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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner, Mark Janus. For reasons stated herein, Landmark respectfully urges the Court to overrule its prior decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and grant the relief sought by the Petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's opinion in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) is an "anomaly" in First Amendment Law that should be overruled. In *Abood*, the Court applied private sector cases to a public sector issue. The regulatory frameworks of public and private sector unions are different. They warrant separate and

[1] The parties have provided blanket consent for the filing of *Amicus Curiae* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

distinct strict scrutiny analysis when speech is compelled. In addition, collective bargaining with the government is inherently political, making the compelled speech of agency fee payers in public sector unions more egregious. Agency fee payers should not be forced to subsidize political activity they abhor.

ARGUMENT

I. The *Abood* Court improperly applied private sector union cases and provided no analysis of the serious impairment of First Amendment rights of agency fee payers.

Collective bargaining is the process by which a group of workers speaks with one voice to negotiate the terms of employment with their employer, "including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more." *Collective Bargaining*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining, (last visited November 20, 2017). It is a fundamental purpose of a labor union.

Where permitted, a union may agree with its employer during collective bargaining to create a "union shop," where union membership is mandatory, or an "agency shop." In an agency shop, union membership is not a condition of employment, but every employee represented by the union, including non-union members, must pay the union a service fee equal to union dues. This fee is intended to prevent "free riders" who

would otherwise benefit from the union's efforts. This system requires American workers to subsidize the ideological activities of groups with which they don't want to associate and warrants strict scrutiny.

Under *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977), the First Amendment rights of the agency fee payers are only impinged to the extent that the fees are used for ideological activities not germane to collective bargaining. Unfortunately, Justice Stewart's opinion in *Abood* is notable for its ambiguity and failure to subject the impingement of First Amendment rights to strict scrutiny. As Justice Alito noted in *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012), the *Abood* Court applied private sector precedents to the public sector union context "without any focused analysis." The *Abood* Court failed to discern the principled distinctions between private sector unions and public sector unions arising from state law, including the inherently political nature of collective bargaining with the government. It is an anomaly within the Court's First Amendment jurisprudence that should not stand.

A. Federal regulation of private sector workers under the Commerce Clause arose from crisis and is relatively uniform.

Federal legislation to protect collective bargaining arose from major labor disputes within the private, not public, sector. The Clayton Act of 1914, Ch. 323, 38 Stat. 730, specifically exempted labor from antitrust

considerations. 15 U.S.C. § 17. After decades of strikes and violence in the railway industry, the Railway Labor Act of 1926 ("RLA"), Ch. 347, 44 Stat. 577, granted collective bargaining to railroad workers. In 1951, to prevent the problem of the "free rider," Congress amended the RLA to expressly permit "union shop" agreements requiring union membership as a condition of employment, notwithstanding any state law. 45 U.S.C. § 152, Eleventh. The short-lived National Industrial Recovery Act ("NIRA"), Pub. L. No. 73-67, Ch. 90, 48 Stat. 195 (1933), enacted during the crisis of the Depression, granted collective bargaining rights to private sector workers but expired after two years.

After "a procession of bloody and costly strikes" that, in Senator Robert F. Wagner's words, almost became national emergencies, Congress passed the National Labor Relations Act of 1935 ("NLRA" or "the Wagner Act"), Ch. 372, 49 Stat. 449, 29 U.S.C. §§ 151-169. The NLRA granted collective bargaining rights to most private sector workers. It established collective bargaining as the "policy of the United States." 29 U.S.C. § 151. The NLRA allowed agency shop clauses but also permitted states to ban them. NLRA § 14(b), 29 U.S.C. § 164(b). Congress, wary of overstepping its authority into intrastate activity, justified these intrusions into the private sector by federal legislation because of the seriously detrimental effect of labor disputes or industrial disorganization to interstate commerce. E.g., 29 U.S.C. § 151; NIRA, Title I § 1.

Federal protection of the collective bargaining rights of federal workers began with executive, not

legislative, action. President Kennedy granted collective bargaining rights to federal employees by executive order in 1962. Exec. Order No. 10,988, 3 C.F.R. 321 (1959-1963). This was not prompted by an emergency or need for "labor peace." Federal employees had been prohibited from striking under Section 305 of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act"), 29 U.S.C. §§ 141-197. Not until 1978 did Congress pass the Federal Service Labor-Management Relations Statute ("FSLMRS") to codify the collective bargaining rights of most federal workers. 5 U.S.C. §§ 7101-7135.

B. State and local regulation of public sector workers is inconsistent.

State legislation to protect collective bargaining by public sector workers was also slow to follow the NLRA and did not arise until the late 1950s. Wisconsin granted certain municipal employees the right to organize and join labor organizations under Chapter 509, Laws of 1959, Wis. Stat. § 111.04(1). Local government began to allow collective bargaining as well. New York City's Mayor Wagner granted certain municipal workers collective bargaining rights in 1958 by executive order, citing the need to minimize labor disputes. Exec. Order (Mayor Wagner) No. 49 § 2 (1958).

From these beginnings, public sector unionism at the state and local level dramatically expanded[2] – as

[2] In 1984, Illinois granted certain public employees bargaining rights through the enactment of the Illinois Educational

did strikes and work stoppages, despite laws prohibiting strikes. "In 1966 there were 142 strikes by public employees throughout the United States. In 1967 the figure climbed to more than 250, all of which were technically illegal." Charles J. Morris, *Public Policy and the Law Relation to Collective Bargaining in the Public Service*, 22 Sw. L.J. 585, 587 (1968). Public union growth surpassed that of private sector unions. In 2009, the number of unionized workers who work for the government surpassed those in the private sector for the first time. Steven Greenhouse, *Most U.S. Union Members Are Working For the Government, New Data Shows*, N.Y. Times, January 23, 2010, B1.

Unlike the comparatively uniform system at the national level, a patchwork of regulation over public sector workers and their rights to strike or engage in collective bargaining developed in the states and local governments in the 1960s. Although the vast majority of states allow public sector workers to engage in collective bargaining, state workers' rights in a given state may differ from those of county or municipal workers. Statutes may specifically cover teachers but not police officers. See Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, Center for Economic and Policy Research,

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Labor Relations Act ("IELRA"), 115 Ill. Comp. Stat. 5/1-21, and the Illinois Public Labor Relations Act ("IPLRA"), 5 Ill. Comp. Stat. 315/1-28. The IPLRA's purpose was to "prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all." *Id*. at 315/2.

March 2014. A notable disparity in the regulation of public sector workers is the right to strike. There is a clear threat to the people's welfare if public safety officers are allowed to strike and desert their posts. Accordingly, the overwhelming majority of states prohibit police officers and firefighters from striking. *Id.* at 8.

The history and justification for collective bargaining legislation are thus very different for private sector and public sector unions. One regulatory scheme arose in response to strikes and crises while the other preceded them. These differences warrant exacting analysis of the specific statutory scheme at issue when the First Amendment rights of an agency fee payer are impaired. The *Abood* Court failed to do so.

C. The *Abood* Court provided no analysis of the serious impairment of First Amendment rights of agency fee payers.

The Supreme Court first addressed the constitutionality of agency fees in two cases arising from the *private* sector under the federal Railway Labor Act. In *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956), nonunion members claimed that the collective bargaining agreement for a union shop violated their First Amendment rights by requiring them to support the union's political activities. The Court found that the RLA, which pre-empted the state's right-to-work law, was a proper use of congressional power. "Industrial peace along the arteries of commerce is a legitimate objective." *Hanson*, 351 U.S. 225, 233.

The Court then rejected the argument that First Amendment rights to freedom of expression and association were violated by compelled union membership alone, since the only conditions were payment of dues, fees and assessments. As Justice Alito noted in *Harris v. Quinn*, 189 L. Ed. 2d 620, 642, 134 S. Ct. 2618, 2629 (2014), the Hanson Court disposed of the First Amendment concerns with a single sentence: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." *Hanson*, 351 U.S. 225, 238. However, the Court left the door open to future challenges if such payments were "used as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Id*. The record in the instant case provides the evidence that was apparently lacking in *Hanson*.

In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Court returned to the issue left open by *Hanson*. The Court recognized that using fees for political activity could violate the agency fee payers' First Amendment rights. The Court used the doctrine of constitutional avoidance, however, to read the RLA to prohibit unions from using fees on political activity not germane to collective bargaining. *Id*. at 770.

The Court relied on these two *private* sector union cases in *Abood*, a case involving agency fee payers who were *public* sector employees. In *Abood*, a Michigan statute allowing union representation for local government

employees included an agency shop provision. Schoolteachers who did not want to join the union were still compelled to pay a service charge equal to the regular dues required of union members. Justice Stewart acknowledged that requiring an agency fee payer to help finance the union as the collective bargaining agent *might* interfere with the employee's freedom to associate for the advancement of ideas. He appeared to refer back to the RLA's justification for such impingement. "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." *Abood*, 431 U.S. at 222.

This is a flaw at the heart of *Abood*. There was no analysis whether Michigan's statutory scheme withstands strict scrutiny for affecting First Amendment rights. The *Abood* Court simply used the justifications found in *Hanson* and *Street*. "The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." *Id.* at 224. Ultimately, the Court held that agency fee payers have the right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id*. at 234. The holding in *Abood* ignores the inherently political nature of collective bargaining by public sector unions.

II. Political activity is a core function of labor unions.

Political activity is a core function of a labor union, whether it serves private or public sector workers. In Justice Frankfurter's dissenting opinion in *Street*, he argued that political activity was inherent to labor unions. "For us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life." *Street*, 367 U.S. at 812. He continued, "The notion that economic and political concerns are separable is pre-Victorian. . . . It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor." *Street*, 367 U.S. 740, 814-815.

Professor Clyde W. Summers, a labor law expert and one of the drafters of the Labor Management Reporting and Disclosure Act of 1959 ("Landrum-Griffin Act"), wrote that political activity was one of a union's functions.

> [U]nions engage in extensive political activity. This may consist of direct political action ranging from merely endorsing candidates to providing campaign funds and full-time campaign workers. It also includes political education programs which, though not directed toward the election of any particular candidate, may influence political decisions

> on subjects reaching from social security or public housing to segregation or foreign aid.

Clyde W. Summers, *The Public Interest in Union Democracy*, 53 NW. U. L. REV. 610, 621 (1958). Union political activity adds vitality to American political discussions, "but it also poses serious problems." *Id.* According to Summers, "The use of pooled resources by large interest groups for the purpose of influencing elections and political decisions has long been recognized as a substantial danger within our political system." *Id.* Professor Summers made these observations in 1958, before the emergence of public sector unionism.

Labor's interest in politics is self-evident. Labor's success has been dependent upon the legislation and executive action described above. As a matter of course, both private and public sector unions engage in express advocacy on behalf of candidates. But the mere act of collective bargaining with the government is inherently political. Agency fee payers are thus compelled to support political speech.

III. Collective bargaining with the government is inherently political.

State and local governments employ workers to provide essential services. With finite resources, there is an opportunity cost for every public expenditure. Money spent on sanitation workers' salaries is money not available to pave roads. Salaries are not the only subjects of collective bargaining. The AFL-CIO provides

an expansive list of potential terms of employment in collective bargaining such as "pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more." Nearly every public expenditure is a policy choice.

Central to the policy justification for collective bargaining proffered by labor proponents is the need to equalize the bargaining power between worker and employer. As Chief Justice Taft wrote, "Union was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 (1921) (Taft, C.J.). In its "findings and policies," the NLRA provides that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract" and business employers substantially burdens and affects the flow of commerce. 29 U.S.C. § 151.

According to Professor Summers, "Collective bargaining . . . was historically conceived as something more than an ingenious gimmick of economic selfregulation (sic) by countervailing power." Summers, 614. It gave voice to free workers and a chance to control their destiny. (Not so for agency fee payers.) He admitted, though, that "Collective bargaining, narrowly conceived, is an economic mechanism to equalize bargaining power and thereby enable workers to get their fair share of the fruits of their labor." *Id.* Unions have sought to aggrandize their bargaining power by becoming exclusive bargaining agents. Unions themselves helped create the "free rider" problem.

The relative bargaining power of public and private sector unions is very different. The *Abood* Court noted some of these differences between public and private employers: 1) A public employer is not guided by profit or market forces and bargains over a price-inelastic essential service; 2) The public employer is not likely to be a single cohesive unit and many levels of government authority may be involved; and 3) The public employer is responsible to the voters, "including taxpayers, users of particular government services, and government employees." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 227-229.

The public sector union's bargaining position with its employer is much more powerful than the private sector's. The public sector union's great strength obviates any justification for compelled support form dissenting agency fee payers. Through the political process, government workers can actually select their bargaining partners. The *Abood* Court conceded that it is surely "arguable" that collective bargaining by public sector unions gives them more influence in the decision-making process than private sector unions. The Court added, "Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table." The political activity of public sector unions since *Abood* shows this to be a dramatic understatement.

Public sector unions often have an ally, not an antagonist sitting across the bargaining table. An AFSCME

District Council leader, Victor Gotbaum, claimed in 1975: "We have the ability, in a sense, to elect our own boss." Daniel DiSalvo, *The Trouble with Public Sector Unions*, National Affairs, Fall 2010, http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions. One indication of public sector unions' favorable position with management is the generous pension system provided to many government workers.

As Professor Edward L. Glaeser noted:

> State and local governments don't want to face the short-term consequences of paying higher wages, so they structure compensation in ways that defer the costs of each new deal for years. Politics doesn't just favor delayed compensation; it also favors forms of compensation that are particularly hard for people to evaluate.

Edward L. Glaeser, *Transparency for the Public Sector*, Economix blog, N.Y. Times, May 25, 2010, https://economix.blogs.nytimes.com/2010/05/25/transparency-for-the-public-sector/. He continued, "This system almost seems as if it were designed to bring about fiscal crisis after fiscal crisis. Because the unions and their bargaining partners have an incentive to understate the cost of future benefits, governments are never going to set aside enough money to pay for them." *Id.*

Government pensions are a political issue. The unfunded pension obligations sponsored by state and local governments across the United States were recently calculated at $1.378 trillion under government

accounting standards. Joshua D. Rauh, *Hidden Debt, Hidden Deficits: 2017 Edition*, Hoover Institution, May 15, 2017. State and local governments are thus on the verge of a full-fledged pension crisis. These pension obligations have the potential to crowd out most discretionary spending by state and local governments.

The trillion dollar pension obligations that have been approved for public sector workers are a testament to their incredible political strength. It is simply absurd to argue that they need the meager funds they extract from agency fee payers to continue functioning as bargaining representatives.

CONCLUSION

For the foregoing reasons, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) should be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment.

Respectfully submitted,

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