No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
932 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

D. ALICIA HICKOK
Counsel of Record
MARK D. TATICCHI
DRINKER BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alicia.Hickok@dbr.com
Mark.Taticchi@dbr.com

Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because this Court's decision on whether public-sector employees are required affirmatively to opt out of fees for nonchargeable speech has implications for the rights of individuals regarding speech and affiliation and implicates serious privacy issues associated with an individual's choice not to speak or affiliate with a particular organization or type of speech. The Rutherford Institute writes in support of Petitioners on this point.

SUMMARY OF ARGUMENT

The difference between providing a person an opportunity to opt into support for political and ideological speech and requiring that person to opt out has to date been analyzed in terms of *risk*—namely, the risk that his or her funds will be used (even if fleetingly) to support political or ideological speech. It was that analysis that led this Court to require opting into special assessments, and that reasoning certainly

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[1] This amicus brief is filed with the parties' consent. The parties filed their consents with the Clerk of Court on October 24, November 2, and November 3, 2017. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

could support finding that opting in should be required for the funds at issue here as well.

The Rutherford Institute writes to suggest that the question should be analyzed instead in the way that is most protective of two individual rights. *First*, individuals have the right to decide for themselves the "ideas and beliefs deserving of expression, consideration, and adherence," *Agency for Int'l Dev. v. Alliance for Open Soc'y Intl, Inc.*, 570 U.S. __, 133 S. Ct. 2321, 2327 (2013) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)), which means that a person ought not to be obligated to provide financial support unless he or she affirmatively supports what the money is used for. *Second*, the right to privacy that is inherent in the First Amendment ought to be construed so that ambiguity favors the individual's power to decide.

If a person is required to opt out, the person must be strongly enough opposed to the use of his or her money to fund the political and ideological activities that he or she is willing to be seen as a dissenter. The only two options, then, are to support financially or to make a public statement of disavowal. If, on the other hand, a person refrains from opting in, the person does not disclose anything about his or her actual motivation, because one does not need to be an active dissenter not to pay when the payment requires a volitional act.

When examining religious rights under the First Amendment, the Court has been solicitous of a person's right not to identify with any religious belief, and it has elevated that right to the same level as a right to choose among places of worship. The same should be true when examining the speech and associational values at issue here. Only an opt-in system can allow a person to be a non-supporter

without requiring him or her to be a dissenter. And only an opt-in system can protect a person from having to declare dissent in order not to support. Both of these values are inherent in the First Amendment, and this Court should recognize that they lead to requiring an opt-in system as much as the risk analysis in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. __, 132 S. Ct. 2277 (2012) does.

ARGUMENT

I. UNDER *KNOX*, THE OPT-OUT REQUIREMENT FOR ANNUAL ASSESSMENTS IS CONSTITUTIONALLY IMPERMISSIBLE.

In the wake of this Court's precedents of *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and under Illinois law, public-sector employees who decide not to join a representative union are currently required to pay an annual fee that helps fund chargeable expenses related to collective bargaining.

Part of this fee goes to expenses related to the collective bargaining process, and part is for nonchargeable expenses that include political and ideological speech. After the nonmember pays the annual fee, the union calculates the nonchargeable fee and sends a *Hudson* notice to nonmembers. If a nonmember does not want to subsidize the political and ideological actions, he or she must affirmatively request a refund of the amount of the fee designated for nonchargeable expenses—i.e., the nonmember must speak and affirmatively opt out. If the nonmember does not object in the time allowed by the union—which is typically a short time window—the nonmember

must pay the full fee. The nonmembers must take such affirmative steps to speak in order to protect their rights not to associate and not to speak each year. The only question that The Rutherford Institute wishes to address in this brief is whether the same core constitutional values that animated *Abood*, *Hudson*, and *Knox* require that the portion of the annual fee that is not dedicated to collective bargaining be treated the same way that special assessments are – i.e., as opt-in. And it urges the Court to find that that is so, not just based on the reasoning in *Knox*, but based on other values that animate the Court's First Amendment jurisprudence and are equally compelling here.

The opt-out requirement currently in place is constitutionally problematic given that this Court has held that First Amendment guarantees of freedom of both association and expression preclude a public-sector union from requiring a nonmember to give—even temporarily—financial support for political and ideological causes as a condition of public employment. *See Hudson*, 475 U.S. at 302 & n.9.

Indeed, even prior to *Abood*, it was clear that public employees do not give up their First Amendment rights when they accept public employment. *See* 431 U.S. at 222. Even "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Id*. Given that baseline predicate, the Court recognized in *Abood* that compelling full financial support for a union might interfere not only with a public employee's right "to associate for the advancement of ideas," but also with a pubic employee's right "to refrain from doing so, as he sees fit." *Id.* Consequently, the Court in *Abood* determined that to require

a nonmember public-sector employee to specify which nonchargeable expenditures he disagrees with "would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Id.* at 241. Under these principles, then, establishing a process that prohibits a public employee from refusing to speak in order to refuse to associate is constitutionally problematic. *Id.*

In *Hudson*, the Court reaffirmed the caution in *Abood* that requiring a nonmember public employee to provide financial support for the activities of the representative union could infringe on the individual's right to associate or right to refrain from association. 475 U.S. at 302.

In *Knox*, the Court addressed the other end of the fee collection process—special assessments above and beyond the regular annual fee. The specific challenge in *Knox* was to an attempt by Service Employees International Union (SEIU) to collect "special assessment" fees from both members and nonmembers to fund its Political Fight Back Fund. 132 S. Ct. at 2285. In June 2005, SEIU sent its annual, standard *Hudson* notice to employees, informing them of their monthly dues and the estimated percentage of dues that would be allocated for political activities. *Id.* Employees were instructed how to opt out of paying for politically-related activities within 30 days of receiving the *Hudson* notice. *Id.*

Then, on August 31, 2005, the SEIU sent a letter to employees stating that for a limited period of time their fees would be increased to support the union's Political Fight-Back Fund. *Id.* at 2286. The fund was used to oppose two California ballot initiatives (both

regulating union-related activities) and "to elect a governor and a legislature who support public employees and the services [they] provide." *Id.* (citation omitted). Employees who had not objected to part of their annual fee being used to fund political expenditures after receipt of the June *Hudson* notice did not receive a new opportunity to object to supporting political speech after the increase announced in August. And nonmember employees who did opt out of the June *Hudson* notice were required to pay 56.35% of the new assessment (the percentage of the yearly dues not designated for political activity). *Id.*

This Court determined that SEIU's actions were inconsistent with the First Amendment, holding that when a public-sector union imposes a fee increase for political activities, it must provide a new *Hudson* notice and may not use any funds from nonmembers without their *affirmative* consent. *Id.* at 2296. In other words, under *Knox*, public-sector unions can collect special assessments from nonmembers outside of the regular annual fee and for political purposes only through an *opt-in* process.

Following *Knox*, a union must first establish a procedure that avoids a risk that special assessment funds will be used "even temporarily" to fund political and ideological speech, or indeed, any speech not related to collective bargaining. *Id*. This is so because if a public-sector employee ends up paying *less* than his or her proportionate share, no constitutional right of the union would be violated. *Id.* On the other hand, a disproportionally greater payment would infringe the First Amendment rights of the public-sector employee. Accordingly, even if SEIU reimbursed nonmembers who wanted to opt out of the special assessment after the fact, there would still be a First

Amendment violation. "[T]he First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full." *Id.* at 2292-93; *see also Hudson*, 475 U.S. at 305-06 ("A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections.").

The rationale behind the conclusion in *Knox* stemmed from two unremarkable premises. *First*, the state statute forcing nonmember public employees to subsidize political speech constitutes compelled speech and compelled association. 132 S. Ct. at 2291. *Second*, [u]nions have no constitutional entitlement to the fees of nonmember-employees." *Id.* (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007)). The union could not, therefore, compel speech or association by requiring public-sector employees to pay for the union's political and ideological speech unless it served a "compelling interest" and was not significantly broader than necessary to serve that interest. *Id.* In conducting its analysis, the Court determined that because the union did not have a right to collect fees, the nonmembers' First Amendment rights were paramount. *Id.* For that reason, the Court determined in *Knox* that the unions, which do not have a protected right to collect payment from nonmember public-sector employees, and not the nonmember public-sector employees themselves, should bear the risk that the fees collected might be reduced if opt-in procedures were used instead of opt-out ones. *Id* at 2295.

As asked by the majority in *Knox*: "Once it is recognized, as [this Court's] cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for

putting the burden on the nonmember to opt out of making such a payment?" *Id.* at 2290. There is no analytical basis for answering the question for the portion of the annual assessment that goes to support political and ideological union speech differently from the way it was answered for special assessments in *Knox*.

That said, there is an imprecision that has surfaced from time to time in this Court's compelled speech analysis that this case offers the opportunity to address, and that is the issue of the protections given to an individual's right to be silent. The Rutherford Institute urges the Court to address this imprecision.

II. THE CHOICE TO BE SILENT ENCOMPASSES MORE THAN A RIGHT TO DISASSOCIATE OR DISAGREE.

In *Hudson*, the Court repeated the reference on which it had relied in *Abood*—that James Madison's view of religious liberty was echoed in Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." 475 U.S. at 306 n.15 (quoting *Abood*, 431 U.S., at 234-235 n.31, itself quoting I. Brant, James Madison: The Nationalist 354 (1948)). No one would question whether the First Amendment protects a man's right to choose not only which church to attend but whether to choose to attend any church at all. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."). The Court in *Wallace* grounded the right not to select a religion in the "conviction that religious beliefs worthy of respect are the product of free and

voluntary choice by the faithful," a principle that applies equally to "the disbeliever and the uncertain." *Id*. at 53.

The free speech corollary must likewise be true. The First Amendment protects an individual's decision regarding what not to say as much as the decision regarding what to say. *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). But the First Amendment also must encompass a right to be ambivalent or agnostic, decidedly neutral, or apathetic about a message or an affiliation.

In an opt-out system, however, protections are offered only to objecting nonmembers who *disagree with* the political and ideological speech and associations of their representative unions and who disagree strongly enough to meet the deadlines and writing requirements each year. Merely protecting against a requirement that one "furnish contributions of money for the propagation of opinions which he disbelieves" thus protects only a portion of what the First Amendment assures. Those who are ambivalent or agnostic or decidedly neutral or apathetic are left without protection under the current opt-out schemes for nonchargeable expenses.

The opt-out system requires all nonmembers to speak—regardless of whether they agree, disagree, or neither. Because the effect of not opting out is to pay, individuals who do not opt out are speaking in favor of the union's nonchargeable expenditures, and the only alternative speech is to opt out and actively disapprove of the expenditures. The individuals who fall in the middle ground, who affirmatively want to remain silent or who do not care or are undecided, have no way to be silent or to reserve judgment. Instead, they must take affirmative action.

Said differently, an opt-out system requires a nonmember to speak in order not to pay for the political and ideological speech. This practice is thus fundamentally inconsistent with providing equal protection to the right to hold a position that is neither affirmative nor negative. As the Court reiterated several Terms ago, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev.*, 133 S. Ct. at 2327 (quoting *Turner*, 512 U.S. at 641). Indeed, "[o]ur political system and cultural life rest upon this ideal." *Id*. Shifting to an opt-in system protects that right, because the person who pays is one who supports the union's positions; everyone else is permitted to be silent.

There is a second First Amendment value that is implicated in the choice between opting in and opting out. Only an opt-in system can protect the privacy of individual nonmembers' messages or non-messages. By encompassing a variety of messages from agreement to disagreement to ambivalence, the opt-in system protects a person's actual thinking—and strength of conviction—from others' view (and approbation or disapproval). Nothing can be inferred from a person who does not opt in to the excess assessment, except, perhaps, that the individual did not support the political and ideological speech strongly enough to authorize the payment.

This is so because "[i]n most circumstances silence is so ambiguous that it is of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others." *United States*

v. Hale, 422 U.S. 171, 176 (1975). The opposite is true when a person must choose to opt out. That person is compelled to express disagreement in a public and visible way.

Said differently, the right to hold a position that is neither yea nor nay carries with it a concomitant right not to be perceived as taking sides. This right is both a speech right and a privacy right. *See Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (*per curiam*) ("Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" (citation omitted)). Requiring an affirmative opt out from the non-collective bargaining portion of the annual fee compromises that right.

This case provides the Court with the opportunity to say not just that opt-in systems are required because of the risk allocation discussed in *Knox*, but also because they are the only systems that are congruent with the full breadth of the First Amendment's protections. It also provides this Court with the opportunity to affirm that those protections include the right to hold all views between affirmation and rejection and to express, and be known to have expressed, only those views one affirmatively chooses.

CONCLUSION

Opt-out schemes impermissibly place the burden on nonmember public employees to take affirmative steps to protect their inherent rights not to speak and not to associate. Based on the reasoning in *Knox*, opt-out schemes for annual assessments are inconsistent with the First Amendment. In addition, opt-out schemes

cannot accommodate the full range of speech and cannot accord proper privacy protections to that range of speech. Accordingly, The Rutherford Institute respectfully asks the Court to reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
932 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

D. ALICIA HICKOK
Counsel of Record
MARK D. TATICCHI
DRINKER BIDDLE
& REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alicia.Hickok@dbr.com
Mark.Taticchi@dbr.com

Counsel for Amicus Curiae

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