No. 11-681

In the
Supreme Court of the United States

PAMELA HARRIS, et al.,

Petitioners,

v.

PAT QUINN, et al.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, PACIFIC LEGAL FOUNDATION, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May a state, consistent with the First and Fourteenth Amendments, compel home health care providers to support financially a political organization to bargain with the state legislature over the amount of the state budget to devote to home health care programs?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is the public interest arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for freedom of conscience enshrined in the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), *Doe v. Reed*, 561 U.S. 186 (2010), and *Siefert v. Alexander*, No. 10-405 (2011). The Center is vitally interested in limiting the ability of government to compel membership in and financial support of political organizations.

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To

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[1] Pursuant to this Court's Rule 37.3, all parties have filed blanket consents to amici with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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 Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995); and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012).

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable history of advancing the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and application of sound science in legal proceedings. It provides legal representation, without fee, to parents, scientists, educators, and other individuals, corporations and trade associations. It has litigated several "compelled speech" and "compelled association" cases as "first chair" counsel and as amicus or counsel for amici.

SUMMARY OF ARGUMENT

Liberty of conscience, protected by the First Amendment, includes the right to be free from compelled support of political activities – including the political activities of public employee labor unions. There is no distinction between "bargaining" and "lobbying." A collective bargaining agreement with public employees is an instrument of government that allocates scarce public resources.

There is no government basis, compelling or otherwise, that justifies the interference with fundamental First Amendment liberties that occurs win dissenting public employees are compelled to finance the political activities of public employee unions. These activities involve the essential political task of allocating government resources. Prior decisions granting public employee unions a privileged position – allowing them to interfere with dissenting employees First Amendment rights – has resulted significant damage to effective governance. The Court should reconsider those decisions.

ARGUMENT

I. The First Amendment Was Intended to Protect Against Compelled Political Support.

In his dissent in *Lathrop v. Donohue*, Justice Black noted: "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). For the most part, this Court has come to accept Justice Black's point of view, ruling that government compelled support of ideological causes violates the First Amendment.[2] *Knox v. SEIU*

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[2] Amici here use the term "ideological" in its broadest sense. As this Court noted in *Abood v. Detroit Board of Education*, 431 U.S., at 231-32: "But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. Nothing in the First Amendment or our cases discussing its meaning makes

Local 1000, 132 S. Ct., at 2295; *United States v. United Foods, Inc.*, 533 U. S. 405, 411 (2001); *Keller v. State Bar of California*, 496 U.S., at 15-16 (1990); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943). Yet in the public employee labor union context, this Court has permitted compelled support of ideological causes – offering only limited procedural protection. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986); *Abood*, 431 U.S., at 237. As demonstrated below, Justice Black is correct that a purpose of the First Amendment was to protect against compelled support of ideological causes.

Evidence of congressional intent or ratification arguments concerning the Free Speech Clause is scarce, at best. There was clear consensus that the measure prohibited "censorship" but there was debate about the extent to which government could punish speech after it was published. That debate is revealed in the sources recounting the debates over the Sedition Act of 1798. *See* History of Congress, February, 1799 at 2988; *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress, p. 934 (1794)). But did the founding generation intend the First Amendment to protect against compelled speech? For that answer we must resort to the "practices and beliefs of the Founders" in general. *McIntyre v. Ohio Election Comm'n*, 514 US 334, 361 (1995) (Thomas, J., concurring).

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the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."

While there was no discussion of compelled support for political activity, there was significant debate over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. This Court has often quoted Jefferson's argument "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779) in 5 The Founders Constitution, University of Chicago Press (1987) at 77; quoted in *Keller v. State Bar*, 496 U.S., at 10; *Chicago Teachers Union v. Hudson*, 475 U.S., at 305, n.15; *Abood*, 431 U.S., at 234-35 n.31; *Everson v. Board of Education*, 330 U.S. 1, 13 (1947). Jefferson went on to note, "That even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

James Madison was another prominent voice in the Virginia debate, and again this Court has relied on his arguments for the scope of the First Amendment protection against compelled political support: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, Memorial and Remonstrance Against Religious Assessments in 5 The Founders Constitution at 82;

quoted in *Chicago Teachers Union*, 475 U.S., at 305, n.15; *Abood*, 431 U.S., at 234-35 n.31.[3]

Although these statements were made in the context of compelled religious assessments, this Court easily applied them to compelled political assessments in *Chicago Teachers* and *Abood*. This makes sense. Jefferson himself applied the same logic to political debate. In his first Inaugural Address, Jefferson equated "political intolerance" with the "religious intolerance" he thought was at the core of the Virginia debate. Thomas Jefferson, First Inaugural Address (1801) in 5 The Founders Constitution at 152. The theme of his address was unity after a bitterly partisan election, and goal he expressed was "representative government" — a government responsive to the force of public opinion. *Id.*; Thomas Jefferson Letter to Edward Carrington (1787) in 5 The Founders Constitution at 122 (noting, in support of freedom of the press, "[t]he basis of our government [is] the opinion of the people"). How is government to be responsive to public opinion unless individuals retain the freedom to reject politically favored groups?

Madison too noted the importance of public opinion for the liberty the Founders sought to enshrine in the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison and the process for the formation of that opinion is important.

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[3] The amount of compelled support is irrelevant to the constitutional injury. As Madison noted, even "three pence" is too much to compel. Madison, Remonstrance, *supra* at 82. Jefferson noted that freedom of conscience is violated when people are taxed to pay simple living expenses for their own pastors. Jefferson, Religious Freedom, *supra* at 77, *see also Pacific Gas & Electric Co.*, 475 U.S. at 24 (Marshall, J. concurring).

James Madison, Public Opinion (1791) in 2 The Founders Constitution at 73-74. Madison argued that free exchange of individual opinion is important to liberty and that is why he worried about the size of the nation: "[T]he more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty." *Id*. The concern was that "real opinion" would be "counterfeited." *Id*.

Madison's concern for "counterfeited" opinion was based on his fear that the voice of the individual would be lost as the nation expanded. There are other ways to lose the voice of the individual, however. Compelling the individual to support a political organization he opposes is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he despises. He is forced to pay for the counterfeiting of public opinion, distorting democracy and losing his freedom in one fell swoop.

This is exactly what the union, in collaboration with the state, accomplished here. The caregivers are forced to support financially a political organization they oppose — they are forced not only to acquiesce, but to support financially the creation of "counterfeit" public opinion. This is flatly incompatible with the First Amendment with its "respect for the conscience of the individual [that] honors the sanctity of thought and belief." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

Freedom of conscience and the dignity of the individual -- these are the foundations underlying the liberty enshrined in the First Amendment. They lay at the core of Jefferson's and Madison's arguments

that have influenced the separate opinions regarding the Freedom of Speech of Justices Black (*Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J. dissenting) ("The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.")), Douglas (*Pollak*, 343 U.S. at 468-69 (Douglas, J. dissenting)), and Stone (*Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting) ("The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit")), to name but a few.

This Court recognized these principles in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There, Justice Jackson writing for the Court observed that "Authority here is to be controlled by public opinion, not public opinion by authority." Yet reaching this conclusion was not easy for the Court. Just three years earlier the Court upheld a compulsory flag salute law in *Minersville School District v. Gobitis*. That decision prompted Justice Stone to observe that "The very essence of the liberty … is the freedom of the individual from compulsion as to what he shall think and what he shall say." *Id*. at 604 (Stone, J. dissenting).

Since *Minersville*, Justice Stone's dissent has been vindicated. This Court has ruled that the freedom of conscience and human dignity protected by the First Amendment were violated in compelled flag salutes (*Barnette*, 319 U.S. at 641), required membership in a political party (*Elrod v. Burns*, 427 U.S. 347, 356-57 (plurality) (1976)), compelled display of state messages on license plate frames (*Wooley v. Maynard*, 430 U.S., at 713), required distribution of other organization's newsletters (*Pacific Gas & Elec-*

tric Co. v. Public Utilities Commission, 475 U.S. 1, 17-18 (1986)), and compelled contributions for political activities (*Abood*, 431 U.S. at 233-35; *Keller*, 496 U.S. at 16). The First Amendment protects public employees from government-compelled support of the political activities of the state, labor unions, and others.

II. This Court Should Reconsider the Constitutionality of Compelled Payments By Public Employees For "Bargaining"

A. The procedural protections created by this Court have proven ineffective in protecting public employees' First Amendment rights.

In a series of clear decisions, this Court has held that labor unions may not use dues or agency shop fees to support political campaigns which workers do not wish to support. *See Abood*, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 522. Yet for decades, organized labor has engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. Pa. J. Bus. & Emp. L. 663 (2008); Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck*

and similar cases). *See also Monson Trucking Inc.[v.] Anderson*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union [v.] Orce*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 NLRB LEXIS 57, *14 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

As one expert testified to Congress,

> [t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course.

Hearings Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). The NLRB has adopted delay tactics so

extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See*, *e.g.*, *Am. Fed'n of Television & Recording Artists*, 327 N.L.R.B. 474, 476 (1999) (challenging 1989 expenditures). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Given the politically weak positions of dissenting workers, the pervasive abuses of unions, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in the environment of the unionized workplace must be the guiding principle in this case. *See also* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience.").

B. Public sector "bargaining" is indistinguishable other lobbying activity.

Contracts between private employers and unions representing private sector employees are private decisions generally disciplined by market forces.

Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003). Errors in analysis by the employer can lead to the employer going out of business. That result is tempered, however, by the fact that competitors in the private sector can continue to provide the goods or services or new firms can rise to fill the gaps.

Public sector contracts are quite different. As Summers notes, those contracts are not private decisions. Instead, the contract itself is an instrument of government. *Id.* 442. The decision to spend more money on home health care workers means either higher taxes or a decision to spend less money on other public services. Here the employee has two roles that may well be in conflict. As employee, the worker may enjoy the benefit of higher wages, shorter hours, or license restrictions that prevent other workers from competing for his or her position. As a citizen and taxpayer, however, the employee's interests are quite different. The citizen may worry about whether the restrictions limiting competition for his or her job will have an impact on public health or leave some disabled people without the care they need. He or she may also worry about the services that must be cut in order to finance higher wages for his or her job. To cover the costs of increased payments to personal care assistants will the state cut back on healthcare, parks, roads, bridge maintenance, or assistance to the poor?

The District of Columbia Circuit noted this problem in *Miller v. Airline Pilots Association*, 108 F.3d 1415 (D.C. Cir. 1997). The precise issue was whether the union could compel dissenters to contribute toward the cost of lobbying on safety related issues. *Id.*, at 1422. The court explained that while all pilots

may be interested in the airline safety, they will not all agree on the cost of that safety: "The benefits of any regulation include trade-offs." *Id.* That issue of trade-offs is present in every lobbying campaign by public employee unions. Teachers may want higher pay, but are they willing to accept the trade-off of larger class sizes? Will they be willing to subject their own children to those larger class sizes? How is it that only one side of this debate, the public employee union's position, is privileged by the ability to coerce payments from dissenters to support the lobbying?

This Court recognized the difficulty of distinguishing between lobbying and bargaining in *Lehnert v. Ferris Faculty Association*. The plurality opinion agreed that dissenting employees can be compelled to finance lobbying the government to win ratification of a negotiated agreement. *Id.*, 519-20. The Court then tried to draw a line between this type of lobbying and other lobbying that might advance the interests of employees more generally, finding that dissenting employees could not be compelled to pay for the latter. *Id.*, at 520. As demonstrated in *Knox*, however, the unions have ignored such line-drawing. There is, however, no meaningful difference between the two types of legislative measures in terms of their effect on employees as employees and employees as citizen/taxpayers. *See* Rafael Gely, et al., *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"*, 14 Employee Rts. & Emp. Pol'y J. 93 (2010).

Simply put, state and local governments are different from private firms. That difference is critical. We do not rely on government as merely one partici-

pant in the market that produces widgets. Courts have long understood that government is fundamentally different from the private sector. *See Unified School District v. Wisconsin Public Employment Relations Commission*, 81 Wis.2d 89, 259 N.W.2d 724, 730 (1977); *State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d 415, 417 (Fla. 1992). We give our government the power to compel payments in the form of taxes so that it can deliver public services. These public services range from police and fire protection to licensing of drivers to road maintenance to care for the poor. How much in taxes government will compel and what balance of services it will deliver with those tax receipts are all decisions that we leave to the political process. *See Gibraltar School Dist. v. Gibraltar MESPA-Transportation*, 505 N.W.2d 214, 223 (Mich. 1993). The Constitution protects the right of citizens to band together to participate in this process or petition government as individuals. They may not, however, coerce others to finance their political activities.

Public sector bargaining is a political process that concerns the allocation of scarce government resources. *See* Summers at 443. There is no meaningful distinction between an employee group lobbying for a salary increase, a business lobbying for loan or tax credit, or a taxpayer association lobbying for lower tax rates. All of these groups seek to influence government to accept their policy preference and advance their particular financial goals. There is no basis for granting one group the power to compel financial support from citizens who oppose those policy goals. Indeed, this Court recognized that the business' shareholders who dissent from the lobbying program are free to withdraw their investment from

the firm – neither the corporation nor the state may compel them to support the business' lobbying program. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

1. Public sector bargaining is especially pernicious because of the limited short-term focus of the goals of bargaining.

Although this Court first suggested that public employees in "bargaining units" are no different than employees in the private sector compelled into a bargaining unit, the actual judgment of the Court was that the dissenting employees had stated a cause of action under the First Amendment. *Abood*, 431 U.S., at 241-42. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment. He questioned, however, the Court's suggestion that public employees could be compelled to pay a fee for "bargaining" with the public entity employer. Instead, he argued that the Court ought to simply apply the same analysis it used in the patronage cases. *Id*., at 260 n.14 (Powell, J., concurring in the judgment).

Justice Powell's analogy of compelled payments to a public employee labor union to political patronage systems is not entirely apt. In dissenting from the Court's ruling in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), Justice Scalia noted arguments that patronage may be necessary to the survival of political parties "as the forges upon which ... the essential compromises of American political life are hammered out." *Id*., at106 (Scalia, J. dissenting).

While it can be argued that political parties share a goal of governance for the public good – even while disagreeing on what constitutes the public good – the same cannot be said of public employee labor unions. These unions cannot be concerned with the "public good." The union's interest is always the interests of public employees in working fewer hours for more pay and with protection from dismissal. This is a short-term, narrow focus that can easily be seen to come into tension with the employees' interests as citizen and taxpayer.

Two examples in California highlight the limited focus of public employee unions compared to the broader interests of the employees as citizens and taxpayers. Recently, the California Teachers Association successfully opposed a bill that would allow school districts to take prompt action against teachers accused of sexually molesting children. The legislation, Senate Bill 1530, would have allowed school districts to send out the notice of dismissal over the summer thus allowing the dismissal proceedings to begin before the start of the Fall semester. *Compare* http://acalanesteachers.org/News.html *with* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1530&search_keywords=] (last visited Nov. 25, 2013).

Another example, also concerning the California Teachers Association, highlights one reason for California's long-term budget crisis. The union sponsored, campaigned for, and won passage of a ballot initiative compelling the state legislature to devote 40 percent of all state revenues to public schools. Steven Malanga, *The Beholden State*, City Journal, vol. 20, no. 2 (2010) (http://city-journal.org/2010/20_2_california-unions.html last visited Nov. 25, 2013).

Teachers as employees clearly benefitted because the funding formula added $450 million to the budgets of local school districts, most of which went to teacher salaries and benefits. *Id.* Teachers as citizen/taxpayers, however, may have a different point of view on a constitutional provision that ties the hands of the state legislature in allocating limited revenues among all of the competing public services the state provides.

In this way public employee collective bargaining affirmatively interferes with effective governance. *See* Justin, Duclos, *The Etiology of a Malfunction in Democratic Processes*, 45 Ariz. St. L. J. 53, 78 (2013). Because of the political power of this special interest group, cities and school districts are increasingly in danger of bankruptcy. *See* Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U. Pa. J. Lab. & Emp. L. 453 (2003). Several cities have filed for bankruptcy protection in recent years, Detroit being the most recent example. Joseph Lichterman, *Judge to Rule on Detroit Bankruptcy Petition on December 3*, Reuters, http://www.reuters.com/article/2013/11/25/us-usa-detroit-bankruptcy-idUSBRE9AO0ZZ20131125 (last visited Nov. 25, 2013). This case, however, does not involve the question of whether public employee collective bargaining is a wise public policy. Instead, this Court must decide if the citizen who also happens to be an employee must continue to finance the political lobbying for the measures that cause the bankruptcy.

2. Public entities are also in danger of capture by public sector unions in pursuit of their limited, short-term goals.

This Court has recognized the inherently *political* nature of public sector collective bargaining. Lehnert, 500 U.S., at 519. The Court has not, however, given much thought to the impact on government structure of allowing these unions to coerce payments from dissenting employees. Public employee unions have already established themselves as a major political force. *See* Joe Guillen, "Issue 2 Campaigns Raised More than $50 Million," Cleveland Plain Dealer, December 17, 2011;[4] Molly Bloom and Ida Lieszkovszky, "Educations Unions Raise Much of $19 Million to Defeat Ohio's Issue 2," State Impact, NPR, October 27, 2011.[5] This includes political spending on state judicial elections. Brennan Center for Justice, New York University School of Law, "Special Interest TV Spending in Wisconsin Supreme Court Race Tops $3 Million," April 4, 2011;[6] Shushannah Walshe, "30 Million Pouring in to Influence Wisconsin's Recall Elections," ABC News, August 4, 2011.[7]

Public employee unions are not limited to lobbying public agencies and legislative bodies. They can also seek to take over those agencies. Given the narrow focus of these unions and the potential impact on

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[4] http://www.cleveland.com/open/index.ssf/2011/12/issue_2_campaigns_raised_more.html (last visited Nov. 25, 2013)

[5] http://stateimpact.npr.org/ohio/2011/10/27/education-unions-push-campaignspending- on-ohios-issue-2-sky-high (last visited Nov. 25, 2013).

[6] http://www.brennancenter.org/content/resource/special_interest_tv_spending_in_wisconsin_supreme_court_tops_3_million (last visited Nov. 25, 2013).

[7] http://abcnews.go.com /Politics/30-million-pouring-influence-wisconsin-recall-elections/story?id=14235471 (last visited Nov. 25, 2013).

general public policy, the dissenting employee as citizen and taxpayer has special reason to be concerned.

Member dues (both voluntary and coerced) allow public employee unions to amass significant resources to be employed in political campaigns. John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, 162 Hoover Inst. Pol'y Rev. (Aug. 1, 2010).[8] Politicians, eager to maintain their position, will naturally tend to favor concentrated groups with such resources. *Id.* The political power wielded by unions make government authorities more likely to favor the union demands more heavily in balancing taxpayer needs against employee wishes. *See* Matthew Dimick, *Compensation, Employment Security, and the Economics of Public-Sector Labor Law*, 43 U. Tol. L. Rev. 533, 546-47 (2012); Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. Econ. & Org. 1, 4-5 (2006); Troy, *supra*; Terry M. Moe, *The Union Label and the Ballot Box*, Educ. Next, Summer 2006, at 59.

Public employee unions do not simply dominate on financial issues, however. Their campaign war chests also allow them considerable voice on policy. Caroline Minter Hoxby, "How Teachers' Unions Affect Education Production," Quarterly Journal of Economics 111, no. 3 (August 1996). California is a case in point.

A study by the California Fair Political Practices Commission showed that in 10-year period between 2000 and 2009 the California Teachers Association was the top spending political organization in the state by a wide margin. Big Money Talks, Califor-

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[8] http:// www.hoover.org/publications/policy-review/article /43266 (last visited Nov. 25, 2013).

nia's Billion Dollar Club, Calif. Fair Political Practices Comm'n, (March, 2010) at 10.[9] During that period, the powerful public teachers union spent more than $200 million on political campaigns, ballot initiatives, and lobbying. *Id*. at 11. The number two ranked political organization was also a public employee union, the California State Council of Service Employees which spent more than $107 million in this same period. *Id*. at 10. By contrast, the California Chamber of Commerce spent only one-fifth as much on political activities as the teachers union. *Id*.

As noted earlier, the California Teachers Association successfully sponsored a ballot initiative to amend the California Constitution to guaranty 40 percent of the state budget every year to public education. That measure put an additional $450 million per year in the hands of local school districts. Those districts, however, are not managed by independent boards representing parents and citizens. The teachers union has invested its political funds in local school board elections. Those local school boards are now "close allies" of the teachers union. Malanga, *supra*.

This tremendous political power of the public employee unions is made possible in part by rulings of this Court that allow the unions to compel dissenters (as a condition of continued public employment) to contribute financial support to the union's political activities.

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[9] Available at http://www.fppc.ca.gov/reports/Report38104.pdf (last visited Nov. 25, 2013).

C. The Court should overrule *Abood* as a failed experiment based on a faulty premise.

In his dissent in *Rutan*, Justice Scalia quoted the colorful logic of Geoge Washington Plunkitt of Tammany Hall fame:

> "First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay."

Rutan, 497 U.S., at 93 (Scalia, J. dissenting). Whatever one may believe about the merits of Plunkitt's argument for party patronage, the same logic cannot be applied to public employee unions. The nation survived quite well for two centuries served by able men and women as public employees without representation by a public employee union.

This Court in *Abood* accepted, without analysis, the argument that the same interest in labor peace that supported compelled union shop fees in the private sector applied equally to the public sector. *Abood*, 431 U.S., at 224. There was no basis for this claim, however. There was no showing of a history of labor violence that could be settled with collective bargaining and exclusive representation. Even more than the lack of a factual justification for the claimed state interest, there is no basis for distinguishing between "bargaining" and ordinary political activity.

One premise underlying *Abood* and its progeny is that there are actions by public employers that are strictly "employer" actions, separate and apart from

"public agency" actions. *Lehnert*, 500 U.S., at 520. That ill-defined line was fully destroyed, however, when the Court ruled that a public employee union could compel public employees to finance efforts to win legislative approval of the bargaining contract. *Id.* Yet, as we have seen, those activities are fundamentally governmental in nature and affect the entire range of decisions legislatures and executives must weigh in deciding how to allocate scarce public resources.

CONCLUSION

There is simply no basis for distinguishing between a union lobbying for increased wages for public employees, a business lobbying for a tax credit, or a taxpayer organization lobbying for a tax decrease. Allowing a labor union to use the power of the state to compel dissenting employees to pay for the union's political activities advances public employment labor peace no more than allowing the business or the taxpayer association to compel dissenters to contribute toward their political activities. This Court should overrule its decision in *Abood* and reverse the decision below.

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Respectfully submitted,

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