No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PROFESSORS EUGENE VOLOKH AND WILLIAM BAUDE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Professor Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at the UCLA School of Law. He has taught and written about First Amendment law for over 20 years, and has authored dozens of law review articles on the subject as well as the textbook The First Amendment and Related Statutes (6th ed. 2016). Professor William Baude is the Neubauer Family Assistant Professor of Law at the University of Chicago Law School. He specializes in constitutional law, and is the co-author of the textbook The Constitution of the United States (3d ed. 2016). Amici curiae have an interest in the proper development of First Amendment law.[1]

SUMMARY OF ARGUMENT

1. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court has observed, is "something of an anomaly" when it comes to the First Amendment. *Harris v. Quinn*, 134 S. Ct. 2618, 2627 (2014) (internal quotation marks omitted). In fact, *Abood* is even more anomalous than previously acknowledged. For the first time, "*Abood* . . . recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997). *Abood* then concluded that some interference with this new First

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[1] All parties have consented in writing to the filing of this brief. No entity or person aside from amici and their counsel made any monetary contribution supporting the preparation or submission of this brief. No counsel for any party to this proceeding authored this brief in whole or in part.

Amendment interest was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations," and the need to avoid free-riding on the public union's collective bargaining efforts. *Abood*, 431 U.S. at 222.

The Court has since questioned whether *Abood* balanced the competing interests correctly, noting, for example, that "free-rider arguments are generally insufficient to overcome First Amendment objections." *Harris*, 134 S. Ct. at 2627 (internal quotation marks and alterations omitted). Petitioner and his *amici* press similar arguments for reversing *Abood* here. *See* Pet. Br. at 36–37.

Where *Abood* truly went wrong, however, was not in how it applied the new First Amendment objection it recognized. Rather, *Abood* erred by recognizing that objection in the first place. Compelled subsidies of others' speech happen all the time, and are not generally viewed as burdening any First Amendment interest. The government collects and spends tax dollars, doles out grants and subsidies to private organizations that engage in speech, and even requires private parties to pay other private parties for speech-related services—like, for example, legal representation. To be certain, these compelled subsidies are subject to *other* constitutional restrictions. For example, the government cannot compel payments that violate the First Amendment's Religion Clauses or the Equal Protection Clause. But a compelled subsidy does not itself burden a free-standing First Amendment interest in freedom of speech or association.

So if *Abood* misapplied the First Amendment, it undercut a First Amendment interest that *Abood* it-

self miscreated. If anything in *Abood* should be revisited, it is the existence of the First Amendment interest itself. That is also sufficient reason to reject Petitioner's request to expand *Abood*'s First Amendment holding by overturning it in the other direction.

2. There is certainly no First Amendment violation when the government itself engages in taxpayer-funded speech that some find objectionable. The content of that speech is protected from First Amendment scrutiny by the government speech doctrine. No matter how much we disagree with the government's message, we cannot withhold the portion of our taxes that support it. The First Amendment permits taxpayers who object to government speech to raise their own voices in opposition and to associate with others who share their views. And, of course, disgruntled voters can express their frustration at the ballot box. But those are their only remedies. They have no First Amendment interest to resist subsidizing government speech they happen to disapprove of.

The First Amendment analysis is the same when the government gives tax revenues to private entities to provide services that include speech. As with government speech, the government's choice of what services and what speech to subsidize does not implicate the First Amendment's freedom of speech and association rights, outside of certain exceptions like public forums. *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991). Nor does the First Amendment constrain private grant recipients when they speak using government funds. Again, taxpayers who oppose these compelled expenditures have no right to withhold taxes,

and no recourse besides engaging in speech or association themselves or voting for different government officials.

The only difference with the compelled subsidies challenged here (and in *Abood*) is that they involve payments made directly from one private party to another as a condition of public employment. But the government frequently conditions important activities on the purchase of speech-related services from private entities or individuals. Doctors and lawyers must enroll in continuing medical and legal education courses to remain in practice. States require entrants to a wide variety of occupations to purchase dozens or hundreds of hours of training and certifications. And a number of states require people buying real estate to be represented by an attorney at the closing. The government requires people to purchase non-speech services from private entities too, like car insurance and vaccinations, and the entities that receive these government-compelled funds are then free to spend them on objectionable speech.

The First Amendment does not provide freedom from any of these mandatory payments for others' speech. Practicing attorneys cannot refuse to pay for CLE programming because they disagree with the messages presented or because they choose not to associate with CLE providers. Home buyers cannot refuse representation by counsel in states that require it, even if they would prefer to spend their money on something else. These and other instances of private speech funded by government mandate need not be viewpoint-neutral, nor must they be justified by a compelling governmental interest. The First Amendment rights to freedom of speech and association

simply do not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of.

3. Stripped of *Abood*'s unfounded First Amendment concerns, this is an easy case. The government has determined that collective bargaining is the best way to negotiate contracts and settle disputes with public employees. The government would undisputedly be free to establish a public collective bargaining agent, or to pay a private one directly from the public fisc. That it has chosen instead to pay its employees and then require *them* to hire the collective bargaining agent does not change the constitutional analysis.

4. Under the doctrine of stare decisis, *Abood* should not be overturned unless it reached the wrong result. It is not enough to note that *Abood* was badly reasoned, or that parts of the opinion were flawed. The Court should overturn *Abood* only if, going back to first principles, it can establish that the Free Speech Clause *does* protect a right that is violated by agency fees. But the First Amendment provides no such right. The judgment below should be affirmed.

ARGUMENT

I. THERE IS NO FIRST AMENDMENT RIGHT NOT TO SUBSIDIZE SPEECH ONE DISAGREES WITH

The First Amendment injury from compelled subsidies that *Abood* recognized has an enormous scope. Virtually any disagreement with a subsidy recipient's positions could trigger it. As the Court wrote of public unions in *Abood*, "[o]ne individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself." *Abood*, 431

U.S. at 222. "[T]he union's wage policy" could be objectionable "because it violates guidelines designed to limit inflation." *Ibid.* Some public employees might oppose "the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination." *Ibid.* The "union's policy in negotiating a medical benefits plan" could conflict with a public employee's "moral or religious views about the desirability of abortion." *Ibid.*

Just as non-union members may find many reasons to disagree with a public union's speech, there are countless grounds to object to other speech supported by government funds. Many people undoubtedly disagree with a great deal of public and private speech funded by taxes or other compulsory payments. There is, however, no First Amendment interest in avoiding those subsidies.

A. The First Amendment Does Not Restrict Taxpayer-Funded Government Speech

The most commonplace compelled subsidy of others' speech is government speech funded by tax dollars. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). Federal, state, and local governments all collect taxes and spend this money on speech that advances government objectives, such as public education; public health and safety campaigns; anti-discrimination advocacy; and environmental conservation campaigns, among many others.

"When government speaks, it is not barred by the Free Speech Clause from determining the content of

what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015). The government is therefore not bound to be viewpoint-neutral in its speech or to provide a compelling governmental interest for the viewpoints it expresses. *Ibid.* For example, as the Court recently observed, when the government produced "posters urging enlistment [in the military], the purchase of war bonds, and the conservation of scarce resources" during World War II, "the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities." *Matal*, 137 S. Ct. at 1758. The government, and its employees and contractors, can likewise advocate for recycling or vaccination or any other idea without giving equal support to the opposing view.

Nowhere is this more evident than in public education, where the government sets the entire curriculum. The government demands far larger payments from most people to support public education than it does for public unions or other subsidized private speech. And the broad spectrum of views expressed by the government and its employees on public campuses ensures that almost any taxpayer could find a message to disagree with. Nonetheless, the First Amendment has never permitted taxpayers to withhold payments to the government to avoid subsidizing objectionable speech.

B. The First Amendment Does Not Restrict Taxpayer-Funded Government Subsidies of Private Speech

So the First Amendment interest recognized in *Abood* could only conceivably apply to subsidies of private speech, not speech by the government. Justice Powell considered this limitation in his concurrence in *Abood*, and offered the following distinction between subsidizing government speech as compared with speech by private actors:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Abood, 431 U.S. at 259 n.13 (Powell, J., concurring).

Logic does not support Justice Powell's distinction. First, representative government is in the driver's seat in both direct government spending and in private subsidies: the same government that

spends taxpayer money on causes some find "abhorrent" also decides to adopt agency fee requirements or other private subsidies. In both cases, the government is ultimately responsive to the people. But the government's accountability to the public could not cure a First Amendment violation. The First Amendment, like the rest of the bill of rights, was created to protect Americans against government overreaches. The need for these protections does not disappear because the government represents the taxpayers and is accountable to them. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598, (1998) (Scalia, J., concurring in the judgment) ("[O]ne would think that directly involving the government itself in the [First Amendment violation] would make the situation even worse."). On the contrary, dissenting minority groups are the ones who most need First Amendment protection. By definition, the rights and interests of these groups cannot be guaranteed by majoritarian control of government.

Second, Justice Powell's distinction between government and private speech subsidies ignores that the government is free to spend public money to fund private speech without triggering First Amendment scrutiny. Just as "[t]he Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about [a government] venture," *Matal*, 137 S. Ct. at 1757, the government may subsidize private speech that furthers its objectives. In other words, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

For instance, the federal government funds private organizations that advocate for democratic institutions through the National Endowment for Democracy. *See* 22 U.S.C. § 4411. And many states fund crisis pregnancy centers, which advocate for women to bring unwanted pregnancies to term. Jennifer Ludden, *States Fund Pregnancy Centers That Discourage Abortion*, NPR (Mar. 9, 2015, 4:32 PM), https://www.npr.org/sections/health-shots/2015/03/09/391877614/states-fund-pregnancy-centers-that-discourage-abortion. The First Amendment does not restrain these uses of public money to subsidize private speech.

Indeed, the Federal Government routinely funds private programs performing education, public health and safety outreach, research, training, civil society development, and many other missions. *See generally* U.S. General Services Administration, *2017 Catalog of Federal Domestic Assistance* (Oct. 2017 ed.), https://www.cfda.gov/downloads/CFDA_2017.pdf. The government need not observe viewpoint neutrality in handing out these grants. *Rust*, 500 U.S. at 193. Nor must the government restrict grant recipients' use of these funds for lobbying or other political purposes. Although the government may have the power to forbid grant recipients from engaging in political activity, it has no obligation to do so. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548–49 (1983) ("Congress might also enact a statute providing public money for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying.").

Again, the private speech subsidized by the government is surely objectionable to some taxpayers. But, just as with the government's own speech, there is no First Amendment right not to have one's tax dollars transferred to private entities who will spend them on speech the taxpayer disagrees with. Neither the government nor the private recipient need separate out the funds used for speech from those used for other services. Nor must the government justify these speech subsidies with a compelling interest.

To be sure, the Constitution imposes some limits on government funding of private speech. The government could not, for example, spend taxpayer money to establish a national religion. *See McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005). And it may be that the government cannot force its employees to *join* a public union, which might violate the First Amendment's guarantee of freedom of association. The First Amendment might also restrict discriminatory application of compelled funding requirements—for instance, if *only* those employees who opposed the union were required to fund it. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994) (condemning compulsions "activated by [a] particular message spoken" that exact a "content-based penalty"). Some justices of this Court have also suggested that the Constitution (though not the Free Speech Clause) prevents the government from giving public funds to one major political party but not another. *Finley*, 524 U.S. 569, 598 n.3 (Scalia, J., concurring in the judgment).

These limits, however, do not derive from a general-purpose First Amendment right not to subsidize objectionable speech. Outside a public forum, the

First Amendment rights to freedom of speech and association do not inhibit the government from funding private speech that the government believes will advance the public interest.

C. The First Amendment Does Not Restrict Government Compulsion to Purchase Services, Regardless Of How The Service Provider Spends Its Revenues

There is thus only a narrow possible foothold for the First Amendment interest recognized in *Abood*. If the government formed its own collective bargaining agent for public employees, the government speech doctrine would preclude First Amendment scrutiny of the agent's speech or the funds that support it. *See Walker*, 135 S. Ct. at 2245. Similarly, if the government used taxpayer revenues to subsidize a non-governmental collective bargaining agent for public employees, the government's funding decision would not have to be viewpoint-neutral or justified by a compelling interest. *See Rust*, 500 U.S. at 193. *Abood*'s shaky premise is that the First Amendment analysis is somehow different when the government compels people to hand over money directly to another private party.

But *Abood* provided no explanation why this would be true, and we have heard no such explanation. The government surely could transfer public funds to a private collective bargaining agent without violating the First Amendment. It likewise does not violate the First Amendment when the government achieves the same result through a private transfer that eliminates the governmental middle-man.

Abood's assumption that compelled private subsidies are subject to First Amendment scrutiny also ignores the web of laws requiring private parties to purchase speech-related services from private entities as a condition of exercising rights just as important as public employment. Attorneys and doctors must purchase continuing education to maintain their right to practice. *See* American Bar Association, *MCLE Information by Jurisdiction*, https://www.americanbar.org/cle/mandatory_cle/mcle_states.html (last visited Jan. 3, 2018); Federation of State Medical Boards, *Continuing Medical Education: Board-by-Board Overview*, https://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/GRPOL_CME_Overview_by_State.pdf. As with any compelled speech subsidy, some people subjected to this requirement may disagree with the speaker's point of view. For example, New York, California and other states require attorneys to purchase education on competence issues, like substance abuse and mental health, and on the elimination of bias. *See, e.g.*, State Bar of Cal. Rule 2.72; Ariz. Sup. Ct. Rule 45; 22 NYCRR § 1500.22; Fla. S. Bar Rule 6-10.3. Like the dissenting public employees described in *Abood*, some attorneys may disapprove of the messages they are compelled to subsidize. But the First Amendment does not permit them to continue practicing without meeting CLE requirements. [2]

[2] Compelling people to actually *listen* to speech might pose significant First Amendment problems, though such problems might be reduced if the compulsion is part of a system of professional regulation and education. But compelling people to *pay* for CLE programming, whether through

Many states condition occupational license requirements on attending training sessions or receiving certifications from accredited private providers. Barbers, cosmetologists, school bus drivers, house painters, interior designers, auctioneers—various states require entrants to all of these professions and many others to purchase dozens or even hundreds of hours of instruction as a prerequisite to licensing. *See generally* Dick M. Carpenter II, *et al.*, License to Work: A National Study of Burdens from Occupational Licensing, Institute for Justice (May 2012), http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf. When the government requires a citizen to attend and complete a course or training session, it compels her (or her employer) to pay for speech, and to show up and listen to that speech too.

Several states also require the parties to a real estate transaction to hire an attorney.[3] These

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taxes, through mandatory bar fees, or through direct payments, ought to be constitutional.

[3] *See, e.g.*, N.Y. Jud. L. § 484 (New York); *In re Mid-Atlantic Settlement Servs.,* No. UPL 95-15 (Bd. on Professional Responsibility of the Supreme Ct. of Del. Mar. 8, 2000), *aff'd, In re Mid-Atl. Settlement Servs.*, 755 A.2d 389 (Del. 2000) (Delaware); *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info Servs.*, 459 Mass. 512, 532 (2011) (Massachusetts); NC Bar Advisory Op. 2002-1 (North Carolina); *State v. Buyers Serv. Co.*, 357 S.E.2d 15 (S.C. 1987) (South Carolina); O.C.G.A. § 44-14-13(a)(10) (Georgia); C.G.S. § 38a-402(13) (Connecticut). *See also* James Orlando, *Requirement of Attorney Presence At Real Estate Closing*, Conn. Office of Legis. Res., No. 2009-R-0448 (Dec.

attorneys engage in speech by advising their clients and preparing legal documents. But there is no First Amendment problem presented by these requirements merely because the government compels one private party to subsidize speech or advocacy by another.

Numerous laws also mandate subsidies for non-speech services from private organizations, which can then spend their government-compelled profits on speech. The vast majority of states require residents to purchase car insurance as a condition of driving a car. *Minimum liability car insurance requirements by state*, CarInsurance.com, (Dec. 12, 2017) https://www.carinsurance.com/Articles/minimum-liability-car-insurance-requirements-by-state.aspx. Until the recent repeal of the Affordable Care Act's individual mandate, the federal government required all citizens to buy health insurance. *See* 26 U.S.C. § 5000A. All states require parents to vaccinate their children as a condition of attending public school, and most do not permit exemptions on philosophical grounds. Ctr. for Disease Control & Prevention, *State School Immunization Requirements and Vaccine Exemption Laws*, https://www.cdc.gov/phlp/docs/school-vaccinations.pdf. Compulsory payments fill the coffers of the organizations that provide these services, and the funds may then be used to support objectionable speech. Once again, however, the First Amendment rights to freedom of speech and association provide no basis to avoid these subsidies.

23, 2009), https://www.cga.ct.gov/2009/rpt/2009-R-0448.htm.

Viewed against the full spectrum of compelled subsidies to private speakers, *Abood* and its progeny suffer from tunnel vision. Compelled government subsidies for services that include speech are not limited to union dues, bar dues, and a few obscure regulatory schemes. There is no principled way to draw a line between these cases and the many instances where the government compels individuals to purchase speech, or to purchase services from private actors who are free to spend the compelled subsidies on speech.

Whether or not it is good policy for the government to require private citizens to have representation, or training, or insurance, the First Amendment does not require the government to provide or fund these services directly. It is free to rely on market actors and self-regulating professional bodies—methods of regulation that are less intrusive than direct government control. Yet once it does so, members of the public do not acquire a right to demand that part of their compulsory legal, training, or insurance fees be refunded if the recipients end up using some of their profits for their own ideological expression.

Nor have we seen any persuasive argument that a right against compelled subsidies is supported by the original meaning of the Constitution. Although Petitioner's *amici* suggest that Madison and Jefferson would have supported a prohibition on compelled speech subsidies, the only support they muster comes from the *freedom of religion* context. Amicus Curiae Br. of the Center for Constitutional Jurisprudence at 12; *see also Abood*, 431 U.S. at 234 n.31. Religious speech is different, because the Establishment Clause restricts the government from giving tax money to

support religion as much as it restricts compelling private transfers supporting religion. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions[.]"). Indeed, Jefferson's famous line that to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical" was made in opposition to Virginia's tax levy to support its established church. *Id.* at 28. Such a levy would be held unlawful today, and so would compelled private subsidies to a church. But these restrictions derive from the Establishment Clause, not the First Amendment rights to freedom of speech and association.

True, the Court has rightly held that government *restrictions* on political spending by private parties are speech restrictions that burden the First Amendment. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010). But the reverse does not follow. Campaign spending is protected not because it is itself speech, but because the spending enables speech. Compelled spending is therefore not compelled speech.

The right not to subsidize speech one disagrees with was adopted uncritically in *Abood*, and if taken seriously, it is incompatible with many of the traditional functions of government. If the Court revisits *Abood*, it should reject this unwarranted expansion of the First Amendment.

II. A GOVERNMENT REQUIREMENT THAT EMPLOYEES HIRE A COLLECTIVE BARGAINING AGENT DOES NOT VIOLATE THE FIRST AMENDMENT

Once public sector agency fees are placed in the context of other compelled subsidies, and the lack of foundation for *Abood*'s First Amendment injury is exposed, this becomes an easy case. Public sector unions serve as collective bargaining agents. They provide a single point of contact for negotiations with the employer, and help to settle disputes amicably. The question whether closed shop unions are the best solution to problems of industrial relations is a policy issue for legislatures. As far as the Constitution is concerned, "[i]ndustrial peace along the arteries of commerce is a legitimate objective; and [a legislature] has great latitude in choosing the methods by which it is to be obtained." *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 233 (1956).

The analysis above suggests the many ways the government could choose to implement a compelled subsidy to ensure the availability of collective bargaining agents. The government could pay its employees a reduced salary, create a state entity to serve as a collective bargaining agent, and fund it with the savings. By the same token, the government could use the savings to hire a private union to represent its employees. Or it could do what it does now, and require its employees to give directly to the union as a condition of government employment. In the eyes of the First Amendment, these choices are all equal.

Regardless of which structure the government uses to compensate collective bargaining agents, dissenting employees subsidize the union under govern-

ment compulsion. But none of these structures violates the First Amendment. Like the countless other compelled subsidies that enable government to function, it does not implicate freedom of speech at all.

III. THE COURT SHOULD NOT OVERRULE *ABOOD* BECAUSE IT REACHED THE CORRECT RESULT

In order to overrule part of *Abood*, as Petitioner urges, the Court should have to conclude that that part of *Abood*'s holding is wrong as a matter of first principles. This requirement is antecedent to the usual analysis of stare decisis. "[S]tare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). The Court "need not . . . approve or adopt all the language and all the reasoning" of *Abood* to leave it alone. *City of Greenwood v. Peacock*, 384 U.S. 808, 831 (1966). *Abood* should be upheld if it the Court determines that the opinion and its progeny were "correct in their basic conclusion" that agency fees do not inherently violate the First Amendment. *Ibid.*

Petitioner's critique of *Abood* does not establish that *Abood* was wrongly decided. He argues that *Abood*'s premise that "forcing employees to subsidize advocacy that is political and ideological in nature" should have led to the conclusion that "it is unconstitutional to force employees to subsidize bargaining with the government." Pet. Br. at 15. But this is merely a criticism of *Abood*'s reasoning, not an argument that public sector agency fees are in fact unconstitutional. If *Abood*'s premise was unduly generous to the First Amendment claim at issue, then it does

not matter whether its subsequent reasoning was faulty.

The same is true of the more recent cases of *Harris* and *Knox*. *Harris* characterized *Abood* as "treat[ing] the First Amendment issue" raised by agency fees "as largely settled," despite a lack of relevant holdings in previous cases. *Harris v. Quinn*, 134 S. Ct. 2618, 2631 (2014). It then attacked the basis on which *Abood* determined that agency fees do not violate the First Amendment rights of dissenting employees. *Id.* at 2633–34. *Harris* condemned agency fees for violating "the 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." *Id.* at 2644. But the only source for this supposedly "bedrock principle" seemed to be *Abood* itself, and subsequent cases applying it. *Knox* likewise emphasized the pedigree and importance of the First Amendment prohibition of "compelled funding of the speech of other private speakers or groups," but cited only *Abood* and its progeny for support. *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309 (2012).

The alleged deficiencies of *Abood*'s solution to the First Amendment problem of compelled funding of private speech can only justify overruling that case if the First Amendment problem actually exists. To conclude that *Abood* should be overruled because agency fees violate the First Amendment, one must do more than simply critique the internal logic of *Abood*. One must create what was absent in *Abood*: a justification, from first principles, for a First Amendment right not to subsidize speech with which one disagrees. If all that can be found to justify this supposedly "bedrock

principle" is circular citations and *ipse dixit*, then *Abood* was not wrongly decided and should not be overturned.

CONCLUSION

There is no First Amendment right against having one's money taken and spent on causes with which one disagrees. The decision below should therefore be affirmed.

Respectfully submitted,

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