No. 14-915

IN THE
SUPREME COURT OF THE UNITED STATES

REBECCA FRIEDRICHS, ET AL.,
Petitioners,
v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CONSITUTIONAL LAW PROFESSORS, PROF. DANIEL DISALVO, THE JUDICIAL EDUCATION PROJECT AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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 non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

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INTEREST OF *AMICI CURIAE*[1]

Joining in this brief as *amici* are the following law professors whose research and teaching has focused on constitutional law:

Bradley A. Smith, Capital University Law School

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

recently, Government Against Itself (Oxford Univ. Press 2015).

Individual *amici* have no personal stake in the outcome of this case; their interest is in seeing the proper application of this Court's First Amendment precedent in the public union setting.

Amicus Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited powers, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy.

Amicus Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. The Center and the Claremont Institute share the mission of restoring the principles of the American Founding to preeminent authority in our national life, including the protection for freedom of conscience enshrined in the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari to overrule *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). The Court's observation in *Knox v. Service Employees*, 132 S. Ct. 2277, 2290 (2012), that *Abood* is "something of an anomaly," is a significant understatement.

Amici's goal in this brief is to demonstrate the degree to which *Abood* was and remains an outlier in its tolerance for compelled speech under general First Amendment principles. By exalting the "common cause" of the public employee union over the recognized First Amendment interests of the dissenting union employee to justify the so-called "chargeable" component of the compelled agency fee, *Abood* was out of step with the Court's compelled speech cases at the time it was decided.[2] Since the foundational decision in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court has analyzed compelled speech cases by starting with the presumption that the individual speaker controls his or her message.

Before and after *Abood*, the Court has only strengthened this presumption, and applied it in a number of contexts to invalidate government-mandated speech. *Abood*'s treatment of the mandatory agency fee cannot be reconciled with the principles announced in these cases.

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[2] *Amici* will not focus on the unjustifiable opt-out regime for the non-chargeable portion of forced agency fees.

Abood further strayed from mainstream First Amendment principles by accepting the argument that monetary gains resulting from collective bargaining justify dismissing the professed objections of dissenting employees. As such, *Abood* is premised on the remarkable assumption that dissenters' constitutional rights can be involuntarily sold at a monetary price.

Finally, *Abood* inexplicably relied on congressional labor policy to justify the impingement of First Amendment rights of state and local public employees, despite public employee unions' very existence depending on state law. Quite unlike private unions, moreover, public employee unions are a relatively new historical phenomenon, and their power has been improperly and unduly distorted by *Abood*'s historical accident—at the expense of dissenters' speech rights.

ARGUMENT

I. *Abood*'s Tolerance For Compelled Speech To Support The "Common Cause" Conflicts With The Fundamental First Amendment Rule That Individuals Have The Right To Control Their Own Speech.

Abood's tolerance for the "chargeable" component of compelled agency fees has persisted for too long as a special exception to mainstream First Amendment principles.

A. *Abood* Itself Recognized That The Entire Agency Fee—Chargeable Or Not—Implicates First Amendment Interests.

Abood correctly acknowledged that the agency fee involved the impingement of a dissenting payor's speech rights:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is *constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause* leaves some leeway for the leadership of the group."

Abood, 431 U.S. at 222-23 (quoting *Machinists v. Street*, 367 U.S. 740, 778 (1961)) (emphasis added) (footnote omitted).

Abood tolerated this impingement for the "common cause" up to the point that the union's speech activities became nakedly partisan or "ide-

ological." It created the chargeable/non-chargeable distinction as the supposed "remedy" for improperly compelled speech on the non-chargeable side of the line, 431 U.S. at 232-36, thereby establishing a regime that inherently incentivizes unions to categorize as chargeable as much of their activity as possible, through obfuscation or otherwise.[3]

Amici will not belabor the point ably made in the petition: *Abood* should be taken at its word that the *entire* agency fee implicates speech rights. *See* Pet. at 14-15. Thus, even on the "chargeable" side of the line, the funds are being taken, by law, directly from the non-consenting employee's paycheck for a form of lobbying and speech directed at the government—here, that teachers should have higher salaries, inflexible tenure rules, more generous pensions, and so on.

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[3] One *amicus* has explained:

> How the percentages of union dues apportioned to politics and collective bargaining are made is shrouded in secrecy. . . . This means that the union is holding many of the cards and has an incentive to say that as much as possible of the dues is being used for collective bargaining. . . . [T]here is a method to the madness: in determining *Hudson* rights, unions have an incentive to keep as much money as possible from nonmembers and spend as freely on politics as circumstances dictate. In addition, the smaller the refund, the less likely agency fee payers are to go through the trouble of securing it.

Daniel DiSalvo, Government Against Itself 64. *See also* Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. Pa. J. Bus. & Emp. L. 663, 694 (2008).

See Pet. at 18-20. Focusing on the hazy distinction between chargeable and non-chargeable components obscures the deeper First Amendment problems underlying the forced payment for both components in the first place.[4] Indeed, the line-drawing exercise speaks only to the *purposes* for which the non-union member has been compelled to subsidize the union's speech, not *whether* compulsion has occurred.

Rather, *amici* focus on *Abood*'s elevation of "common cause" interests (identified as "labor peace" and avoiding the supposed "free rider" problem) over the individual's interest to justify the chargeable portion of the agency fee. *Abood*, 431 U.S. at 221-23. Permitting compelled speech for the sake of such collective interests cannot be reconciled with the general rule that individuals control their speech and beliefs under a broad array of this Court's decisions. This mistake took *Abood* outside the mainstream of First Amendment jurisprudence at the time, and, as First Amendment doctrine has developed since, *Abood*'s outlier status has only been magnified.

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[4] Ironically, *Abood* has been cited many times as *supporting* the mainstream rule that speakers cannot be forced to subsidize speech with which they disagree—but only as to the non-chargeable portion. This may explain, in part, why the chargeable portion of the compelled agency fee has avoided close constitutional scrutiny for so long.

B. The Court's Major Compelled Speech Cases Prior To *Abood* Recognized The Paramount Interest Of The Individual Speaker.

1. The Court's first major decision involving government-compelled speech was *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which struck down a state rule conditioning access to public schools on saluting the American flag while reciting the pledge of allegiance. The language of the state rule was "taken largely from the Court's . . . opinion" three years earlier in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), where the Court *upheld* a flag salute requirement over the challenge that it violated the religious views of a Jehovah's Witness family.

In *Gobitis*, the Court characterized its task as "reconcil[ing] the conflicting claims of liberty and authority." *Id.* at 591. "When," the opinion asked rhetorically, "does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?" *Id.* at 593. In refusing to strike down the flag-salute rule, the Court repeatedly emphasized the importance of subordinating individual belief in the name of promoting the "common" and "unified" good.[5]

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[5] *E.g.*, 310 U.S. at 594-95 ("mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities"), 596 ("ultimate foundation of a free society is the binding tie of cohesive sentiment").

Barnette marked a significant change of course. Without citing a single case, the Court re-examined *Gobitis* and recast the debate. 319 U.S. at 634-42. Rather than adopting *Gobitis*' characterization of the flag salute requirement as a "general law" that impacted the Jehovah's Witnesses' religious views, *Gobitis*, 310 U.S. at 594-95, the *Barnette* court began with the proposition that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights *which guards the individual's right to speak his own mind*, left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 634 (emphasis added); *id*. at 634-35 (question was whether the "compulsory rite" could "infringe [the] constitutional liberty of the individual").

In just a few pages, the Court established the bedrock principle that the First Amendment protects the *individual's* "free mind" from compulsion by the state, and this interest is paramount. *Id*. at 637, 642. In an oft-cited passage, the Court concluded that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*. at 642.[6]

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[6] The Court has since repeatedly cited the similar view of Thomas Jefferson: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Irving Brant, James Madison: The Nationalist 354 (1948). Indeed, *Abood* cited this language to justify objection to the non-chargeable portion of the agency fee, 431 U.S. at 234 n.31, not recognizing its applicability to the *entire* agency fee.

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Despite recognizing that even the chargeable portion of a compelled agency fee impacts a dissenter's First Amendment rights because he or she may have "ideological objections to a wide variety of activities undertaken by the union," 431 U.S. at 222, *Abood* plainly saw no connection between *Barnette* and chargeable fees.[7]

2. Just two months before releasing *Abood*, the Court decided *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, New Hampshire citizens challenged a state law banning defacement of license plates bearing the state motto: "Live Free or Die." Plaintiffs alleged that the motto offended "their moral, religious, and political beliefs." *Id*. at 707.

The Court analyzed the dispute squarely in the context of *Barnette*: "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id*. at 714 (citing *Barnette*). And, "as in *Barnette*," the New Hampshire law "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id*. at 715; *see id.* at 714 ("right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'") (quoting *Barnette*).

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[7] *Abood* referenced *Barnette*'s "fixed star" passage only in concluding that unions could not compel non-chargeable contributions for "ideological" causes. 431 U.S. at 235.

While the Court considered "[c]ompelling the affirmative act of a flag salute . . . a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate," it concluded that "the difference is essentially one of degree." *Id.* at 715. As for the State's asserted interest in promoting "appreciation of history, individualism, and state pride," such collective goals could not overcome the "individual's First Amendment right to avoid becoming the courier" for an ideological message with which it disagreed. *Id.* at 716-17.

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Remarkably, *Abood* saw no connection between *Wooley* and the compelled payment of agency fees. *Abood* cited *Wooley* only once, in a footnote string cite of general First Amendment principles, and made no effort to distinguish the case. 431 U.S. at 231 n.28.

C. The Court Has Exalted The Individual Speaker's Interests And Beliefs In Multiple Compelled Speech Contexts, Before And After *Abood*.

The choice between a "common cause" goal and individual speakers' preferences plays out one way or another in every compelled speech case. Since *Barnette*, the Court has moved unmistakably in the direction of favoring the individual speaker's preference over the asserted collective goal—except in *Abood*.

In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), for example, the Court considered forced association fees used primarily to

market mushrooms. The Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 601 et seq., authorized the Secretary of Agriculture to establish a "Mushroom Council" which, in turn, was authorized to impose mandatory assessments on growers. *Id.* at 408. The objecting grower did not want to get lumped in with the market in a generic advertising campaign, and this desire was sufficient to invalidate the forced assessment.

Unlike in *Abood*, the objector was not labeled a "free rider" for hoping to avoid paying its "fair share" for group-generated "benefits" it did not want. Rather, the Court cited *Barnette*, *Wooley*, and *Abood* (for its willingness to disallow compulsion of the non-chargeable component), and stressed the importance of respecting the individual grower's viewpoint:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

United Foods, 533 U.S. at 410. And because the Mushroom Council existed almost entirely to engage in the speech with which the dissenter disa-

greed, the common-cause interest of the group did not justify the mandatory fee. *Id.* at 415-16.[8]

The First Amendment theory underlying *United Foods* applies with even more force here. Many teachers, including petitioners, flatly disagree with *Abood*'s presumption that all teachers benefit from collective bargaining. *See* Pet. at 23-24; *see also* Section II *infra*. Moreover, *United Foods* accepted for sake of discussion that the commercial speech interests at issue there were "entitled to lesser protection" than other speech interests. 533 U.S. at 410. So, while a mushroom grower cannot be forced to support commercial speech generically promoting mushrooms, under *Abood*, a dissenting teacher *can* be forced to support union speech that, for instance, urges the state to continue spending billions of dollars on a teacher-tenure regime found by a court to be so flawed that it violated the state's minimal constitutional guarantee for a quality education.[9]

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[8] Fourteen years after *United Foods* held that growers could not be compelled to pay for the Mushroom Council's speech, the Council remains alive and well. *See* Mushroom Council, *About the Mushroom Council*, online at http://mushroomcouncil.org/about-the-mushroom-council (boasting that the "Council plays a very important role in the national promotion of fresh mushrooms").

[9] In *Vergara v. California*, No. BC 484642, slip op. at 8, 11, 15 (Cal. Super. Ct. Aug. 27, 2014), the Los Angeles County Superior Court held that a series of job-security statutes backed by the California Teachers Association ("CTA") violated students' rights under the State constitution. Pet. at 18-19; *see Vergara* slip op. at 8 (evidence of the detrimental effect of "grossly ineffective teachers" on students "shocks the conscience"). The litigation and the underlying tenure policies became the critical issue in the 2014 race for Cali-

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1989), provides another example of *Barnette*-inspired deference to speaker's autonomy. In *Hurley*, a unanimous Court found that Massachusetts' common-cause interest in anti-discrimination did not justify forcing a parade organizer to admit parade participants whose message the organizer did not support. Such use of "the State's power violates the *fundamental rule* of protection under the First Amendment, that *a speaker has the autonomy to choose the content of his own message*." *Id*. at 573 (emphasis added). (The Court later referred to this as "the general rule of speaker's autonomy." *Id*. at 578.) "Although the State may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information,' outside that context it may not compel affirmance of a belief with which the speaker disagrees." *Id*. at 573 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), and citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973), and *Barnette*, 319 U.S. at 642).

The notion that the individual speaker presumptively controls their own speech has manifested itself in various other contexts:

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fornia Superintendent of Public Instruction, where the CTA spent $11 million to support the incumbent. John Fensterwald, *Superintendent race turns on future of reform*, EdSource (Nov. 1, 2014), online at http://bit.ly/1DQSdJ6.

1. *Patronage*. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court examined the long tradition of patronage for non-policymaking jobs. Plaintiffs alleged that they had to join the Democratic Party, "contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party" in order to keep their jobs. *Id.* at 355. The plurality opinion cast the dispute in *Barnette*-like terms, focusing on the individual's beliefs. *Id.* at 355-56 ("a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs"). The important interests of "effective government and efficiency of public employees" purportedly fostered by patronage could not satisfy the plurality's least-restrictive-means test. *Id.* at 363-64; *see also Branti v. Finkel*, 445 U.S. 507, 513-14 (1980) (noting that *Elrod* brought patronage "within the rule of cases like" *Barnette*).

The *Elrod* plurality's focus on the coerced financial support inherent in patronage applied with equal force to *Abood*'s discussion of the forced agency fee the following year:

> The financial and campaign assistance that [the dissenter] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and *any assessment of his salary is tantamount to coerced belief*. . . . Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of

> his political persuasion is constrained, and support for his party is diminished.

Elrod, 427 U.S. at 355-56 (emphasis added).[10]

Yet *Abood* apparently saw no connection between *Elrod* and the chargeable portion of the agency fee; it cited *Elrod* only with respect to the non-chargeable portion. *Abood*, 431 U.S. at 233-35; *see also id.* at 242 (Rehnquist, J., concurring) ("Had I joined the plurality opinion in *Elrod* . . ., I would find it virtually impossible to join the Court's opinion in this case.").

As the distinction between public employee unions and political parties diminishes each year—if ever there was a principled distinction—*Abood*'s failure to follow *Elrod* becomes more difficult to explain. *See id.* at 256-57 (Powell, J., dissenting) ("the public sector union is indistinguishable from the traditional political party in this country"); Edwin Vieira, Jr., *Are Public-Sector Unions Special Interest Political Parties?*, 27 DePaul L. Rev. 293 (1977).

2. *Forced Assistance To Third Parties' Speech.* An agency fee is compelled support for speech by the union. The Court has considered and rejected mandatory speech-assistance requirements in multiple cases apart from *United Foods*. In *Pacific Gas & Electric Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986), the Court invoked the individual speaker's autonomy in striking down a state

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[10] *Cf. Abood*, 431 U.S. at 230 (minimizing the compelled agency fee's burden on the dissenting payor since they remain otherwise "free to participate in the full range of activities open to other citizens").

requirement that the utility (PG&E) disseminate, in its customer mailers, materials generated by a ratepayer advocate. The compelled assistance requirement "penalizes the expression of particular points of view and forces speakers to alter their speech." *Id*. at 9. The State's common-cause goal of "fair and effective utility regulation," while it "may be compelling," did not survive strict scrutiny; among other things, the Court found "no substantially relevant correlation between" this interest and the compelled assistance. *Id*. at 19-20 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (internal citation omitted)).[11]

Pacific Gas also drew from *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which struck down Florida's "right of reply" statute when a candidate demanded access to the newspaper's editorial pages after they criticized him. *Pacific Gas* noted that the Florida statute forced the "newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent." *Pacific Gas*, 475 U.S. at 10-11 (including *cf*. cite to *Wooley* and *Barnette*).

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[11] *Harris v Quinn*, 134 S. Ct. 2618 (2014), similarly found no such connection to justify *Abood*'s "labor peace" rationale in concluding that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked." 134 S. Ct. at 2640. No such showing could be made given that (a) federal public employee unions advocate for union and non-union employees despite a *prohibition* on mandatory agency fees under federal law, 5 U.S.C. § 7102 (*see Harris*, 134 S. Ct. at 2640), and, (b) likewise, 23 states forbid mandatory agency fees. *See* DiSalvo at 64-66.

On the other side of the same coin, the Court has rejected efforts to limit one person's speech to enhance the relative position of other speakers. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (rejecting the goal of "equalizing the relative financial resources" of candidates as justification for cap on personal campaign expenditures); *id.* at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). In rejecting the "Millionaire's Amendment" in another statutory scheme aimed at leveling campaign expenditures, the Court further observed that the "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008). *Abood*, however, reached the opposite conclusion: "such interference as exists [through the agency fee] is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222.

3. *Avoidance Of "Broad Prophylactic Rules" Compelling Speech*. In *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), the state required professional fundraisers to disclose to potential donors "the percentage of charitable contributions collected during the previous 12 months that were actually turned over to a charity." The Court viewed this as a sort of "prophylactic rule of compelled speech," aimed at informing donors "how the money they contribute is spent" in light of a purported "misperception" that the

money given to professional fundraisers "goes in greater-than-actual proportion to benefit charity." *Id*. at 798.

The mandatory agency fee is, in a sense, also a prophylactic rule aimed at preventing the perceived injustice of so-called "free riders" benefitting from collective bargaining. *Riley*, however, applied strict scrutiny to reject the mandated disclosure, since "more benign and narrowly tailored options [we]re available" to address the alleged problem of "donor misperception." *Id*. at 800. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 801 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

D. Mandatory Agency Fees Cannot Be Justified Under The Very Narrow Circumstances Where Compelled Speech Is Still Allowed.

There remain a few narrow circumstances where the government may compel speech with which a speaker disagrees, none of which support deviating from the general rule of speaker autonomy in this case. In the commercial speech context, the Court has occasionally tolerated the compelled dissemination of "purely factual and uncontroversial information." *See Hurley*, 515 U.S. at 573. That, of course, is not the case here.

Nor does this case fall within the scope of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), which upheld mandatory assessments as part of a comprehensive, mar-

ketwide regulatory scheme, which were used to fund generic advertising. As the Court explained in *United Foods* (and stressed in *Glickman* itself), that case is limited to its particular facts—"the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy." 533 U.S. at 411. *See also Glickman*, 521 U.S. at 469 (stressing "the importance of the statutory context in which [the case] arises.").

Finally, compelled bar association fees, permitted by *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), are distinguishable for the reasons set out in *Harris*: they are justified by the "State's interest in regulating the legal profession and improving the quality of legal services." 134 S. Ct. at 2643-44 (citation omitted).

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In sum, *Abood* strayed from bedrock First Amendment principles respecting the individual speaker's autonomy and beliefs. The advancement of these principles in First Amendment doctrine since *Abood* only highlights its anomalous status.

II. *Abood*'s Mistaken Presumptions Caused It To Stray Even Further From The First Amendment Mainstream.

Abood violated the fundamental First Amendment rule that the government must always bear the burden of justifying an abridgment of speech rights. *See*, *e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the con-

stitutionality of its actions."). *Abood* assumed that no such showing was required because the "important government interests recognized in the *Hanson* and *Street* cases *presumptively support the impingement* upon associational freedom created by the agency shop." 431 U.S. at 225 (emphasis added); *id.* at 220-22 (discussing "labor peace" and "free rider" justifications). As explained in *Harris*, however, *Abood*'s blanket reliance on these cases was unwarranted. *Harris*, 132 S. Ct. at 2632.

Moreover, *Abood*'s acceptance of the "free rider" justification itself flips the governing rule of speaker autonomy on its head: Notwithstanding the dissenter's stated position that they strongly oppose being forced to support the union's speech, *Abood* accepts at face value the claim that the dissenter "nevertheless obtain[s] benefits of union representation that necessarily accrue to all employees,"[12] so therefore the burden on their First Amendment right is acceptable. That is, *Abood* improperly presumes *as a constitutional matter* that some measure of monetary "benefit" can justify forcing a citizen to support a cause they verify is abhorrent to them. Such a rule not only smacks of paternalism, it suggests that constitutional rights can be sold—involuntarily—to the govern-

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[12] *Abood*, 431 U.S. at 222 (citing *Street*, 367 U.S. at 761; *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415 (1976); and *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 740-41 (1963)). The Court's acceptance of the "free rider" justification in each of those cases, however, was rooted in *deference to a congressional determination* that free rider concerns outweighed speech burdens on dissenting *private*-sector workers. *See also* Section III, *infra*.

ment for a price. (*Abood* did not say how much "benefit" was enough.) In matters of belief, it is unclear how *any* amount of monetary "benefit" can overcome the First Amendment harm associated with being forced to support an organization over one's objection. *Cf. Elrod*, 427 U.S. at 356 (*Barnette*'s prohibition on forced orthodoxy cannot be imposed "[r]egardless of the nature of the inducement").

Consider the case of a young teacher, confident in her abilities, who opposes rigid tenure rules, including, for example, "last in/first out" rules that require new teachers to get laid off first. Or an ambitious teacher of any age who simply objects to a tenure system and strongly favors a merit-based system. Why are their views entitled to less respect than the mushroom grower in *United Foods* who thought their product was superior and therefore objected to a forced marketing fee? Under *Abood*, the dissenting teachers are denigrated as "free riders" on the assumption that they don't know what is best for them. Who is more of a "free rider," the mushroom grower who may benefit marginally from generic advertising paid by other growers, or one of 330,000 teachers who believes that the CTA's positions fundamentally harm not just herself, but also the state as a whole and the children in her classroom?

That *Abood* persists in a system that affords greater constitutional dignity to the dissenting mushroom grower than the dissenting teacher is not just an "anomaly." *Knox*, 132 S. Ct. at 2290. It is an affront to teachers who dare to believe differently.

III. History Does Not Support *Abood*'s Reliance On Theories Underlying Congressional Regulation Of Private Unions.

Finally, it is worth noting that public employee unions exist by legislative grace *in each State*. Indeed, through the 1950s, "many states forbade government workers from joining unions, and when they could join unions, union rights were highly restricted." DiSalvo at 40 (also noting that only three states had collective bargaining laws for state and local employees in 1959, and the number grew to 33 by 1980). Still today, three states expressly forbid the practice of public employee unionization. *Id.* at 41.

It is an utter mystery, then, why *Abood* looked as it did to the National Labor Relations Act (NLRA) and the Railway Labor Act as the guideposts for measuring the union's interest as a justification for abridging dissenters' speech rights. *Abood*, 431 U.S. at 218-28. *Abood*'s core conclusion was that "such interference [with speech rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union to shop to the system of labor relations established by Congress." *Id*. at 222.

President Franklin Roosevelt signed the NLRA in 1935. 29 U.S.C. § 151 *et seq*. The law did not cover public employees, and, indeed, President Roosevelt categorically opposed the notion that public employees should *ever* be allowed to collectively bargain:

> Meticulous attention should be paid to the special relations and obligations of public servants to the public itself and to the Government. . . . The process of collective bargaining, as usually understood, cannot be transplanted into the public service.

DiSalvo at 43 (citing Samuel I. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt 325 (Random House 1937)).

Policymakers in that era, well aware of the strife that led to legislation protecting *private* labor unions' activities, nevertheless objected to *public* employee unions—for precisely the reasons that public collective bargaining so strongly implicates public employees' First Amendment interests:

> The dominant understanding, regardless of political viewpoint—from labor leaders to conservative Republicans—was that collective bargaining would interfere with the sovereignty of government by delegating a piece of policymaking authority to union representatives in collective bargaining negotiations.

DiSalvo at 40.

Looking back, it is astonishing how quickly CTA leveraged the *Abood* anomaly. CTA did not have the right to collectively bargain and collect agency fees under California law until 1975, S.B. 160, 1975-1976 Reg. Sess. (Cal. 1975), yet it gained near-complete dominance over California politics soon thereafter. In 2010, the California Fair Political Practices Commission measured all campaign and lobbying reports from 2000-2009

and identified the 15 largest political spenders, whose collective political expenditures totaled $1 billion. Cal. Fair Political Practices Comm'n, *Big Money Talks: California's Billion Dollar Club* at 11 (March 2010), online at http://www.fppc.ca.gov/reports/Report31110.pdf. CTA lapped the field with more than $211.8 million in such expenditures. The next-closest political player during the time period, an affiliate of SEIU (the union at issue in *Knox*), spent $107.4 million. The report shows that, together, CTA's and SEIU's spending on politics ($319 million) outpaced by more than $96 million the political spending by the four largest associations representing business interests *combined*.[13]

The complaint in this case, moreover, highlights many CTA expenditures that are remarkable not just for their size, but also for their seeming lack of connection to teachers' bargaining. Pet. App. 64a-67a. Given the sums it now collects and spends on such far-flung activities, and given the basic reality that money is fungible, *Knox*, 132 S. Ct. at 2293 n.6 ("our cases have recognized that a union's money is fungible"), even if CTA's funding declines without the luxury of objectors' forced agency fee, no one can plausibly argue that CTA will be unable to continue its bargaining activities.[14] *See Harris*, 134 S. Ct. at 2641. CTA certain-

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[13] Collectively, the Pharmaceutical Research and Manufacturers of America, California Hospital Association, California Chamber of Commerce, and Western States Petroleum Association spent $222,474,639 during the period. *Big Money Talks* at 11.

[14] While agency fees increase union membership, evidence from the states that do not permit agency fees demonstrates

ly does not take this position, at least internally. CTA informs its members that it has already begun "to address long-term approaches to the loss of Fair Share." *See* Cal. Teachers Ass'n, *Not if, but when: Living in a world without Fair Share . . .* (July 2014) at 20, online at http://bit.ly/1DswFRS; *id.* (asking, "What is it like to work in an environment where members must be signed up each year?"); *id.* at 22 ("[p]lanning, organizing, and preparedness will ensure our continued organizational strength").

CONCLUSION

Abood's forced agency fee regime cannot survive scrutiny under traditional First Amendment principles. The Court should grant the petition and overrule *Abood*.

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that most public employees would voluntarily join even if they are not forced to pay dues. DiSalvo at 64-65.