No. 16-___

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 Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Twice in the past five years this Court has questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, __ U.S. __ , __, 134 S. Ct. 2618, 2632–34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2289 (2012). Last term this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, __ U.S. __, 136 S. Ct. 1083 (2016).

This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, who was a Plaintiff-Appellant in the court below, is Mark Janus.

Respondents, who were Defendants-Appellees in the court below, are American Federation of State, County, and Municipal Employees, Council 31; Michael Hoffman, in his official capacity as the Acting Director of the Illinois Department of Central Management Services; and Illinois Attorney General Lisa Madigan.

Parties to the original proceedings below, who are not Petitioners or Respondents, include plaintiffs Illinois Governor Bruce Rauner, Brian Trygg, and Marie Quigley, and defendant General Teamsters/Professional & Technical Employees Local Union No. 916.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The Seventh Circuit order affirming the district court is reproduced in the appendix (Pet.App.1) as is the district court's order dismissing Petitioner's complaint (Pet.App.6).

JURISDICTION

The Seventh Circuit entered judgment on March 21, 2017. Pet.App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the Appendix (Pet.App.43).

STATEMENT OF THE CASE

This case challenges the constitutionality of Illinois's agency fee law under the First Amendment.

A. Illinois Compels State Employees to Pay Agency Fees to an Exclusive Representative for Speaking and Contracting with the State over Governmental Policies.

1. The Illinois Public Labor Relations Act ("IPLRA"), 5 ILL. COMP. STAT. 315/1 et seq., grants public sector unions an extraordinary power: if a union meets certain qualifications, it can become "the exclusive representative for the employees of [a bargaining] unit for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment not excluded by Section 4 of this Act." *Id*. 315/6(c).

Exclusive representative status vests a union with agency authority to speak and contract for all employees in the unit, including those who want noth-

ing to do with the union and oppose its advocacy. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[1] The status also vests a union with authority to compel policymakers to bargain in good faith with the union, 5 ILL. COMP. STAT. 315/7, and to only change certain policies after first bargaining to impasse, *Vienna Sch. Dist. No. 55 v. IELRB*, 515 N.E.2d 476, 479 (Ill. App. Ct. 1987). These authorities are exclusive because the public employer is precluded from dealing with individual employees or other associations. 5 ILL. COMP. STAT. 315/4.

The IPLRA empowers an exclusive representative not only to speak and contract for unconsenting employees in their relations with the government, but also to force those employees to pay for its advocacy. The Act does so by authorizing "agency fee" arrangements in which employees are forced, as a condition of their employment, to "pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment" to an exclusive representative. 5 ILL. COMP. STAT. 315/6(e).

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[1] Case law concerning the National Labor Relations Act is apposite because Illinois's labor laws, like most public sector labor laws, are based on the NLRA. *See* Sally J. Whiteside, Robert P. Vogt & Sherryl R. Scott, *Illinois Public Labor Relations Laws: A Commentary & Analysis*, 60 CHI.-KENT. L. REV. 883, 883 (1984) ("[T]he legislature, in discussing the *IPLRA*, expressly stated that it intended to follow the [NLRA] to the extent feasible.").

Illinois's agency fee requirement tracks this Court's holding in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), concerning the compulsory fees that public employees can be forced to pay under the First Amendment. *Abood* established a framework under which public employees can be forced to pay a union for bargaining with the government and administering the resulting contract, *id.* at 232, but cannot be forced to pay for union activities the *Abood* Court deemed to be political or ideological, *id.* at 236.

2. Petitioner Mark Janus is an Illinois state employee who is being forced to pay agency fees to a union, AFSCME, Council 31, against his will. Pet.App.10. AFSCME exclusively represents over 35,000 state employees who work in dozens of agencies, departments, boards, and commissions subject to the authority of Illinois's governor. *Id.*

In February 2015, AFSCME began bargaining with newly elected Governor Bruce Rauner, who acts through Illinois's Department of Central Management Services ("CMS"), over policies that affect these state employees. The course of these negotiations through January 2016 is detailed in an Illinois Labor Relations Board ("Board") decision. *Dep't of CMS v. AFSCME, Council 31*, 33 PERI ¶ 67, ALJD at 4-139,[2] 2016 WL 7645201 (Dec. 12, 2016). The decision dis-

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[2] "ALJD" refers to the Administrative Law Judge's Recommended Decision, and "Bd." to the Board's Decision, available at https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf.

cusses, among other things, Illinois's dire budgetary and pension-deficit situation, which formed the backdrop for the negotiations, *id*. at 12–13, and the Governor's "intent to seek contract changes that [would] provide[] additional efficiency and flexibility," link pay increases to merit, and "obtain significant savings (in the proximity of $700 million) from the healthcare program." *Id*. at 19. The Board's decision also details the parties' positions concerning twelve disputed "packages" of issues: wages, health insurance, subcontracting, layoff policies, outstanding economic issues (mainly holiday pay, overtime, and retiree health care), scheduling, bumping rights, health and safety, mandatory overtime, filling of vacancies, union dues deduction, and semi-automatic promotions. *Id*. at 37–97. The Board concluded that Governor Rauner and AFSCME reached a bargaining impasse in early 2016. *Dep't of CMS*, Bd. at 24.

The Governor has been attempting to unilaterally implement, over AFSCME's objections, policies that include "$1,000 merit pay for employees who missed less than 5% of assigned work days during the fiscal year; overtime after 40 hours; bereavement leave; the use of volunteers; the beginning of a merit raise system; [and] drug testing of employees suspected of working impaired." *AFSCME, Council 31 v. Dep't of CMS,* 2016 IL App (5th) 160510-U, ¶ 7, 2016 WL 7399614 (Ill. App. Ct., 2016). AFSCME, however, has resorted to litigation to thwart the Governor's attempt to implement his desired reforms. *Id.*

Regardless of their personal views concerning these policies and AFSCME's conduct, Janus and all other employees subject to AFSCME's exclusive representation are required, by operation of 5 ILL. COMP. STAT. 315/6(f), to subsidize AFSCME's efforts to compel the State of Illinois to bend to the union's will. This statute mandates that agency fee exactions must continue notwithstanding the expiration of a collective bargaining agreement. *Id.*

The agency fees Janus and other Illinois public employees are compelled to pay AFSCME and other exclusive representatives are calculated by the unions themselves. 5 ILL. COMP. STAT. 315/6(e). Under *Chicago Teachers Union v. Hudson*, unions are supposed to calculate their agency fees based on an audit of their expenditures during the prior fiscal year and to provide nonmembers with a financial notice explaining the calculation of their fee. 475 U.S. 292, 304–10 (1986). AFSCME's *Hudson* notice, which can be found at Pet.App.28, indicates that AFSCME set its 2015 agency fee at 78.06% of full union dues based on an audit of union expenditures in calendar year 2009. Pet.App.34.

B. Proceedings Below

1. In recent years, this Court has increasingly questioned the validity of *Abood's* holding that public employees can constitutionally be forced to subsidize union speech to influence government policymakers.

In 2012, the Court, in *Knox v. SEIU, Local 1000*, deemed *Abood*'s "[a]cceptance of the free-rider argu-

ment as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly," given that "[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections." 567 U.S. 298, __, 132 S. Ct. 2277, 2289–90 (2012). *Knox* also held that agency fee provisions are subject to at least "exacting First Amendment scrutiny," *id.* at 2289, which is a level of scrutiny *Abood* conspicuously failed to apply, *see Abood*, 431 U.S. at 245 (Powell, J., concurring in judgment).

In 2014, the Court in *Harris v. Quinn* gave no fewer than six reasons why "[t]he *Abood* Court's analysis is questionable."__ U.S. __, __, 134 S. Ct. 2618, 2632 (2014). To wit, *Abood*: (1) "fundamentally misunderstood" earlier cases concerning laws authorizing compulsory fees in the private sector; (2) failed to appreciate the difference between bargaining in the private and public sectors; (3) failed to appreciate the difficulty of distinguishing between collective bargaining and politics in the public sector; (4) did not foresee the difficulty in classifying union expenditures as "chargeable" or "nonchargeable"; (5) "did not foresee the practical problems that would face objecting nonmembers"; and (6) wrongly assumed forced fees are necessary to exclusive representation. *Id.* at 2632–34. The Court stopped short of overruling *Abood*, however, because it was not necessary to resolve the issue in *Harris*, which was whether Illinois could force individuals who were not public employees to pay agency fees. *See id.* at 2638 & n.19. The

Court opted to limit *Abood's* application to "full-fledged public employees." *Id*. at 2638.

In 2015, the Court granted certiorari in *Friedrichs v. California Teachers Association,* __ U.S. __, 136 S. Ct. 1083 (2016), to resolve the question of "whether *Abood* . . . should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment." Petition for Cert. at (i), *Friedrichs*, 2015 WL 393856. Following the death of Justice Scalia, the Court split 4 to 4 on this question. 136 S. Ct. at 1083.

2. On February 9, 2015, Governor Rauner filed a lawsuit seeking to overrule *Abood* and have Illinois's public-sector agency fee law declared unconstitutional. Pet.App.2. Shortly thereafter, Illinois Attorney General Lisa Madigan intervened as a defendant, and three Illinois state employees—Mark Janus, Brian Trygg, and Marie Quigley—moved to intervene as plaintiffs. *Id*. at 3. The district court granted the employees' motion to file their complaint in intervention and, in the same order, dismissed Governor Rauner from the case on jurisdictional and standing grounds. *Id*. This left the employees as the only plaintiffs in the case.

On July 21, 2016, Janus and Trygg filed a Second Amended Complaint alleging that forcing them to pay fees as a condition of public employment violated their First Amendment rights. Pet.App.9. Defendants moved to dismiss the complaint and argued, among other things, that *Abood* precluded Plaintiffs'

claim. *Id.* at 7. On September 13, 2016, the district court granted the motion to dismiss based solely on *Abood*. *Id.*

Janus and Trygg appealed the dismissal to the United States Court of Appeals for the Seventh Circuit. On March 21, 2017, the Seventh Circuit affirmed the dismissal of Janus' claim on the ground that *Abood* controlled but dismissed Trygg's claim on an alternative ground. Pet.App.4–5. Janus now petitions this Court for certiorari and requests that this Court overrule *Abood* and declare Illinois's agency fee law unconstitutional.

REASONS FOR GRANTING THE PETITION

This Court determined that the question presented here was worthy of its consideration when it granted certiorari on the same question in *Friedrichs*. 136 S. Ct. at 1083. That question is just as worthy of the Court's consideration today. Agency fees remain the largest regime of compelled speech in the nation. *Abood* remains wrongly decided for the reasons stated in *Harris*, 134 S. Ct. at 2632–34, and because it is inconsistent with this Court's precedents requiring that instances of compelled speech and association satisfy heightened constitutional scrutiny.

This case is a suitable vehicle for reconsidering *Abood* because it concerns the same statute as did *Harris*, but involves a full-fledged public employee. The Court should take this case to overrule *Abood* and declare agency fees unconstitutional.

I. The Court Should Reconsider *Abood* and Hold Agency Fees Unconstitutional.

A. *Abood*'s Validity Is a Matter of Exceptional Importance Because Agency Fee Requirements Are Widespread and Egregiously Infringe on First Amendment Rights.

1. It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. Yet agency fee requirements are not rare. Janus and millions of public employees[3] are subject to agency fee requirements that compel them to subsidize the speech of a third party (an exclusive representative) that they may not wish to support.

This significantly impinges on the First Amendment rights of each and every employee who did not choose to subsidize the union's advocacy. *Knox*, 132 S. Ct. at 2289. Each such employee is being deprived of his or her fundamental right to choose which

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[3] There are 10,987,000 union-represented employees in the twenty-two states that do not have right to work laws prohibiting agency fees. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Econ. News Release, tbl. 5, http://www.bls.gov/news.release/union2.t05.htm (last visited Apr. 16, 2017). Roughly half of union-represented employees are in the public sector. *See id.*, tbl. 3, http://www.bls.gov/news.release/union2.t03.htm (last visited Apr. 16, 2017) (showing 8,437,000 and 7,834,000 union-represented employees nationwide in the private and public sectors, respectively).

speech is worthy of his or her support. With agency fees, the government is "substitut[ing] its judgment as to how best to speak for that of speakers" and violating "[t]he First Amendment['s] mandate that . . . speakers, not the government, know best both what they want to say and how to say it," *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988).

The infringement that agency fees inflict on public employees' rights is particularly egregious because those fees support speech designed to influence governmental policies. "In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . ." *Harris*, 134 S. Ct. at 2632. Consequently, a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. While compelled subsidization of any speech offends First Amendment values, *see United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001), compelling support for political speech is particularly offensive because "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

In fact, agency fees inflict the same grievous First Amendment injury as the government forcing a citizen to support a mandatory advocacy group to lobby the government. This is because an exclusive representative's function under the IPLRA and other public-sector labor statutes is quintessential lobbying:

meeting and speaking with public officials, as an agent of interested parties, to influence public policies that affect those parties.[4] Janus and millions of other public employees are effectively being required to support a government-appointed lobbyist. If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government.

2. Agency fees interfere not only with individual liberties, but also with the political process the First Amendment protects. Mandatory advocacy groups that individuals are forced to support, and that enjoy special privileges in dealing with government enjoyed by no others, will naturally have political influence that far exceeds citizens' actual support for that group and its agenda. Agency fees transform employee associations into artificially powerful factions, which skews the "marketplace for the clash of different views and conflicting ideas" that the "Court has long viewed the First Amendment as protecting." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

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[4] *Cf. Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials"; and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"); 2 U.S.C. § 1602(8)(A) (defining "lobbying contact" as "any oral or written communication . . . to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to . . . the administration or execution of a Federal program or policy").

In many ways, agency fee requirements have replaced unconstitutional political patronage requirements as the means by which government officials compel support for advocacy organizations that share their agendas. A plurality of this Court held in 1976 that states could not force most public employees to support a political party, *Elrod v. Burns*, 427 U.S. 347 (1976), but then inconsistently held one year later in *Abood* that states could force employees to support a representative for petitioning the government. These requirements are constitutionally indistinguishable, as several Justices recognized in *Abood*, 431 U.S. at 256–57 (Powell, J., concurring in judgment), except that agency fees are a more recent development.[5] There is, for example, little distinction between forcing Illinois public employees to directly support the Democratic Party, as in *Elrod*, 427 U.S. at 351, and requiring Illinois public employees to financially support advocacy groups with agendas closely aligned with that political party.

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[5] Some Justices have expressed the view that political patronage requirements are sanctioned by historical practice, as they were common before and after the First Amendment's adoption. *See, e.g., Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 687–88 (1996) (Scalia, J., dissenting). Whatever the merit of this dissenting view, it has no application to public-sector agency fees. The vast majority of public sector labor laws were first enacted in the 1960s and 1970s. *See* Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 Cato J. 87, 96–99 (2010).

The constitutionality of agency fees thus presents an issue of exceptional importance worthy of this Court's review. *Abood* is a root cause of the widespread infringement agency fees wreak on First Amendment rights.

B. The Court Should Reconsider *Abood* Because It Is Inconsistent with Other Precedents, Wrongly Decided, Unworkable, and Not Supported by Reliance Interests.

This Court has "not hesitated to overrule decisions offensive to the First Amendment," *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (opinion of Scalia, J.)), for stare decisis "is at its weakest when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Among other grounds, the Court will revisit a decision if it conflicts with its other precedents, is badly reasoned and wrongly decided, has proven unworkable, and/or is not supported by valid reliance interests. *See Citizens United*, 558 U.S. at 363; *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992); *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). *Abood* should be reconsidered, and ultimately overruled, for all four reasons.

1. *Abood* is inconsistent with this Court's precedents concerning the constitutional scrutiny applicable to compelled association and speech. The Court "explained in *Knox* that an agency-fee provision imposes 'a significant impingement on First Amend-

ment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289). This requires, at a minimum, that the agency fee provision "serve a 'compelling state interest[ ] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Knox*, 132 S. Ct. at 2289).

The Court has long applied that standard, or similar formulations, to instances of compelled expressive association. *See, e.g.*, *Roberts v U.S. Jaycees*, 468 U.S. 690, 623 (1984) (citing cases). It has done so in cases involving private organizations, *see id.*; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577–78 (1995), and political parties, *see Elrod*, 427 U.S. at 362–63; *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996). Even compelled support for the mundane commercial speech at issue in *United Foods,* 533 U.S. 405, received the "exacting First Amendment scrutiny" referenced in *Knox*, 132 S. Ct. at 2289.

Harris found it "arguable" that even this "standard is too permissive." 134 S. Ct. at 2639. Janus agrees because agency fees compel not only association, but also support for speech. The "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Id.* (quoting *Knox*, 132 S. Ct. at 2288). Given that agency fee laws compel support for speech concerning political affairs, *id.* at 2632–33, the laws constitute a regu-

lation of political speech that should be "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (quoting *Wis. Right to Life*, 551 U.S. at 464); *see also Riley*, 487 U.S. at 795–98 (subjecting compelled speech to scrutiny applied to content-based prohibition on speech).

Abood inexplicably failed to apply either form of heightened First Amendment scrutiny to compulsory fees to support public-sector unions' petitioning of the government. Most notably, *Abood* never considered whether agency fees are narrowly tailored—i.e., never evaluated whether exclusive representation can be "achieved through means significantly less restrictive of associational freedoms" than compulsory fees. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

Abood's failure to apply the proper level of scrutiny did not go unnoticed at the time. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, sharply criticized the majority opinion for not applying the exacting scrutiny applied in *Elrod*. *See* 431 U.S. at 262–64 (Powell, J., concurring in the judgment); *accord id.* at 242–44 (Rehnquist, J., concurring). This criticism was well founded, for the "public-sector union is indistinguishable from the traditional political party in this country," *id.* at 257 (Powell, J., concurring in the judgment), given that "[t]he ultimate objective of a union in the public sector, like that of a political party, is to influence public

decisionmaking in accordance with the views and perceived interests of its membership." *Id*. at 256.

Abood's analysis has only grown more aberrant over time. *Abood* now conflicts with a host of subsequent precedents concerning the constitutional scrutiny applicable to instances of compelled expressive association, *see Roberts*, 468 U.S. at 623; *O'Hare*, 518 U.S. at 714–15; *Dale*, 530 U.S. at 658–59; and *Hurley*, 515 U.S. at 577–78, to instances of compelled speech, *e.g., Riley*, 487 U.S. at 795–98, and to compulsory fee requirements, *see United Foods*, 533 U.S. at 411; *Knox*, 132 S. Ct. at 2289; and *Harris*, 134 S. Ct. at 2639. The conflict with *Harris* is particularly notable, as *Harris* held that compelling personal assistants to pay agency fees failed exacting scrutiny because the fees were not necessary either for exclusive representation or to improve public programs. 134 S. Ct. at 2640–41.

Abood's analysis (or lack thereof) must be revisited for this reason alone. The Court should take this case to do now what it failed to do in *Abood* and what the Court's other precedents require: apply First Amendment scrutiny to agency fee requirements.

2. *Harris* identified why *Abood* is poorly reasoned: a line cannot be drawn between bargaining with government and lobbying the government over its policies. 134 S. Ct. 2632–33. "[I]n the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government," and core sub-

jects of bargaining, "such as wages, pensions, and benefits are important political issues." *Id.*

The Court recognized this even prior to *Harris*, remarking that "[t]he dual roles of government as employer and policymaker . . . make the analogy between lobbying and collective bargaining in the public sector a close one." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (plurality opinion). Justice Marshall saw no distinction at all. *Id.* at 537 (Marshall J., dissenting). Even the majority opinion in *Abood* acknowledged "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political." 431 U.S. at 231; *see also id.* at 256 (Powell, J., concurring in judgment) (finding "no principled distinction" between public sector unions and political parties).

The Court has simply not followed this incontrovertible premise to its inevitable conclusion. Given that (1) bargaining with the government is indistinguishable from lobbying government; and that (2) "[a] State may not force every person who benefits from [a lobbying] group's efforts to make payments to the group," *Harris*, 134 S. Ct. at 2638, it follows that it is unconstitutional to force public employees to support bargaining with government.[6]

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[6] *Abood*'s finding that bargaining with the government is also analogous in some ways to private-sector bargaining, 431 U.S. at 220–23, is irrelevant even if accurate, for it does not change

3. *Abood*'s "practical administrative problems" stem from its conceptual flaw: it is difficult to distinguish chargeable from nonchargeable expenses under the *Abood* framework. *Harris,* 134 S. Ct. at 2633. The three-prong test a plurality of this Court adopted in *Lehnert,* 500 U.S. at 522, for this task is as subjective as it is vague. *See Harris,* 134 S. Ct. at 2633. Consequently, "[i]n the years since *Abood*, the Court has struggled repeatedly with this issue." *Id*. (citing several cases). For example, this Court has held that union lobbying expenses are nonchargeable, except for contract ratification or implementation, *Lehnert,* 500 U.S. at 522 (plurality opinion), and yet the chargeability of lobbying expenses remains a contested issue.[7] This Court also held that union lobbying expenses are nonchargeable, *see Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 451–53 (1984), and yet that too remains a litigated issue.[8]

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the relevant fact that bargaining with the government is political and indistinguishable from lobbying.

[7] *See, e.g., Knox,* 132 S. Ct. at 2294–96 (reversing Ninth Circuit decision that unions could charge nonmembers for "lobbying . . . the electorate"); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422–23 (D.C. Cir. 1997) (holding nonchargeable pilot union's expenses in lobbying federal agencies); *United Nurses & Allied Prof'ls*, 359 N.L.R.B. 469, 474 (Dec. 14, 2012) (National Labor Relations Board deems lobbying expenses chargeable to nonmembers if the "specific legislative goal [is] sufficiently related to the union's core representational functions").

[8] *Scheffer v. Civil Serv. Emps. Ass'n*, 610 F.3d 782, 790–91 (2d Cir. 2010) (reversing district court decision finding union organ-

Separating the wheat from the chaff was made even more difficult, if not impossible, by *Locke v. Karass*, 555 U.S. 207 (2009), which held that extraunit activities of union affiliates are chargeable to nonmembers if they (1) "bear[ ] an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 218 (Alito, J., concurring) (quoting *Lehnert*, 500 U.S. at 524). The Court did not "address what is meant by a charge being 'reciprocal in nature,' or what showing is required to establish that services 'may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 221 (Alito, J., concurring). Nor did the Court resolve what accounting method, if any, can properly calculate the exact percentage of an affiliate's services that are available to each local union in a given year.

The ongoing problems with administering *Abood* are unresolvable because there is no true distinction between bargaining and lobbying in the public sec-

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izing expenses chargeable); *Bromley v. Mich. Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (holding defensive organizing nonchargeable to employees); *but see UFCW, Local 1036 v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc) (upholding NLRB decision that organizing expenses are partially chargeable to nonmembers).

tor, and because of the underlying incentives at work. Unions have strong financial incentives to extract the greatest fee possible from nonmembers by pushing the envelope on chargeability. In contrast, employees have little financial incentive to challenge excessive union fees because the amount of money at stake for each particular employee is comparatively low and the time and expense of litigation is high. *See Harris*, 134 S. Ct. at 2633. Given these incentives, any framework that permits unions to seize any compulsory fee from unconsenting employees will inevitably lead to abuse of employee rights and endless litigation.

No amount of tinkering with *Abood* can change these realities. As Justice Black prophetically noted in his dissent in *International Association of Machinists v. Street* when discussing the futility of trying to separate union bargaining expenses from political expenses: "while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated." 367 U.S. 740, 796 (1961) (Black, J., dissenting).

4. No reliance interests justify retaining *Abood* notwithstanding its infirmities. Overruling *Abood* would merely deprive unions of "the 'extraordinary' benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund." *Knox*, 132 S. Ct.

at 2295. Unions have no valid interest in this unconstitutional privilege, for a "union has no constitutional right to receive any payment from . . . [nonconsenting nonmember] employees." *Id.*; *see Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007). The Court can and should reconsider *Abood*.

C. Compulsory Fee Requirements, and *Abood*'s Free Rider Rationale for Upholding Such Requirements, Cannot Satisfy Heightened Constitutional Scrutiny.

The Court should hold forced fee provisions unconstitutional because they cannot survive heightened constitutional scrutiny. This includes the exacting scrutiny required under this Court's compelled-association precedents, under which the provision must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289). *First*, exclusive representation can be achieved without agency fees because unions greatly benefit from the extraordinary powers, privileges, and membership-recruitment advantages that come with exclusive representative status. *Second*, far from being a least restrictive means, agency fees exacerbate the associational injury that exclusive representation already inflicts on employee rights. *Third*, *Abood*'s "free rider" justification inverts reality by presuming that exclusive representation burdens unions and benefits nonmember employees, when in most ways the opposite is true.

1. This Court recognized in *Harris* that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at 2634. Even a cursory review of this nation's labor laws makes clear that a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* at 2640. Exclusive representation functions without compulsory fee requirements in the federal government, 5 U.S.C. § 7102, the postal service, 39 U.S.C. § 1209(c), and the nation's twenty-eight right to work states.[9]

Agency fees are not needed for exclusive representation because the extraordinary powers and privileges that come with exclusive representation are their own reward for a union. Exclusive representative status grants a union "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202 (1944). The union gains legal authority to speak and contract for unconsenting employees, and authority to force government policymakers to listen to and only deal with that union, and not with individual employees themselves. *See supra* pp. 1–2. "The

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[9] *See Right to Work States*, Nat'l Right to Work Legal Def. Found., http://www.nrtw.org/rtws.htm (last visited Apr. 1, 2017).

loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

Compulsory fees are not necessary to induce unions to assume and exercise these special privileges. A union vested with exclusive representative authority is already "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table," *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014), and "justly compensated by the right to bargain exclusively with the employer," *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014).

This is particularly true given that "exclusive representation *assists* unions with recruiting and retaining members." Pet.App.12 (emphasis added). The status alone is advantageous, "as employees are more likely to join and support a union that has authority over their terms of employment, as opposed to a union that does not." *Id.* Unions also use their exclusive representative authority to obtain government assistance with recruitment and dues collection, "such as contract terms providing for union orientations for all employees and automatic deduction of union dues from employees' paychecks." *Id.*

AFSCME's expired collective bargaining agreement with the State illustrates the assistance unions

commonly obtain for themselves.[10] AFSCME had the State agree to grant union agents various privileges, including: special access to state facilities and email systems, Art. VI, § 2; time off to conduct union business, *id*. § 3; a right to use workplace bulletin boards, *id*. § 4; personal and work information about all employees, *id*. § 5; a right to distribute union literature in the workplace to non-working employees, *id*. § 6; a right to use state meeting rooms for union meetings, *id*. § 7; and a right to conduct a "union orientation" for new employees, *id*. § 10. All of these privileges facilitate soliciting employees to become and remain union members.

AFSCME also bargained for the State to collect union membership dues and political contributions directly from consenting employees' paychecks. Art. IV, § 1. This government commitment to act as a union collection agency is a great benefit to unions, which "face substantial difficulties in collecting funds for political speech without using payroll deductions." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (quoting *Pocatello Educ. Ass'n v. Heideman,* 504 F.3d 1053, 1058 (9th Cir. 2007)). "At bottom, the use of the state payroll system to collect union dues is a state subsidy of speech." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013). And it is a subsidy that only exclusive representatives en-

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[10] The collective bargaining agreement is an exhibit to the Second Amended Complaint (Pet.App.13) and can be found in the district court docket at ECF No. 145-1.

joy under the IPLRA. *See* 5 ILL. COMP. STAT. 315/6(f). These and other benefits of exclusive representation obviate any need to compel nonconsenting employees to subsidize an exclusive representative.

2. Agency fees are not a "means significantly less restrictive of associational freedoms," *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289), to achieve exclusive representation for another reason: the fees only exacerbate the associational injury that this mandatory association already inflicts on employees' First Amendment rights. Under a regime of exclusive representation, the government strips unconsenting employees of their individual right to speak and contract for themselves vis-à-vis their employer, and hands their rights over to an advocacy group they may oppose. The union gains agency authority both to speak and contract for those employees, which, in turn, "extinguishes the individual employee's power to order his own relations with his employer." *Allis-Chalmers*, 388 U.S. at 180.

Because "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives can (and do) engage in advocacy that individual employees oppose. *See Knox*, 132 S. Ct. at 2289; *Abood,* 431 U.S. at 222. Exclusive representatives can also enter into binding contracts as the employees' proxy that harm employees' individual interests. *E.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (exclusive representative waived employees' right to bring discrimination claims against their employer

in court by agreeing that employees must submit such claims to arbitration). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers,* 388 U.S. at 180.

Unsurprisingly, given an exclusive representative's power to speak and contract for individuals against their will, this Court has long recognized "the sacrifice of individual liberty that this system necessarily demands," *Pyett*, 556 U.S. at 271, that "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them" under exclusive representation, *Douds*, 339 U.S. at 401, and that exclusive representation results in a "corresponding reduction in the individual rights of the employees so represented," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).[11]

For the government to additionally force nonconsenting employees to subsidize their government-imposed agent and its unwanted advocacy only compounds the First Amendment injury inflicted on these individuals. The employees are forced to pay a union for suppressing their own rights to speak and contract for themselves. The employees are also forced to subsidize advocacy that they oppose and

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[11] *See also Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (holding that a union's "status as [an employee's] exclusive representative plainly affects his associational rights" because the employee is "thrust unwillingly into an agency relationship" with a union with whose demands he may disagree).

that may harm their interests. This is perverse, akin to requiring kidnapping victims to pay their captors for room and board. Agency fees thus cannot be considered a "means significantly less restrictive of associational freedoms." *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289).

3. *Abood's* "free rider" justification for agency fees, *see* 431 U.S. at 221–22, falls short of what is required to satisfy First Amendment scrutiny. *Abood* begins by treating exclusive representation as if it were an onerous burden, or "great responsibilit[y]," the government imposes on unions, and for which unions deserve compensation for bearing. *Id.* at 221. This turns reality on its head. Exclusive representative authority is not imposed on unions: unions voluntarily seek that mantle. And it is not a burden, but an incredible government-conferred power. Consequently, "it is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation." Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. SOC. POL'Y & ECON. STUD. 163, 179 (1995). Union complaints about the heaviness of the crown they coveted, and now jealously guard, cannot be taken seriously.

Abood then posits that agency fees "distribute fairly the cost of these activities among those who *benefit*, and . . . counteract[] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining *bene-*

fits of union representation that necessarily accrue to all employees." 431 U.S. at 222 (emphasis added). Among other flaws,[12] this incorrectly presumes that employees believe they benefit from an exclusive representative's advocacy, which many do not. *Abood* itself inconsistently recognized this only two sentences later when acknowledging that "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative," and listed several examples. 431 U.S. at 222.

Abood was thus wrong to label as "free riders" employees who do not want to subsidize unwanted advocacy by an unwanted representative. It is far more accurate to label employees subject to agency fee mandates "forced riders," as these employees are being forced by the government to travel with an exclusive representative to policy destinations that they may not wish to reach.

Finally, *Abood*'s statement that an agency fee arrangement "counteracts the incentive that employees might otherwise have to become 'free riders,'" 431 U.S. at 222, ignores the previously discussed advantages exclusive representation provides unions with respect to recruitment and dues collection, *see*

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[12] This rationale is also faulty because "[t]he mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." *Harris*, 134 S. Ct. at 2636; *see also Knox*, 132 S. Ct. at 2289–90 (finding "free-rider arguments . . . generally insufficient to overcome First Amendment objections").

supra pp. 23–25. These advantages far outweigh any minor disadvantages that may come with exclusive representative power. Union membership among public employees skyrocketed after several states passed laws authorizing their exclusive representation. *See* Chris Edwards, *Public Sector Unions and Rising Costs of Employee Compensation*, 30 CATO J. 87, 96–99 (2010).[13] Union membership rates are far higher in those states that authorized exclusive representation than in those states that did not. *Id.* at 106–07. The difference is considerable even absent compulsory fees.[14] Exclusive representative status does not, contrary to *Abood's* implausible speculation, impede a union's ability to recruit and retain members. It facilitates that endeavor.

Overall, *Abood* got it backwards by presuming that exclusive representation burdens unions and benefits nonmember employees. *Abood's* free rider rationale for agency fees thus "falls far short of what the First Amendment demands." *Harris*, 134 S. Ct. at 2641.[15]

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[13] *Available at* https://goo.gl/z08rpZ (last visited May 1, 2017).

[14] In 2008, public-sector union membership rates were 37.9% in Nevada, 31.6% in Iowa, 27.9% in Florida, and 27.2% in Nebraska, s*ee* Edwards, *supra*, at 106, each of which allow exclusive representation, but ban compulsory fees. By contrast, public-sector union membership rates were far lower in states that ban exclusive representation: 4.2% in Georgia, 5.2% in Virginia, 6.0% in Mississippi, and 8.2% in South and North Carolina. *Id.*

[15] *Abood's* finding that a state's interest in "labor peace" justifies exclusive representation of employees, 431 U.S. at 220–21,

II. This Case Is a Suitable Vehicle for Reconsidering *Abood*.

This Court laid bare *Abood's* infirmities in *Harris*, a case concerning Illinois's agency fee statute, but stopped short of overruling *Abood* because the case did not involve full-fledged employees. 134 S. Ct. at 2638 & n.19. This case involves the same agency fee statute as *Harris*, 5 ILL. COMP. STAT. 315/6(e), but concerns its application to a full-fledged state employee. This action is thus a suitable vehicle to overrule *Abood* for the reasons stated in *Harris*.

There are three facets to this case that render it a particularly good vehicle for reconsidering *Abood*. *First*, Illinois's agency fee statute authorizes what *Abood* permits. The statute calls for forcing public employees to "pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment," but not other expenses. 5 ILL. COMP. STAT. 315/6(e). This case, therefore, squarely presents the question of

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does not justify agency fees, but only "[t]he principle of exclusive union representation," *id*. at 220. The two "are not inextricably linked," as exclusive representation can and does exist without agency fees. *Harris*, 134 S. Ct. at 2640; *see* p.22, *supra*. To the extent there is a linkage, agency fees are not a least restrictive means to achieve labor peace, as the government can maintain order and discipline in its workplaces through means far less offensive to First Amendment freedoms. Pet.App.15.

whether *Abood* was correct that such exactions are facially valid under the First Amendment.

Second, AFSCME generally uses the three-prong test adopted by a plurality of this Court in *Lehnert*, 500 U.S. at 519, to determine the expenses the union charges to nonmember employees. AFSCME's Fair Share Notice states:

> In addition your Fair Share fee includes your pro rata share of the expenses associated with the following activities which are chargeable to the extent that they are germane to collective bargaining, are justified by the government's vital policy interest in labor peace and avoiding free riders, and do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Pet.App.30. AFSCME's use of this agency fee test illustrate why *Abood*'s dividing line is unworkable. It leaves Janus and other employees with little idea of what activities they are being forced to subsidize because each prong of the chargeability test "involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?)." *Harris*, 134 S. Ct. at 2633 (quoting *Lehnert*, 500 U.S. at 551 (Scalia, J., concurring in judgment in part & dissenting in part)). At the very least, AFSCME's use of this Court's agency fee test provides an excellent basis for reviewing whether that test makes sense.

Finally, the political nature of bargaining with the government is vividly illustrated by AFSCME's negotiations with Governor Rauner, which are chronicled at *Department of CMS*, 33 PERI ¶ 67. "There can be no reasonable disagreement that the outstanding issues—including wages, health insurance, subcontracting, layoff—were of the utmost importance to the parties." *Id.,* ALJD at 153. During the negotiations, given Illinois's precarious fiscal situation, *id*. at 12, "[t]he State consistently indicated its need to save hundreds of millions of dollars in health insurance costs" and "that it could not afford to pay step increases or across the board wage increases and was opposed to increases that were unrelated to performance," *id*. at 154. AFSCME took opposite positions. *Id*. For example, while "[i]t is uncontested that the State was looking to save hundreds of millions of dollars per year on health insurance, . . . the Union had, over two proposals, offered savings that essentially had a net savings of zero dollars due to the increased benefits it still sought." *Id*. at 224. This dispute, and other policies subject to the negotiations,[16] make clear that "the terms upon which the State settles with its employees is necessarily a political, public policy issue." *Id*. at 159.

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[16] To offer other examples, the State claimed that its preferred holiday and overtime policies would save taxpayers an estimated $180 and $80 million, respectively, *Dep't of CMS,* ALJD at 63-64, and that AFSCME's semi-automatic promotion demand would cost taxpayers $20-30 million, *id*. at 97.

AFSCME's conduct during bargaining illustrates the same point, as its advocacy extended to the legislature, the public, and the courts. AFSCME proposed, during bargaining, that the state executive branch commit to "jointly advocate for amending the pension code" and increasing State taxes. *Id.* at 26–27. AFSCME also sought legislation "to change the existing structure for contract negotiations only for negotiations between the Rauner administration . . . and not any later-elected governor." *Id.* at 167. "AFSCME sponsored rallies in various regions of the state" that "were organized to educate the public and to put pressure on the Governor to change his position at the bargaining table." *Id.* at 135.[17] AFSCME is petitioning state courts to stop the Governor from implementing the reforms he sought during bargaining. *AFSCME, Council 31,* 2016 WL 7399614. These and other aspects of AFSCME's bargaining and related disputes with Governor Rauner have been the subject to widespread public attention.[18] AFSCME's

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[17] AFSCME used similar tactics "[d]uring the course of the 2012-2013 negotiations," wherein "the Union communicated its displeasure in the State's proposals and bargaining positions in a very public manner," such as by having union agents "appear [at] and disrupt Governor Quinn's public speaking engagements, political events, and even his private birthday party/fundraiser." *Id.* at 14. AFSCME's purpose was to "make public [its] displeasure with the Governor and to pressure the Governor to provide more favorable contract terms." *Id.*

[18] *See, e.g.*, Joe Cahill, *The State's Pension Reality Gap Is about to Get Wider*, CRAIN'S CHICAGO BUS. (Aug. 10, 2016),

actions during collective bargaining demonstrate that, "unlike in a labor dispute between a private company and its unionized workforce, the very issues being negotiated are matters of an inherently public and political nature." *Dep't of CMS*, 33 PERI ¶ 67, ALJD at 172.

Of course, *Abood's* propriety does not turn on these facets of the case. *Abood* is wrongly decided, and Illinois's agency fee law is unconstitutional, regardless of how AFSCME calculates its agency fee or wages its political battle with Governor Rauner. AFSCME's conduct does, however, aptly demonstrate that this Court's observations in *Harris* were correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

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https://goo.gl/GBWG3m (last visited Mar. 31, 2017); David Schaper, *Shortfall Threatens Illinois Pension System*, NPR (Mar. 24, 2010), https://goo.gl/8XopCF (last visited Mar. 31, 2017); Kim Geiger, *Rauner Scores Big Win over Union on Contract*, CHI. TRIB. (Nov. 16, 2016), https://goo.gl/wa1cWQ (last visited Mar. 31, 2017); Kim Geiger, Monique Garcia & Haley BeMiller, *Union Authorizes Strike, Rauner Doesn't Budge*, CHI. TRIB. (Feb. 23, 2017), https://goo.gl/VLWo7J (last visited Mar. 31, 2017).

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