for *non-chargeable* expenses, such as expenditures for political or ideological activities, from dissenting non-members. *Id.* at 2290; *Hudson*, 475 U.S. at 305 (holding that unions may not use non-members funds, "even temporarily, to finance ideological activities"). Instead, that is the "infringement of free speech rights" which must be "minimized." The way to do that, the Court concluded, was simply to allow non-members who "wanted to pay for the union's electoral project" to say so affirmatively. 132 S. Ct. at 2293.

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. The Respondent labor unions' opt-out procedure is identical to that rejected as constitutionally inadequate in *Knox*. Like that scheme, the one at issue here presumes, at the start of each year, that employees who have resigned their union memberships nonetheless consent to subsidizing a labor union's political and ideological speech. It requires them to bear the burden (often quite considerable) of complying with confusing and sometimes onerous opt-out procedures year after year, long after their objection has been made clear. And it imposes on them the risk of subsidizing political or ideological activities with which they may disagree if

they are unable to register their objection within the prescribed period.

The union, meanwhile, has no rights at stake but nonetheless enjoys the presumption of financial and ideological support from those who have already rejected joining it as members and presumably do not support its views. *See Knox*, 132 S. Ct. at 2290. This state of affairs obviously violates the tailoring requirement 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." *Id.* (quoting *Hudson*, 475 U.S. at 305). Instead, as in *Knox*, any risk must be borne by the union. *Id*. at 2295. That means the state must obtain the affirmative consent of non-members before it requires them to subsidize the union's political and ideological speech.

As a practical matter, the risk of First Amendment injury here is even greater than in *Knox*. *Knox* concerned a single assessment of funds to subsidize a specific political campaign. *Id*. at 2285–86. By contrast, a teacher who, for whatever reason, fails to register an objection during the prescribed period is on the hook to subsidize the union's varied political activities for the remainder of the year, with the funds being drawn from each of her paychecks. Cal. Gov't Code § 3546(a), Pet App. 34a. For example, a teacher who learns midway through the year that her CTA dues are being used to take positions she

considers objectionable on immigration reform or abortion—both issues where CTA is active—has no recourse and must continue subsidizing its lobbying and political expenditures, week after week, until the next objection period.

While workers who opt in to supporting a union that later takes positions with which they disagree are in the same position as individuals who have chosen to contribute to any other organization, the teacher who has not elected to support the labor union with whose speech she now disagrees is in a very different position: the state is compelling her, with every paycheck, to take a particular side in political and ideological debates, to participate in advancing positions with which she disagrees, and to undermine the advocacy of her own beliefs. This arrangement is by no means "carefully tailored to minimize the infringement of free speech rights." *Knox*, 132 S. Ct. at 2291 (quotation marks omitted). Instead, it guarantees their violation.

This risk of First Amendment violation is exacerbated by inertia. "Research shows that, whatever the default choices are, many people stick with them…." Richard Thaler & Cass Sunstein, Nudge 8 (2008). This may be due to such factors as indifference or the burden of having to decide. *See generally* Cass Sunstein, Deciding by Default, 162 U. Pa. L. Rev. 1, 17–24 (2013) (surveying causes of inertia). Particularly in the union opt-out context, inertia may be driven by the burden of making one's objection effective, which may require "negotiate[ing] technical

procedural hurdles the unions have erected," or simply by lack of knowledge, such as where rights notices are buried in lengthy communications from the union. Ray LaJeunesse, The NLRB Has Failed To Enforce Fully Workers' Rights, 70 N.Y.U. Ann. Surv. Am. L. 305, 313–14 (2015). Regardless of its cause, inertia has the inevitable effect of trapping workers who come to disagree with a labor union's political and ideological speech into supporting that speech, at least until the next opportunity to opt out.

These inertia effects mean that there is no basis to assume that workers who have failed to object "do not feel strongly enough about the union's politics to indicate a choice either way." *Knox*, 132 S. Ct. at 2307 (Breyer, J., dissenting). Under an opt-out regime, there is no way to distinguish employees who wanted to register an objection but did not, as well as those who came to disagree with the union's speech after the objection period, from those who actually intended to support the union's speech throughout. All that can be said of any of these individuals is that, on a particular date in the past, they did not register an effective objection and were therefore required to subsidize the union's political and ideological speech.[7]

---

[7] In other words, failure to successfully register an objection is indicative of nothing. As described above, an employee may only come to disagree with the union's speech after the close of the objection period. But even employees who know they disagree with the union's speech and intend to file timely objections

To be sure, taking advantage of inertia in this fashion may be "a matter of considerable importance to the union." *Id.* (Breyer, J., dissenting). One teachers' union, in a moment of candor, acknowledged that it favors opt-out requirements because they allow it to "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively." *Seidemann v. Bowen*, 499 F.3d 119, 125–26 (2d Cir. 2007). In other words, unions wish to continue to exact political funding from "would-be dissenters" who may not know how to satisfy convoluted opt-out procedures or are reluctant to bear the burden of doing so. But a "union has no constitutional right to receive any payment from these employees." *Knox*, 132 S. Ct. at 2295. In the constitutional calculus, the effects of inertia can only weigh against opt-out requirements.

Finally, requiring affirmative consent would not impose any burden on unions, as a matter of both law and fact. As to the law, there is no balancing "the 'right' of the union to collect [fees from nonmembers] against the First Amendment rights of nonmembers," because unions have no such right. *Knox*, 132 S. Ct. at 2291 (citing *Davenport*, 551 U.S.

---

may be deterred by union harassment, *see* Pet App. 44a, thwarted by the vagaries of the mail, or otherwise frustrated in seeking to cease subsidizing the union's speech. The fact that an employee has not managed to register an objection therefore cannot be assumed to indicate that he or she supports or is indifferent to the union's politics.

at 184). In addition, a union's interests are irrelevant under First Amendment scrutiny; it is the *state's* interests that matter, and they must be "compelling." *Id*. at 2291 & n.3. *See also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). And the only state interest identified by the Court as a possible justification for permitting unions to collect fees from non-members is the advancement of "labor peace" by "prevent[ing] nonmembers from free-riding on the union's efforts." *Knox*, 132 S. Ct. at 2289–90. Yet opt-out requirements—unlike requirements that non-members pay agency fees—cannot be justified as a means to prevent free-riding. In any case, the free-riding justification does not extend to exactions to subsidize political speech, which the state is powerless to impose in any instance. *Abood*, 431 U.S. at 235–36.

All that aside, as a factual matter, affirmative consent requires nothing of unions that they do not already do. Public-sector labor unions that take agency fees from non-members are already required to prepare and distribute "sufficient information to gauge the propriety of the union's fee" pursuant to *Hudson*, 475 U.S. at 306–07, as well as to accept and process opt-out requests, *Abood*, 431 U.S. at 241. Requiring a public-sector union that wishes to exact fees from non-members to obtain their affirmative consent for subsidizing its political and ideological activities would therefore impose no additional burden on the union. All that would change would be the wording of the *Hudson* notice. It is even possible that some

unions could see reduced administrative expenses, if they receive fewer requests to opt in than they have received in the past to opt out.

In sum, the First Amendment affords no special rights to labor unions. If states wish to grant unions the "unusual" and "extraordinary benefit" of collecting fees from non-members, *Davenport*, 551 U.S. at 184, they must do so in a way carefully tailored to minimize impingement on First Amendment rights. That requires obtaining the affirmative consent of non-members before requiring them to fund a union's political and ideological speech.[8]

---

[8] If the Court does not go so far as to invalidate opt-out requirements, it should at least consider whether requiring non-members to lodge objections annually satisfies First Amendment scrutiny and, in particular, careful tailoring. That issue is currently the subject of a circuit split. *Compare Seidemann*, 499 F.3d at 126 (holding annual requirement inconsistent with *Hudson's* requirement that "procedures for objecting be drawn narrowly") *with 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...."). *See generally* Br. of Cato Inst. in Support of Certiorari, at 13–15, *Friedrichs v. Calif. Teachers Ass'n*, No. 14-915 (filed Mar. 2, 2015) (discussing circuit split). Similarly, the Court might also consider whether procedures that require a non-member who comes to disagree with a union's speech partway through the year to continue subsidizing that speech until the next opt-out period satisfy First Amendment tailoring or whether the state and union are required to allow the non-member to stop paying subsidies immediately.

B. The Acceptance of Opt-Out Requirements Is "a Historical Accident" Unsupported by the Court's Precedents

Prior to *Knox*, the Court had never really considered the constitutional legitimacy of opt-out requirements. Instead, "acceptance 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. As such, correcting that accident does not require disturbing the logic or reasoning of any of the Court's precedents. Conversely, because *Knox* cannot be distinguished on any material ground, upholding such requirements would require overruling *Knox* or arbitrarily confining its holding to its facts.

The Court's precedents do not require adherence to the opt-out approach. The issue first came to light 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 the statute 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.

That holding resolved the central legal question, but it presented a problem regarding the remedy, given that the collective bargaining agreement and statute were silent on the point and an injunction

against all union political expenditures would violate the speech and associational 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 approach 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 assess-

ments 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 satisfy the First Amendment's restrictions on compelled funding of the speech of private speakers.

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 further consideration. Notably, *Hudson* considered the ways in which opt-out *procedures* must be "carefully tailored to minimize the infringement" of objecting employees' First Amendment rights. 475 U.S. at 303. It held that public-sector employees who choose to pay an agency fee in lieu of joining a union

and paying full dues are 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.

Because none of the Court's decisions consider or require the opt-out approach, a ruling in favor of petitioners would not require the Court to overrule any of its precedents, but for *Abood*'s pat conclusion on the point. 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.

"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).

And while the Court has decided related issues, that presents no reason for hesitation here. In particular, flipping the presumption would require no significant change to the procedural protections for dissenting workers recognized in *Hudson* and its progeny. The only major difference is that courts would no longer be required to police public-sector union's observance of non-members' opt-out rights.

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

Empirical evidence confirms that opt-out schemes are responsible for the wholesale infringement of the First Amendment rights of government workers who most likely disagree with labor unions' political and ideological speech.

The number of public-sector workers subject to agency-shop agreements, and therefore 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—in total, nearly 7 million workers. Only 8 percent of those

workers have declined union membership—a prerequisite to opting out of paying political subsidies. Bureau of Labor Statistics, News Release, Union Members—2014, Jan. 23, 2015.[9]

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.[10] 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 that 98 percent of the AFT's millions in federal contributions goes to Democrats).[11] Likewise, unions' political advocacy typically espouses positions associated with the Democratic Party, including (with respect to Respondent CTA, in particular) on such divisive issues as abortion, immigration reform, and the minimum wage, among many others.

This means that, due to opt-out requirements, more than three million public-sector workers are

---

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

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

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

supporting the ideas and candidates of a political party they have refused to join, with one million of those identifying as members of the opposing party.

II. The Court Should Reject Opt-Out Requirements Irrespective of Its Decision on Compulsory Fees

The opt-out issue is not presented here in the alternative. The Court should address it no matter how it resolves the issue of agency fees. In fact, ending abusive opt-out requirements assumes even greater importance if the Court overrules *Abood*'s holding that government workers may be compelled to support a labor union as a condition of their employment.

As shown above, even if non-members may be made to pay fees to a public-sector union at all, the requirement that they must 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 the mistaken assumption that such schemes pass constitutional muster.

The same relief is necessary if the Court overrules *Abood*. Overruling *Abood* would simply recognize that, "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues," no less than other political and ideological issues for which a public-sector union cannot compel

support under *Abood*. *Harris*, 134 S. Ct. at 2632. Yet public-sector unions would face even greater incentives than they do today to discourage workers from freely and effectively exercising their opt-out rights, given that they could opt out of the entirety of an agency fee, not just the smaller portion that is currently considered non-chargeable. Likewise, a decision overruling *Abood* would commensurately increase the injury to workers whose exercise of their opt-out rights is frustrated, reflecting their First Amendment interest in speech on political issues involving public employment. By contrast, unions would have no greater constitutional "right" to collect fees from non-members than they do today—that is, none.

Accordingly, the First Amendment injuries imposed by opt-out regimes would be heightened in a post-*Abood* world, and so it would be all the more important that procedures for the collection of fees be carefully tailored to minimize the infringement of speech rights. For all the reasons stated above, that requires repudiating opt-out regimes and conditioning the state-compelled payment of fees to a union on the affirmative assent of the workers asked to pay them. Failure to do so would seriously frustrate the effectiveness of a decision that restores dissenting workers' rights by overruling *Abood*.

CONCLUSION

"First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side it favors." *United States v. United Foods*, 533 U.S. 405, 411 (2001). That is why state-compelled subsidies are subject to First Amendment scrutiny and must be carefully tailored to minimize impingement on First Amendment rights. Allowing the government to compel citizens to subsidize a private party's political speech, subject only to a circumscribed opt-out procedure administered by the party being subsidized, crosses the limited of what the First Amendment can tolerate because a better-tailored procedure—affirmative consent to pay subsidies—is readily available. For that reason, the decision of the court below should be reversed.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
MARK W. DELAQUIL
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

SEPTEMBER 2015