PUBLIC UTILITIES AND THE FIRST AMENDMENT PROBLEM

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Synopsis: Investor-owned utilities are private for-profit companies that enjoy state-granted monopolies to deliver gas and electricity and rely on government-approved rates to generate revenue. Reflecting this legal structure, utility operations and investments are highly regulated. As a result, utilities, whether investor-owned or not, are concerned about legislative and regulatory changes that could impact their business interests. Utilities have interests in a range of policy issues, including infrastructure permitting, air pollution, climate change mitigation, taxes, and land-use. These policy issues impact public spending.

This Article describes how rate-regulated utilities engage in political activities using money that they collect from their captive ratepayers through government-set rates. After *Janus v. American Federation of State, County, and Municipal Employees*, the First Amendment may prohibit federal and state regulators from authorizing utilities to charge ratepayers for any political advocacy expenses. This Article maintains that ratepayer speech and associational freedoms are impermissibly burdened when ratepayers are forced to subsidize utility political speech and activity.

There are reasons that explain why governments granted utility service monopolies to private companies, but this legal and financial ordering cannot be constitutionalized to provide utilities with a singular role in using ratepayer funds to control the future utility service model. This Article suggests an avenue by which ratepayers could ask courts to protect their speech interests while simultaneously lowering their power bills and establishing the correct filed rate.

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I. INTRODUCTION

In 2016, one of the largest multi-state utilities in the country, FirstEnergy Corporation, found itself in trouble. An Ohio subsidiary of FirstEnergy was carrying too much debt. With cheaper renewable energy and natural gas lowering the price of electricity in interstate power markets, FirstEnergy Solutions' coal and nuclear plants were no longer competitive or profitable.[1] Instead of using private financing options, closing its plants, or selling its distressed assets, FirstEnergy attempted to force the public to keep the mismanaged subsidiary afloat.

FirstEnergy's first three attempts to find a "fix for the Ohio hole" failed.[2] In 2016, the Federal Energy Regulatory Commission (FERC) denied FirstEnergy's attempts to force ratepayers to bail out the utility through affiliate power sales

1. *See generally* Complaint at 15-17, State *ex rel.* Yost v. FirstEnergy Corp., 175 Ohio St.3d 201, 240, 240 N.E.3d 269 (2024) (No. 2022-1286), 2020 WL 5743219, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx; *see id*. at 16 ("In its November 2016 Annual Report to Shareholders, FirstEnergy Corp. and its affiliates reported a weak energy market, poor demand forecasts, and hundreds of millions of dollars in losses. Much of these losses could be traced back to failing nuclear power plants operated by FirstEnergy Solutions . . . Worse yet, FirstEnergy Corp. was forced to 'write down' the value of the coal and nuclear plants owned by FirstEnergy Solutions by $6.2 billion.").

2. Answering Brief for Plaintiffs-Appellees' at 4-5, 9, Diane Owens v. FirstEnergy Corp., 149 F.4th 587 (6th Cir. 2004) (Nos. 23-2940, 23-943, 23-3945, 23-3946, 23-3947) (quoting evidentiary record detailing conversations between FirstEnergy executives that describe the overarching scheme as the "Ohio hole"). *See also* SHARON JACOBS & ARI PESKOE, ENERGY EMERGENCIES VS. MANUFACTURED CRISES: THE LIMITS OF FEDERAL AUTHORITY TO DISRUPT POWER MARKETS 22-23 (Harv. Enviro. & Energy L. Prog. 2019).

agreements, which are generally prohibited under federal regulations.[3] During both the 2017 and 2018 state legislative sessions, the Ohio Legislature rejected state laws that would have forced ratepayers to subsidize FirstEnergy's nuclear plants.[4]

FirstEnergy switched tactics. In the run-up to the 2018 election cycle, FirstEnergy funneled over $60 million to Ohio politicians through a 501(c)(4) entity, Generation Now.[5] Generation Now then used FirstEnergy's funding to orchestrate the passage of state legislation that provided bailout protection to FirstEnergy's mismanaged subsidiary.[6]

FirstEnergy charged its captive ratepayers a portion of the $60 million that it directed to Generation Now.[7] In doing so, FirstEnergy forced its ratepayers to act as unwitting accomplices to the utility's efforts to secure passage of FirstEnergy's bailout legislation, which one energy consulting firm suggests will cost Ohioans "$2 billion in excess utility fees and $7 billion in health care costs stemming from pollution."[8] FirstEnergy's decision to charge ratepayers for some of its political activities—unearthed only after a random audit by federal regulators and a federal investigation of the Ohio Speaker of the House—is not anomalous in the industry.[9]

Utilities are private for-profit companies that enjoy state-granted monopolies to deliver gas and electricity. The for-profit utility business model is inherently political; reflecting contentious state decisions to provide a reasonable opportunity for privately owned utilities to recover their costs and earn a return on their capital expenses.[10] Reflecting the for-profit business model, utilities also have business

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3. *See Electric Power Supply Ass'n v. AEP Generation Res. Inc.*, 155 FERC ¶ 61,102 (2016); *Electric Power Supply Ass'n v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 (2016).

4. Complaint at 17, 20, State *ex rel.* Yost v. FirstEnergy Corp., 175 Ohio St.3d 201, 240 N.E.3d 269 (2024) (No. 2022-1286), 2020 WL 5743219, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx (describing how FirstEnergy legislation "received virtually no support from legislators").

5. 501(c)(4) entities are a type of tax-exempt "social welfare" organization that act as vehicles for corporations to advance preferred policies by funding political activity, lobbying, and issue advocacy. 501(c)(4) entities are not required to publicly disclose donors under federal law, so they are often preferred by corporations or individuals that do not want a public record of their activity. *See generally Social Welfare Organizations*, IRS (last updated Apr. 17, 2025), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (last visited Sep. 21, 2025). *See infra* Part III.A(4) for further discussion of 501(c)(4) entities.

6. *See infra* Part III.A(4).

7. *See infra* Part III.A(4) for information detailing how FirstEnergy charged ratepayers for its political activity.

8. Nathanael Johnson, *How a $60 Million Bribery Scandal Helped Ohio Pass the 'Worst Energy Policy in the Country*, GRIST (Jan. 26, 2022), https://grist.org/politics/how-a-60-million-bribery-scandal-helped-ohio-pass-the-worst-energy-policy-in-the-country.

9. *See infra* Part III.A.

10. *See e.g.*, Sandeep Vaheesan, *Democratic Abundance*, LAW & POL. ECON. PROJECT (June 2, 2025), https://lpeproject.org/blog/democratic-abundance/ (arguing that "public ownership of our energy infrastructure provides our best chance of achieving truly 'just and reasonable' rates, ensuring equitable siting of necessary but often intrusive long-lived infrastructure, and elevating demand-side solutions as an essential component of controlling climate change); Chris Villarreal et al, *State-By-State Scorecard on Electricity Competition*, R ST. INST. (May 22, 2025), https://www.rstreet.org/research/state-by-state-scorecard-on-electricity-competition/ (contending that policies encouraging private utility competition offer consumer benefits); Harvey L. Reiter, *Competition*

interests in a range of debated policy issues that impact public spending, including infrastructure permitting, air pollution regulation, climate change mitigation, taxes, and land-use. Utilities, like FirstEnergy, regularly speak—lobby, litigate, advertise—on these controversial issues using money that they collect from the public through government-set rates.

Across the country, rate-regulated utilities are charging unknowing ratepayers for political activity.[11] While the percentage of political advocacy costs in any individual ratepayer bill may not be significant, households may nonetheless be forced to subsidize political activity when paying the power bill every month. These expenses amplify each utility's voice in the political process to increase long-term profits. And in a country with rising electricity rates[12] where an estimated one-in-three American households cannot afford enough electricity, every dollar counts, particularly for ratepayers living in the Southeast and Southwest.[13]

A few states have taken initial legislative and regulatory steps to stop utilities from charging their captive ratepayers for political activities.[14] This Article, however, argues that the First Amendment compels a uniform standard across all states: a utility cannot charge its captive ratepayers for any political activity.

In *Janus v. American Federation of State, County and Municipal Employees*,[15] the Supreme Court announced that the First Amendment generally bars the government from compelling people to pay money to a private organization that engages in speech on matters of substantial public concern. While courts have applied *Janus* to several other types of compelled speech, they have not yet done so in the utility context. This Article contends that the Supreme Court's *Janus* decision applies in force to utilities: it is unconstitutional for the state to authorize monopoly utilities to charge ratepayers for political speech and political activity. The First Amendment prohibits federal and state regulators from authorizing utilities to charge ratepayers for the private organization's political advocacy.

Between Public and Private Distributors in a Restructured Power Industry, 19 ENERGY L. J. 333, 339-40, 343-45 (1998) (explaining how municipal electrical utilities can place pressure on private utilities to perform well and contain costs).

11. *See infra* Part III.A.

12. *See* Noah Schwart, *Requests for Utility Rate Hikes Reach $29 Billion in 2025—Report*, S&P GLOB. (Jul. 10, 2025), https://www.spglobal.com/market-intelligence/en/news-insights/articles/2025/7/requests-for-utility-rate-hikes-reach-29b-in-2025-report-91494944.

13. *See* Carlos Batlle et al., *U.S. Federal Resource Allocations are Inconsistent with Concentrations of Energy Poverty*, 10 SCI. ADVANCES 1 (2024) ("Nearly one in three households in the United States report experiencing energy poverty . . . [and] ~20% of households reported having reduced or not purchased basic necessities to pay their energy bills.").

14. At least eighteen states have filed legislative proposals to prohibit utilities from charging customers for utility political activity, but a majority of these efforts have failed. *See* Shelby Green, *Tracking State Legislation to Get Politics Out of Utility Bills*, ENERGY & POL'Y INST. (May 30, 2025), https://energyandpolicy.org/tracking-states-getting-politics-out-of-utility-bills. Six states have passed legislation that prohibits, to varying degrees, utilities from charging ratepayers for some political activity. *See* California Ratepayer Protection Act of 2025, 2025 CAL. LEGIS. SERV. CH. 634 (West); COLO. REV. STAT.§ 40-3-114 (2023); CONN. GEN. STAT. § 16-243p (2023); An Act to Require Transparency in Public Utility Advertising Expenditures, 2023 Me. Laws 329 (codified as amended at ME. STAT. tit. 35-A, § 302 (2023)); N.H. REV. STAT. ANN. 378:30-e (2019); 2025 Md. Laws. 625.

15. 585 U.S. 878 (2018).

This Article proceeds in five parts. Part II provides an overview of public utilities and the rate-regulation process. Part III details the various political activities that utilities are engaged in before explaining how these companies fund their speech by charging captive ratepayers. Part IV describes the evolution of the Supreme Court's compelled speech and compelled association doctrine. Prior to the Supreme Court's decision in *Janus*, the Court's compelled speech doctrine permitted states to authorize utilities to charge ratepayers for speech that the companies considered germane to its purpose. Part V concludes that *Janus* prohibits states from authorizing this unworkable line-drawing exercise for utilities that engage in any political activity. When utilities charge captive ratepayers to engage in *any* speech that is political, ideological, and divisive, objecting ratepayers are harmed. After *Janus,* the First Amendment prohibits federal and state regulators from authorizing utilities to charge ratepayers for political speech. Part VI suggests that in advancing constitutional claims against utilities' rates that include political speech and political activity costs, ratepayers could reassert their collective interests against utilities.

II. RATE-REGULATED PUBLIC UTILITIES

Public utility laws grant investor-owned utilities monopoly service territories to deliver gas and electricity.[16] These laws also provide utilities with state-regulated rates that are designed to protect the financial viability of utilities and facilitate growth.[17] The result is a lucrative business model: the law shields public utilities from competition by prohibiting new entrants and providing an opportunity to secure significant revenue. Investor-owned electric utilities distribute power to approximately three-quarters of U.S. homes,[18] and utilities enjoy a market capitalization that exceeds $1 trillion.[19]

Reflecting their corporate form, investor-owned utilities are incentivized to maximize profits for shareholders and executives. But utilities, also reflecting their corporate form, pursue profit at the expense of ratepayers.[20] In the absence

16. State public utility laws also grant monopolies to electric cooperatives and publicly owned municipal utilities. Because this Article focuses on investor-owned utilities, discussion of community-owned and municipally managed utilities falls outside of the scope.

17. *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 836-37 (2016).

18. *See* Anodyne Lindstrom & Sara Hoff, *Investor-Owned Utilities Served 72% of U.S. Electricity Customers in 2017*, U.S. ENERGY INFO. ADMIN. (Aug. 15, 2019), https://www.eia.gov/todayinenergy/detail.php?id=40913.

19. *See Utilities—Regulated Electric*, STOCK ANALYSIS (last visited Jun. 27, 2025), https://stockanalysis.com/stocks/industry/utilities-regulated-electric (using 41 stocks to estimate a market capitalization of regulated electric utilities at $1.12 trillion); EDISON ELEC. INST., 2023 FINANCIAL REVIEW: ANNUAL REPORT OF THE U.S. INVESTOR-OWNED UTILITY INDUSTRY 7 (2024) (estimating investor-owned electric utility companies to have a total market capitalization of $890 billion at Dec. 31, 2023).

20. *See generally* Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. REG. 569, 583-90 (2023). *See, e.g.*, Tim McLaughlin, *Top U.S. Power Sector CEOs Pull Down $115 Million in Performance Pay*, REUTERS (Apr. 14, 2025), https://www.reuters.com/business/energy/top-us-power-sector-ceos-pull-down-115-million-performance-pay-2025-04-14 (explaining that utility executive pay is typically tied directly to "performance targets such as total shareholder return and cash flow over a three-year period,"

of competition, public utility commissions (PUCs) are tasked with protecting the public from utilities' monopoly power.[21] Because utilities would charge monopoly prices in the absence of price controls, regulators limit and closely monitor the rates that utilities can charge captive ratepayers.[22]

The rate-setting process is at the heart of the government's oversight of utilities.[23] Regulators use rate cases to balance customers' interest in low prices and fair terms of service against utilities' interest in maximizing returns for its shareholders.[24] Generally, government-approved rates reimburse utilities for operational expenses and provide an opportunity for utilities to earn a fixed rate of return on capital expenditures, which are energy infrastructure projects like new distribution lines or transmission projects. After regulators approve rates, utilities have a legal right to seek recovery of those costs by charging ratepayers.[25]

When utilities request new rates, state PUCs determine whether rate increases should be granted, revised, or denied in a trial-type process. During rate cases, regulators review the operational expenses that utilities seek to recover from ratepayers. Regulators also scrutinize all capital investments because utilities, which can recover capital costs and earn a rate of return on investments, stand to profit from building new infrastructure.[26]

The PUC sets energy rates based on information generated by utilities. Rate cases are premised on utility accounting records about the expenses they represent to have incurred when providing service. Utilities, however, do not provide internal records to state regulators or other parties in the rate-case proceeding unless specific information is requested.[27] Instead, using self-reported data, utilities

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and noting the 2022-2024 performance pay of utility executives, including Vistra CEO's $28.9 million payout, Duke CEO's $16.4 million payout, and PSEG CEO's $12 million payout).

21. *See* Smyth v. Ames, 169 U.S. 466, 545-46 (1898).

22. Some regulatory authorities have supplemented regulation with competition. *See, e.g.*, Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540, 21543 (1996) (to be codified at 18 C.F.R. pts. 35, 385); Order No. 2000, *Regional Transmission Organizations*, 89 FERC ¶ 61,285 (1999).

23. Even in states that provide retail choice, the state continues to set rates for the delivery of electricity. Distribution costs are a significant, and growing, component of customer bills. *See generally Grid Infrastructure Investments Drive Increase in Utility Spending Over Last Two Decades*, U.S. ENERGY INFORMATION ADMIN. (last visited Sep. 22, 2025), https://www.eia.gov/todayinenergy/detail.php?id=63724; Nicholas Crowley & Daniel McLeod, *Trends and Drivers of Distribution Utility Costs in the United States: A Descriptive Analysis from 2008 to 2022*, 37 ELEC. J. 1 (2024).

24. *See generally* Federal Power Comm'n v. Hope Nat. Gas, 320 U.S. 591, 596 (1944); Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1190 (D.C. Cir. 1987) (Starr, J., concurring).

25. *See* Kovvali & Macey, *supra* note 20, at 584.

26. *See generally* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962).

27. In order to request accounting records about certain expenses, regulators and interveners must be aware of the underlying activity for which they are seeking additional information. *See* Scott Judy, *PSC Finds S.C. Utility Withheld Information About Failed Nuke Project*, ENG'G NEWS-REC. (Jan. 15, 2019), https://www.enr.com/articles/46211-psc-finds-sc-utility-withheld-information-about-failed-nuke-project. Utilities can also fail to provide information to regulators even when this information has been requested in discovery. *See, e.g.*, Prepared Testimony of Thomas Long and Sylvia Ashford, Docket No. A.23-06-0008 (Cal. Pub. Serv. Comm'n Sep. 17, 2024), https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/A2306008/7733/540720190.pdf (in

quantify incurred operating expenses and propose a desired return on equity. While intervenors and PUC staff respond to utilities' accounting and proposed business plans, it is the utilities that initially classify expenses and decide what is and is not political speech.

III. UTILITIES FUND THEIR POLITICAL ACTIVITIES BY CHARGING RATEPAYERS

Monopoly utilities regularly speak on, and engage in, various political activities with the goal of aligning the distribution and collection of public money to their corporate interests.[28] Because policies can affect utilities' profits, utilities and their trade associations engage in legislative and regulatory advocacy, litigation, advertising, and financial support of political candidates. These political activities necessarily implicate controversial political subjects, such as climate change, energy generation issues, the role of government in energy and environmental regulation, and infrastructure permitting. Even though many states prohibit utilities from charging customers for direct lobbying expenses, utilities can evade existing rules, and definitions of lobbying are too narrow to capture the panoply of political activity.[29] The consequence of the existing system is that utilities fund some of their political activities, as well as those of their trade organizations, through government-set energy rates charged to captive customers.

A. Utilities Engage in Political Speech and Political Activity

Utilities and their trade associations engage in a number of political activities to affect how public money is spent. These political activities bear fruit: utilities are among the most powerful actors in state and federal policymaking.[30]

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discovery, "PG&E stated that it was not able to provide the specific costs attributable to . . . these two ads and could only state that the costs were included in Planning Order #5049478 for 2022, to which PG&E booked $2,502,000 . . . PG&E records do not enable a determination of which costs in this $2.5 million are attributable to the two video ads in question."); Heather Payne, *Private (Utility) Regulators*, 50 ENV'T L. 999, 1007, 1034-36 (2020) (providing examples of utilities withholding information from regulators and noting that "simply put, fully regulated, monopolistic cost-of-service utilities are not providing enough information to enable meaningful regulation and oversight"). Monopoly utilities also withhold information from the general public, despite facing no competition. Utilities routinely invoke competitive interests as a reason to withhold information from the public. *See id*. at 1045; Entergy La., LLC, Docket No. U-37425, D. Skylar Rosenbloom Letter (La. Pub. Serv. Comm'n Oct. 30, 2024), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=4y5xTw%2F15do%3D.

28. I use the term "political activity" to describe the various actions (including speaking) utilities undertake with the goal of modifying how public money is distributed or collected. This includes efforts to influence public spending through direct political influence, as well as indirect political influence through other organizations or initiatives.

29. *See infra* Part III.A, B.

30. *See generally* Joshua A. Basseches et al., *Climate Policy Conflict in the U.S. States: A Critical Review and Way Forward*, 170 CLIMATE CHANGE 1, 7 (2022) (summarizing scholarship "that attends to [investor-owned utilities'] political activities shows them to be among the most powerfully political actors in state-level climate policymaking" and noting that "[t]he sources of their influence include monopoly control of electricity distribution, unparalleled technical expertise, their lobbying force, and flexible corporate organization"); Joshua A. Basseches, *Who Pays for Environmental Policy? Business Power and the Design of State-Level Climate Policies*, 52 POL. & SOC'Y 409, 438-39 (2024) (explaining that investor-owned utilities are "so much more influential than competing business actors" because of their "(1) size/representation, (2) lobbyists, (3) technical expertise, and

1. Improper Lobbying Charges

Utilities attempt to influence policy by directly lobbying legislative and regulatory bodies.[31] While the scope of ratepayer subsidized lobbying is unknown, sporadic audits by federal and state energy regulators demonstrate that utilities regularly charge their captive customers for lobbying expenses. In some cases, regulators eventually required refunds or offsets, but they only did so after audits revealed improper charges.

"[M]ost audits" conducted by FERC reveal that utilities improperly charge ratepayers for "lobbying expenses."[32] For example, a random federal audit of multi-state utility company FirstEnergy revealed the utility's practice of charging ratepayers millions for lobbying expenses and political corruption during its multi-year effort to pass Ohio House Bill 6 and to subsequently defeat a citizen referendum that sought to repeal the legislation.[33] House Bill 6, which committed $1.3

(4) flexible forms of corporate organization"); *The U.S. Power Sector and Climate Policy*, INFLUENCEMAP (Apr. 2022), https://influencemap.org/site/data/000/018/U.S._Power_Sector_Report_Final_April2022.pdf; *See also* Trevor Culhane et al. *Who Delays Climate Action? Interest Groups and Coalitions in State Legislative Struggles in the United States*, 79 ENERGY RSCH. & SOC. SCI. 1, 10 (2021) ("We find that *Utilities* have the largest and most significant positive correlation between their interests and bill movement . . . We can see that the legislative process systematically results in outcomes that benefit certain coalitions—most notably the *Utilities*—over others."); *id*. at 12 ("Our analysis of lobbying activity reveals a broad split between the coalition advancing climate and clean energy legislation . . . and its opposition coalition (*Utilities, Power Generation, Fossil & Chemical, and Real Estate*). The utilities, similar to their role in key federal climate policy, opposed, hedged their bets on, or supported climate legislation in Massachusetts based on their ability to manage and profit from energy supply."); Christian Downie, *Fighting for King Coal's Crown: Business Actors in the U.S. Coal and Utility Industries*, 17 GLOB. ENV'T POL. 21, 34 (2017) ("[E]lectric utilities can be categorized into three broad groups that supported, hedged, or opposed [certain] regulatory initiatives. These positions closely correlated to their generation portfolios.").

31. *See, e.g.*, Michelle Griffith, *Money Spent on Lobbying in Minnesota Ballooned 18% from 2022 to 2023*, MINN. REFORMER (Oct. 1, 2024) https://minnesotareformer.com/2024/10/01/money-spent-on-lobbying-in-minnesota-ballooned-18-from-2022-to-2023/ (explaining how Xcel spent $1.33 million lobbying the Minnesota PUC in 2023 to push the PUC to approve extending operations of Xcel's Monticello nuclear plant through 2040); Kelsey Brugger, *Why the Permitting Talks Collapsed*, E&E NEWS (Dec. 23, 2024, 6:38 AM), https://www.eenews.net/articles/why-the-permitting-talks-collapsed/ (detailing how Duke Energy spent $1.16 million lobbying on a proposed Senate permitting bill in July, August, and September 2024); Morris et al., *Inside 'The Pond' – CenterPoint's Private Houston-Area Retreat Used for Lobbying Texas Politicians*, HOU. CHRON. (Aug. 14, 2024), https://www.houstonchronicle.com/news/investigations/article/centerpoint-pond-retreat-texas-lawmakers-19579557.php.

32. 2024 REPORT ON ENFORCEMENT, FERC Docket No. AD07-13-018, at 51 (Nov. 21, 2024) [hereinafter 2024 REPORT]. *See also id*. at 58 (summarizing FERC audits as revealing "improper application of merger-related costs; lobbying, charitable donation, membership dues, and employment discrimination settlement costs").

33. *See, e.g.*, Dave Anderson, *FirstEnergy Floats $13.6 Million Refund in Pennsylvania in Response to Ohio Criminal Investigation and Audits of Influence Spending Charged to Customers*, ENERGY & POL. INST. (Apr. 4, 2024), https://energyandpolicy.org/firstenergy-refund-pennsylvania/ (detailing mischarges); Potomac Edison Co., No. 9695, at 16 (Md. Pub. Serv. Comm'n Oct. 18, 2023) (granting request for an independent audit of Potomac Edison and noting at least $38,000 in improper charges); Dave Anderson, *Potomac Edison Faces Maryland Audit After Admitting it Charged Customers for FirstEnergy's Bribes and Lobbying*, ENERGY & POL. INST. (Oct. 26, 2023), https://energyandpolicy.org/firstenergy-maryland-audit/ (noting FirstEnergy admitted in a rate case that it owes $1.7 million in refunds to Maryland customers), Tom Johnson, *JCP&L To Pay Back Customers After Audit*, N.J. SPOTLIGHT NEWS (Mar. 23, 2023) https://www.njspotlightnews.org/2023/03/audit-indicates-jcpl-owes-customers-nearly-10-million/ (explaining Jersey Central Power & Light owes customers $9.6 million after lobbying costs were allocated to ratepayers).

billion in ratepayer money to bail out nuclear plants owned by a bankrupt subsidiary of FirstEnergy, eventually passed. Similarly, SoCalGas, a California gas utility, charged its ratepayers $29.1 million between 2019 and 2023 to finance its lobbying efforts to prevent building electrification policies, which would have had the effect of reducing the utility's gas sales.[34] In 2014, San Diego Gas & Electric Company charged ratepayers $114,000 for "costs incurred to support activities to influence public opinion with regard to legislation."[35] Michigan Electric Transmission Company charged its transmission customers $57,673 for lobbying costs from 2015 to 2018.[36] West Virginia Public Service Commission Staff maintain that subsidiaries of FirstEnergy also classified over $50 million in lobbying expenses and political donations for recovery from captive West Virginia ratepayers.[37] Southwestern Electric Power Company (SWEPCO), a multi-state electric utility that serves customers in Arkansas, Louisiana, and Texas, charged its Louisiana ratepayers for "expenses related to Regulatory and Legislative Actions in the State of Louisiana."[38]

Utilities also charge ratepayers for the salaries of employees who work on direct lobbying efforts.[39] Often, these employees work in "government affairs" or "government relations," and directly lobby elected officials. Other employees, and often company executives, also indirectly engage in political activity during the course of their jobs but fail to classify this discrete time as lobbying.

For example, Atmos Energy, one of the nation's largest natural gas utilities lobbied aggressively in Colorado against pro-electrification building code changes. In July 2021, Gunnison's City Council passed a robust climate plan designed to reduce the county's carbon emissions through electrification of all new residential and commercial structures by 2030. Two months later, Atmos employees, including the Vice President of Marketing and a Public Affairs Manager,

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34. Report on the Results of Operations for San Diego Gas & Electric Company & Southern California Gas Company Test Year 2024 General Rate Case, Docket No. A.22-05-015 et al., at 15-16 (Cal. Pub. Utils. Comm'n Mar. 27, 2023), https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/proceedings-and-filings/230327-caladvocates-a2205015-et-al-political-activites-booked-to-ratepayer-accts-redacted.pdf ("[T]he utility initially insisted that shareholders were funding C4BES' activities. However, Cal Advocates' request for evidence supporting this claim—enforced by a motion to compel—eventually revealed that SoCalGas had booked costs to create and support C4BES to a ratepayer account, and that the utility authorized $29.1 million for these efforts between 2019 and 2023.").

35. *South Dakota Gas & Elec. Co*., FERC Docket No. FA19-3-000, at 44-46 (Jul. 30, 2020).

36. *Michigan Elec. Transmission Co*., FERC Docket No. FA19-7-000, at 17-18 (Jul. 2, 2020).

37. *See* Monongahela Power Co. & Potomac Edison Co., No. 23-0460-E-42T, at 61-62 (W. Va. Pub. Serv. Comm'n Jan. 25, 2024) ("FERC found that certain labor and related cost charges to construction did not meet FERC Uniform System of Accounts (USoA) guidelines for the capitalization of A&G overhead costs from 2015 through 2021. As of December 31, 2022, the Companies have estimated the costs to be $43,418,594 for Mon Power and $7,190,323 for PE. Based on the FERC audit, the Company made an accounting error that continued from 2015 through 2021, and these costs would not have been eligible for recovery in prior nor current proceedings.").

38. *See* Cole Triedman & Cameron Brooks, Regulatory Treatment of Political Expenses in Louisiana and Around the Country, Docket No. R-36832, at 12 (La. Pub. Serv. Comm'n Oct. 25 2024), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=SQev4IRt49s%3D.

39. *See, e.g.*, KARLEE WEINMANN & ITAI VARDI, POWER TRIP: HOW UTILITIES USE CUSTOMER MONEY TO FUND LOBBYING, CORPORATE BRANDING, AND LUXURY LIFESTYLE EXPENSES 10-11 (Energy & Pol. Inst. 2024).

launched a public lobbying campaign against the proposed code changes and testified against them at a council meeting. The city council voted to table discussion of electric-ready building codes for three years.[40] While Atmos' annual report to the state energy regulator disclosed payments that the utility made as part of its lobbying effort against building electrification codes, it only disclosed payment to a single registered lobbyist and did not include a prorated portion of its employee's salaries to reflect the lobbying activity.[41] Because Atmos charges ratepayers for the salaries of its employees, the utility likely forced ratepayers to subsidize the lobbying conducted by utility employees as they influenced Gunnison's proposed building codes. Similarly, in 2023 and 2024, National Grid employees with the titles, "Vice President for U.S. Policy and Regulation" and "Director of Policy and Regulatory Strategy," submitted comment letters responding to a policy designed to establish a declining cap on greenhouse gas emissions.[42] Ratepayers "paid for the labor costs of writing and submitting that comment letter."[43]

2. Industry Trade Associations

The individual and collective policy goals of utilities are often advanced through powerful trade associations, such as the Edison Electric Institute (EEI), the American Gas Association, and the U.S. Chamber of Commerce.[44] Utility trade associations engage in political activity because they can coordinate efforts to craft and respond to policy that threatens to cut into the profits of their member utilities. Trade associations also fund outside political organizations, litigation, and regulatory advocacy to amplify policy coordination.[45]

To this end, utility trade associations are engaged in lobbying by supporting national policy campaigns and coordinating state-level policy initiatives.[46] For example, the U.S. Chamber of Commerce, which counts all investor-owned utilities as members, organized an effort to defeat the Build Back Better Act, a $3.5 trillion reconciliation package that directed public funds, including $550 billion to

40. Nick Bowlin, *The Natural Gas Pushback*, HIGH COUNTRY NEWS (Mar. 21, 2023), https://www.hcn.org/issues/55.4/the-natural-gas-pushback.

41. *See* Joe Smyth, *New Bill Aims to Stop Colorado Utilities from Spending Ratepayer Money on Politics*, ENERGY & POL. INST. (Apr. 20, 2023), https://energyandpolicy.org/new-bill-aims-to-stop-colorado-utilities-from-spending-ratepayer-money-on-politics.

42. *See* Niagara Mohawk Power Corp., Nos. 24-E-0322 & 24-G-0323, at 109-10 (N.Y. Pub. Serv. Comm'n Sep. 26, 2024), ttps://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B0B73392-0000-C64B-858D-B9C25480D349} (discussed by WEINMANN & VARDI, *supra* note 39, at 11).

43. *See id*. at 111.

44. *See generally* Robert Brulle & Christian Downie, *Following the Money: Trade Associations, Political Activity and Climate Change*, 175 CLIMATIC CHANGE 1, 2 (2022) ("[T]rade associations [in the United States] spent $3.4 billion on political activities related to climate change between 2008 and 2018 . . . We find that trade associations spent $2.16 billion on advertising and promotion, $729 million on lobbying, $394 million on grants and $105 million on political contributions.").

45. *See generally Center for Biological Diversity's Opening Comments*, FERC Docket No. RM 22-5-000, at 6-7 (Feb. 22, 2022) [hereinafter *Biological Diversity's Opening Comments*].

46. *See, e.g.*, *Initial Comments of Edison Electric Institute*, FERC Docket No. RM22-5-000, at 13 (Feb. 22, 2022) [hereinafter *Initial Comments of Edision*] (explaining how "EEI provides member companies with a significant range of services that benefit electricity customers, beyond any lobbying activity that we report consistent with federal requirements," including "tracking, summarizing, sharing, and participating in various proceedings across the regulatory landscape.").

respond to the effects of climate change.[47] In 2022, EEI reported being "involved in forty-one states and D.C. last year helping our member companies deal with state regulators and the issues, and we spend a lot of time with state regulators trying to educate them on the importance of these [regulatory proceedings and rate case] decisions."[48] EEI also reported having "directly engaged with state policymakers" on controversial policies.[49] The trade association has also taken credit for delaying the implementation of the Clean Power Plan and achieving "less stringent" standards for new coal-fired power plants.[50]

To fund their various political activities, trade associations charge dues to member utilities. Investor-owned utilities then decide whether and how they will charge these dues to ratepayers. Utilities often record a portion, if not the entirety, of these dues as "operating costs," which are costs that are then passed onto ratepayers unless the state interrogates the expenses and disqualifies their recovery during a rate case.[51] Due to existing rules, some utilities charge ratepayers for all industry association dues, even when the entirety of these funds are used by trade associations for political activities, including lobbying on legislation. In 2020 for example, one research group claimed that industry associations charged utility ratepayers for at least $91,602,933 in dues, although the "actual amount of spending is likely far higher."[52]

Federal audits reveal that utilities regularly charge customers for trade association direct lobbying expenses, despite federal rules against this practice. For example, National Grid's "utility subsidiaries improperly included the lobbying component of industry association payments in their wholesale transmission rates."[53] National Grid did so repeatedly. From 2013 to 2015, National Grid "recorded the entirety [of its gas industry association] payment, including the lobbying

47. *See* U.S. Chamber Staff, *U.S. Chamber's 2022 Accomplishments on Behalf of Business*, U.S. CHAMBER OF COM. (Jan. 6, 2023), https://www.uschamber.com/about/2022-accomplishments-on-behalf-of-business ("Throughout 2022, the U.S. Chamber has advocated in Congress for federal policies that allow businesses to support jobs, growth, and opportunity. We defeated the original 'Build Back Better' reconciliation effort and successfully lobbied members of the House and Senate to reject $2.6 trillion in harmful tax increases from the final bill.").

48. *Comment of the Harvard Electricity Law Initiative*, FERC Docket No. RM 22-5, at 7 (Feb. 22, 2022) [hereinafter *Comment of the Harvard Initiative*].

49. *See id*. at 6. *See also* Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 TEX. J. OIL, GAS & ENERGY L. 101, 150-64 (2016); *Comment of the Harvard Initiative*, *supra* note 48.

50. *See* EDISON ELEC. INST., 2015 RESULTS IN REVIEW (Huffington Post 2016), https://big.assets.huffingtonpost.com/eeibooklet.pdf.

51. Most state and FERC accounting rules consider trade association dues to be presumptively recoverable. *See Delmarva Power & Light Co.*, 58 FERC ¶ 61,169, 61,509 (1992) (stating FERC "has allowed utilities to allocated EEI contributions to wholesale customers only to the extent the contributions are for research and development programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities may not, under any circumstances, be included in the utility's cost-of-service.").

52. *Comments of E9 Insight*, FERC Docket No. RM 22-5-000, at 1 (Feb. 22, 2022) (detailing itemization of utility expenses, including "Industry Association Dues").

53. *Nat. Grid USA*, FERC Docket No. FA16-2-000, at 24 (Nov. 15, 2019).

portion" as an office supply and expense, which it charged to ratepayers.[54] Similarly, a subsidiary of Entergy recorded $85,604 in lobbying expenses for industry association dues that were "recovered in the transmission formula rate."[55] San Diego Gas & Electric improperly charged ratepayers for $275,522 for the "portion of industry association membership dues paid to support associations' efforts to influence legislation."[56]

3. Advertising

Utilities, as well as their trade associations, also use advertising techniques to shape political activity.[57] Utilities advertise to build goodwill amongst a targeted audience that can ultimately shift policies on a single issue and improve the general perception of the utility by reducing the risk that the public will call for future policies that could undercut utility profits.[58]

Utilities engage in issue advertising to advance discrete policy goals. Generally, these advertisements "present the corporation's definition of the issue, structure of facts and argument, and preferred policy alternative. The corporation's view of the problem and its resolution is offered as accurate, valid, and in the public interest."[59] National Grid "used ratepayer funds to develop advertising and other materials that seek to sway public opinion on . . . the role of alternative combustion fuels such as biomethane and hydrogen."[60] In 2022, the utility released a report titled "Our Clean Energy Vision," which advocated against electrification of the building sector, and instead recommended biomethane and hydrogen "to decarbonize New York's gas supply."[61] Gas utility NW Natural engaged in a similar form of issue advocacy when it used more than $1 million in ratepayer funds to promote its decarbonization plan.[62] Similarly, from 2009 to 2011, Allegheny Energy and American Electric Power hired public relations consultants to testify before state utility commissions in support of a new transmission line that the util-

54. *Id*. at 25.

55. *Entergy Gulf States La, L.L.C*., FERC Docket No. FA15-10-000, at 28 (Feb. 21, 2018).

56. *South Dakota Gas & Elec. Co*., FERC Docket No. FA19-3-000, at 45 (Jul. 30, 2020).

57. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (prohibiting utilities from charging customers for some promotional and political advertising, and it instructed state utility regulators to develop advertising standards within two years of the Act's passage in 1978. Only 20 states have done adopted the Act's prohibitions on certain promotional and political advertising.) *See* WEINMANN & VARDI, *supra* note 39, at 16-17.

58. *See generally* David J. Collison, *Corporate Propaganda: Its Implications for Accounting and Accountability*, 16 Accounting, 16 AUDITING & ACCOUNTABILITY J. 853 (2003); William R. L. Anderegg & Gregory R. Goldsmith, *Public Interest in Climate Change Over the Past Decade and the Effects of the 'Climategate' Media Event*, 9 ENV'T RSCH. LETTERS 1 (2014).

59. Robert J. Brulle et al., *Corporate Promotion and Climate Change: An Analysis of Key Variables Affecting Advertising Spending by Major Oil Corporations, 1986–2015*, 159 CLIMATIC CHANGE 87, 90-91 (2020) (citing Herbert Waltzer, *Corporate Advocacy Advertising and Political Influence*, 14 PUB. REL. REV. 41 (1988)).

60. Niagara Mohawk Power Corp., Nos. 24-E-0322 & 24-G-0323, at 111 (N.Y. Pub. Serv. Comm'n Sep. 26, 2024), https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B0B73392-0000-C64B-858D-B9C25480D349}.

61. *Id*. at 111-20.

62. WEINMANN & VARDI, *supra* note 39, at 25-26.

ity wanted to build. These contractors "ran promotional advertisements" to pressure regulators to grant the necessary permits for the project.[63] Ratepayers were initially charged over $6 million for these activities.[64]

Utilities, which face no competition due to their state-protected monopoly franchise, also charge ratepayers for goodwill advertising that is designed to increase the public reputation of the utility.[65] In turn, this promotional advertising assists utilities with controlling negative media and political attention, and therefore decreases the likelihood of future regulatory or legislative action that could run counter to the utility's profit interests.[66] For example, Pacific Gas & Electric (PG&E) requested ratepayers pay at least $2.5 million[67] for television advertisements the utility ran in support of a 10,000 mile undergrounding proposal.[68] The utility considered these "Wildfire Communications," although the advertisements failed to communicate any information about wildfires.

4. Utility Financial Contributions to Political Action Committees and 501(c)(4) Organizations

Utility companies and their trade associations may also direct ratepayer funds to political action committees and 501(c)(4) organizations that engage in political activities. Utilities are likely motivated to fund these entities because they can

63. Newman v. FERC, 27 F.4th 690, 694 (D.C. Cir. 2022).

64. *See id*. at 696. *See also Potomac-Appalachian Transmission Highline, LLC & PJM Interconnection, L.L.C*., 152 FERC ¶ 63,025 at P 8, 26-27 (2015).

65. *See, e.g.*, Susan Phillips, *PGW Spends Millions to Promote Natural Gas. Advocates Accuse the Utility of 'Greenwashing'*, WHYY (Sep. 22, 2025), https://whyy.org/articles/pgw-natural-gas-campaigns-greenwashing (discussing how Philadelphia Gas Works charged ratepayers $4.2 million on promotional campaigns, including on billboards, as well as radio and bus stop advertisements).

66. *See generally* Michael Barnett & Andrew John Hoffman, *Beyond Corporate Reputation: Managing Reputational Interdependence*, 11 CORP. REPUTATION REV. 1 (2008) (discussing how companies, promote themselves as representing norms in an effort to manage overall industry sector reputation).

67. In discovery, "PG&E stated that it was not able to provide the specific costs attributable to . . . these two ads and could only state that the costs were included in Planning Order #5049478 for 2022, to which PG&E booked $2,502,000 . . . PG&E records do not enable a determination of which costs in this $2.5 million are attributable to the two video ads in question." *See* Prepared Testimony of Thomas Long & Sylvie Ashford, Docket No. A.23-06-008, at 78 (Cal. Pub. Serv. Comm'n Sep. 17, 2024), https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/A2306008/7733/540720190.pdf

68. *See id*. at 76-77 ("Through discovery, [the Utility Reform Network] has learned that PG&E's requested recovery for 'Wildfire Communications' in Chapter 14 includes costs for at least two video advertisements that serve the primary purpose of promoting and enhancing the company's image for the benefit of shareholders, rather than benefitting customers . . . In response to questions asking whether the costs of each of these specific ads were included in its request, PG&E acknowledged that it was seeking recovery of the costs of this 'media content.' PG&E says the costs of these ads are included in its 2022 request under Planning Order #5049478."). *See also* Jaxon Van Derbeken, *PG&E Plan to Use Wildfire Funds on Ads Sparks Critics' Fire*, NBC BAY AREA (last updated June 7, 2024, 9:03 AM), https://www.nbcbayarea.com/news/local/pge-plan-wildfire-funds-ads-outrage/3559932/; Ari Palchta, *PG&E Ran a TV Ad Touting its Undergrounding Work. Now it Wants Customers to Pay for It*, SACRAMENTO BEE (Apr. 14, 2024) ("Many PG&E customers have likely seen an upbeat commercial promoting the utility's effort to put 10,000 miles of power lines underground to protect against wildfires . . . [PG&E] spokesperson Jennifer Robinson said in an emailed statement [ ] that PG&E billed customers for the advertisement.").

effectively use PACs and 501(c)(4)s to purchase access to elected officials, to encourage those officials to adopt policies that benefit corporate interests.[69]

There are examples of utility staff working for Political Action Committees (PACs), which raise and spend money to influence elections by directing contributions to specific candidates and political parties. For example, Ameren Corporation employees worked on behalf of PACs such as Ameren FEDPAC, the Ameren Missouri PAC, and the Ameren Illinois PAC.[70] Federal regulators, after auditing the utility, determined that ten Ameren employees spent time working on PACs: serving on PAC boards, attending PAC board meetings, and performing other administrative duties throughout the year. Ameren charged their ratepayers for the time that eight of the ten Ameren employees spent devoting to PACs.[71]

Utilities and their trade associations can also funnel money to 501(c)(4) "social welfare" organizations that engage in "issue advocacy," by funding political allies, organizing responses to other political initiatives, and underwriting organizations that support desired policy outcomes. Understanding how utilities charge ratepayers for 501(c)(4) political advocacy is difficult, if not impossible, because companies do not disclose spending to these organizations and 501(c)(4) organizations are not required to disclose donors on their annual tax returns.[72] Isolated records and investigations, however, suggest that utilities could be donating ratepayer funds to 501(c)(4) organizations that lobby on legislation.

FirstEnergy used ratepayer money to fund two 501(c)(4) entities which then directed funds to bribe Ohio politicians. From 2016 to 2019, FirstEnergy directed over $60 million to two 501(c)(4) entities, Generation Now and Partners for Progress, which worked to secure and protect utility-priority legislation. After FirstEnergy created the two entities, the utility used

> Generation Now's status as an IRS 501(c)(4) and the routing of money through [a] PAC to prevent the public and regulators from discovering their efforts to influence the outcome of the 2018 Ohio Primary Election, to make contribution to candidates in excess of allowable limits, and to avoid reporting political activity.[73]

More specifically, FirstEnergy directed ratepayer funds to the two 501(c)(4) organizations, which then used this funding to secure votes for FirstEnergy's preferred candidate for Speaker of the House and to purchase political support for House Bill 6, which "established a program under which FirstEnergy Solutions'

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69. *See generally* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990) (finding that members of Congress are more responsive to organized business interests).

70. *Ameren Corp*., FERC Docket No. FA20-6-000 (Nov. 7, 2021).

71. *Id*. at 46.

72. Corporate donors are not required to disclose their political expenditures so long as they donate to a 501(c)(4) "social welfare" organization that engages in "issue advocacy" rather than "express advocacy" for a particular candidate. *See Social Welfare Organizations*, IRS (last updated Apr. 17, 2025), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations.

73. Complaint at 19, 21, State *ex rel.* Yost v. FirstEnergy Corp., 175 Ohio St.3d 201, 240 N.E.3d 269 (2024) (No. 2022-1286), 2020 WL 5743219, https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/State-ex-rel-Yost-v-FirstEnergy-et-al-Complaint-Al.aspx.

two Ohio nuclear power plants would become eligible for rate-payer funded subsidies of $9 per megawatt hour produced."[74] After HB 6 passed, FirstEnergy transferred over $40 million to Generation Now to stifle a citizen effort to repeal the legislation through a ballot referendum.[75] While we do not know how much of the $60 million FirstEnergy expended to pass and protect favorable utility legislation was charged to ratepayers, state proceedings have revealed that FirstEnergy improperly charged ratepayers millions for a significant portion.[76]

Consumers Energy, a Michigan utility, contributed $43.5 million to Citizens for Energizing Michigan's Economy (CEME), a 501(c)(4) organization.[77] CEME then used this money on television, radio, internet, and other advertisements that targeted lawmakers who supported rooftop solar policies that would hurt Consumers' profits.[78] In 2019, the Michigan Public Service Commission (MPSC) prohibited Consumers from directing any of its "corporate treasury monies to an Internal Revenue Code 501(c)(4) entity" until at least January 1, 2020.[79] Of course, it is not clear whether "corporate treasury monies" are ratepayer dollars, but the presence of this language in the MPSC's order suggests that the language functionally bans the practice of Consumers charging ratepayers for funds that the utility directed to 501(c)(4) organizations.[80] Otherwise, the language would be superfluous: state regulators already purport to prohibit utilities from recovering political organization contributions in customer rates.[81]

Arizona Public Service Company (APS) also may have used ratepayer funds to attack Arizona's clean energy policies through a 501(c)(4) entity. After the state adopted a 2008 net metering policy that spurred rooftop solar development, which APS perceived as a threat to its utility franchise,[82] the utility directed $12.8 million to at least fifteen 501(c)(4) organization to fund a public relations campaign attacking clean energy laws. Of the $12.8 million spent by these organizations, $3.2

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74. *Id*. at 22-24.

75. *Id*. at 25.

76. *See supra* note 33 and accompanying text.

77. *See* Andy Balaskovitz, *Michigan Regulators Clamp Down on Utility's Political* Spending, CANARY MEDIA (Jan. 28, 2019), https://energynews.us/2019/01/28/michigan-regulators-clamp-down-on-utilitys-political-spending.

78. *See* Tracy Samilton, *FTC Petition: Utility Industry, Including DTE, Consumers, is Unfairly Fighting Rooftop Solar*, MICH. PUB. (May 23, 2022, 10:18 AM), https://www.michiganradio.org/environment-climate-change/2022-05-23/ftc-petition-utility-industry-including-dte-consumers-is-unfairly-fighting-rooftop-solar. *See also* Peskoe, *supra* note 49.

79. Balaskovitz, *supra* note 77 (quoting settlement agreement between Consumers, commission staff, and other groups).

80. *See also* Comments of the Attorney General, No. U-18238, at 3 (Mich. Pub. Serv. Comm'n Feb. 10, 2023), https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y000006mj7uAAA ("The Attorney General finds that the [rate case standard filing requirements] are currently deficient in providing sufficient information and insight on expenses incurred by the utilities to influence public policy and achieve rate case outcomes. The Attorney General recommends that the Commission requires the utilities to disclose . . . contributions to 501(c)(3) and to each non-profit organization, including those organizations receiving contributions from the utility's affiliated 501(c)(3) charitable foundations.").

81. Balaskovitz, *supra* note 77 (quoting then-MPSC Chairman Sally Talberg as saying "[c]ontributions to political organizations are not a cost of utility service and are not included in rates set by the Michigan Public Service Commission").

82. *See generally* LEAH STOKES, SHORT CIRCUITING POLICY 164-93 (Oxford Univ. Press, 2020).

million was directed by the 501(c)(4) entities to support candidates in public utility commission races.[83] The utility also spent $704,000 in a state Secretary of State race, giving $437,000 to support a candidate who was the son of an outgoing utility regulator. Eventually, the FBI, the Arizona Attorney General, and the Arizona Corporation Commission (ACC) opened investigations into APS political activity funding. It is still unknown whether ratepayer funds were directed to 501(c)(4) organizations,[84] but former Arizona Commissioner Bill Mundell said "that the company gets nearly all its money from utility customers."[85]

B. Existing Statutes and Regulations Fail to Protect Ratepayers from Associating with and Subsidizing Utilities' Political Activities

Existing state laws and regulatory procedures are insufficient for protecting ratepayers from associating with, and subsidizing, utilities' political activities. Regulators, either through controlling statutory language or existing regulations, already prohibit utilities from charging ratepayers for a narrow set of political activities. Nonetheless, utilities continue to charge ratepayers for some portion of their political activities as there are no penalties for doing so, and because the regulations fail to capture the breadth of political activities.

Most utilities use the Uniform System of Accounts (USofA) to delineate expenses that can be included in utility rates and therefore recovered from ratepayers (above the line) from those expenses that cannot be included in rates and therefore must be borne by shareholders (below the line).[86] Utilities are also often regulated at the state level, and most states have adopted the USofA system or otherwise incorporated FERC's reporting and accounting rules.[87] Costs included in below the line accounts are not approved by regulators for recovery from ratepayers, and therefore are borne by shareholders. Because investor-owned utilities want to maximize profits, utilities are incentivized to interpret accounting rules so as to exclude the maximum amount of expenses from below the line accounts.

Account 426.4 is a below the line account, and it is where utilities record their "expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordi-

83. *See* Howard Fischer Capital Media Services, *APS Admits Spending $10.7 Million in 2014 to Elect Two Regulators of its Choice*, ARIZ. DAILY STAR (Mar. 30, 2019), https://tucson.com/news/local/aps-admits-spending-10-7-million-in-2014-to-elect-two-regulators-of-its-choice/article_bc6636af-c128-5765-8906-482b92a1bf20.html; Bob Christie, *APS Finally Comes Clean About Political Spending*, KNAU ARIZ. PUB. RADIO (Apr. 26, 2019, 4:30 AM), https://www.knau.org/state-capitol-news/2019-04-26/aps-finally-comes-clean-about-political-spending.

84. *See* Howard Fischer, *Arizona Regulator Can Seek Utility Documents*, ARIZ. DAILY STAR (Sep. 27, 2022), https://tucson.com/news/state-regional/article_23e36f28-3eb1-11ed-ad0e-13b938942974.html (describing the Arizona Supreme Court's rejection of APS arguments that the state regulatory commission had no authority to examine the utility's corporate accounts to determine whether APS spent, and may spend in the future, ratepayer money to elect candidates of the utility's choice by directing funds to 501(c)(4) organizations).

85. Christie, *supra* note 83.

86. *See generally* 18 C.F.R. pts. 101, 201 (2025).

87. *See Comments of the State Agencies*, FERC Docket No. RM 22-5-000, at 89 (Feb. 22, 2022) (collecting sample of state regulations adopting and incorporating the USofA for utilities).

nances . . . or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials."[88] The two Account 426.4 inclusion clauses require utilities to self-report costs incurred to influence public opinion and public officials.[89]

There is no "bright line rule or specific guideline[] that delineate[s] between above the line and below the line expenses for informing and influencing the public."[90] As a result, utilities can interpret the USofA rules to require ratepayers to fund political activity. For example, when trade associations bill member utilities, they disclose only a self-identified percentage of the trade association's total budget spent on "lobbying and political activities," as calculated by the trade association using a narrow definition from the federal tax code.[91] This definition includes costs incurred for "influencing legislation," which the tax code notes includes "communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation."[92]

Notably, this definition *does not* include communications with FERC commissioners, nor does it include expenses that trade associations incur when they attempt to directly or indirectly influence state governors, state utility regulators, and staff at state and federal regulatory agencies. The definition also does not cover trade association activity that aims to indirectly influence legislators, such as costs, described by EEI, for "driv[ing] the conversation about our nation's energy future during the Republican and Democratic national conventions."[93] This definition also fails to capture the practice of trade associations directing funds to other political organizations. In 2020 alone, EEI directed funds to the Americans for Tax Reform, the American Legislative Exchange Council, the National Endangered Species Act Reform Coalition, and more.[94] EEI did not list these as lobbying expenses even though the beneficiary organizations engaged in efforts to direct public funds and regularly speak about controversial public policy issues, such as

88. 18 C.F.R. § 367.4264 (2025) ("This account must include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation, or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations."). *See also id*. at § 367.9301(e) (redirecting "expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature" to Account 426.4).

89. Newman v. FERC, 27 F.4th 690, 698 (D.C. Cir. 2022) (holding that Account 426.4 includes utility expenditures aimed at directly and indirectly influencing public officials).

90. Notice of Inquiry, *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, 177 FERC ¶ 61,180 at P 5 (2021) [hereinafter NOI].

91. *See Comment of the Harvard Initiative*, *supra* note 48, at app. A.

92. *See* 26 U.S.C. § 162(e)(1)(A), (e)(3)(A).

93. *See Comment of the Harvard Initiative*, *supra* note 48, at 7, app. B.

94. *See Biological Diversity's Opening Comments*, *supra* note 45, at 6-7.

"climate change" and state clean energy credits.[95] As a result of this existing system, utilities record only a very small percentage of trade association political activity in below-the-line Account 426.4. The remainder of trade association political activity is charged to ratepayers through Account 930.2.

C. Utilities Charge Ratepayers Through Government-Set Rates

Utilities often recover their political activity costs from ratepayers through state regulatory processes. When an individual utility requests new rates, the state PUC determines whether the utility's rate increase should be granted, revised, or denied based on cost information submitted by the individual utility company. A utility can exploit this informational asymmetry by providing insufficiently detailed, or in some cases false, information to regulators.

During rate-cases or rate stabilization plans, utilities can fail to provide sufficient detail accounting records for state regulators to identify and account for the political activity that utilities are seeking to recover from ratepayers.[96] For example, in a 2019 rate case, Cleco, a Louisiana utility, proposed to recover $99.5 million for "administrative functions," but did not explain the administrative expenses, let alone detail their benefit to ratepayers.[97] While it is possible that Cleco's $99.5 million costs did not include any political activity expenses, it is impossible to know this with certainty because Cleco did not provide any details and state regulators did not demand this information. Similarly, in a 2016 Florida Power & Light (FP&L) rate case, the utility requested that ratepayers cover the entirety of the utility's $9.5 million EEI dues from 2015 to 2018. Despite EEI's known political activities, FP&L did not disaggregate EEI's expenses in its rate request before the Public Service Commission. The utility's inclusion of the entirety of the $9.5 million EEI dues was not challenged during the utility's rate hearing, and as a result, FP&L ratepayers were responsible for the entirety of the cost.[98]

Sporadic federal and state audits demonstrate that utility companies regularly charge customers for inappropriate political activity expenses. In fact, "most [federal] audits find that public utilities recorded non-operating expenses and func-

95. *See, e.g.*, *id*. at 7 n.22 (citing an example of the American Legislative Exchange Council's anti-climate lobbying efforts in Texas); *The Affordable, Reliable and Clean Energy Security Act*, ALEC (Sep. 24, 2024), https://alec.org/model-policy/the-affordable-reliable-and-clean-energy-security-act (providing model legislation to define natural gas as "green energy," which would "apply to all programs in the state that fund any 'green energy' or 'clean energy' initiatives" and noting passage in several states); *American Legislative Exchange Council*, LOBBYMAP (last updated 2024), https://lobbymap.org/influencer/American-Legislative-Exchange-Council-ALEC (explaining how ALEC publishes slate of "model policies" designed to provide framework for state-level climate policy that prolongs the use of fossil fuels, and also submitted regulatory comments to the Virginia Air Pollution Control Board requesting the Board rescind the state's decision to join the Regional Greenhouse Gase Initiative").

96. *See supra* note 67 and accompanying text.

97. *See* Triedman & Brooks, *supra* note 38.

98. *See* Jerry Iannelli, *Study Says FPL Charges Customers Millions in Lobbying Fees Every Year*, MIA. NEW TIMES (May 11, 2017), https://www.miaminewtimes.com/news/fpl-charged-customers-95-million-in-lobbying-fees-from-2015-to-2018-energy-and-policy-institute-says-9338218 (describing study from Energy & Policy Institute finding).

tional operating and maintenance expenses in . . . expense accounts, leading to inappropriate inclusion of such costs in revenue requirements produced by their formula rates."[99] State audits also find improper accounting of utility political activity.[100]

There is little to deter utilities from charging ratepayers for political activities. Political activity costs are only excluded from rates if regulators, PUC staff, or intervenors in a rate case catch violations. As utilities continually fail to provide detailed expense information or open their complete accounting records in rate cases, regulators and consumer advocates lack visibility into rate requests, which makes it extremely difficult to follow political expenses. Similarly, political activity can only be excluded *ex post* if regulators audit a utility company. Audits, however, occur rarely given the time and expense of the taxpayer funded process, which burdens already over-extended and underfunded regulatory agencies. Moreover, even if regulators identify utilities that are charging ratepayers for political activity, utilities are generally only required to issue a refund to customers, which does not function as an effective deterrence mechanism.

IV. THE MODERN EVOLUTION OF THE SUPREME COURT'S COMPELLED SPEECH AND COMPELLED ASSOCIATION DOCTRINE

The First Amendment protects the right to speak and "the right to refrain from speaking."[101] Most of the Supreme Court's free speech cases "have involved restrictions on what can be said, rather than laws compelling speech," but compelled speech is "at least as threatening."[102] In the modern Court's account, compelling payment in certain contexts can be like compelling people themselves to speak, which raises serious First Amendment concerns.

Historically, the Court's compelled speech doctrine allowed state and federal utility regulators to authorize utilities to charge ratepayers for certain "germane" expenses relating to "the reasonable cost of doing business and to the provision of utility services," which could include some utility political activity.[103] *Janus*,

99. 2024 REPORT, *supra* note 32, at 51. *See, e.g.*, *id.* at 58 (summarizing FERC audits as revealing "improper application of merger-related costs, lobbying, charitable donations, membership dues, and employment discrimination of settlement costs, improper labor overhead capitalization rates . . . ."); Southern Cal. Gas Co., Decision No. 24-12-074, at 7 (Cal. Pub. Utils. Comm'n Dec. 23, 2024), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M550/K485/550485071.pdf ("The decision [to use one-way balancing accounts] highlights a pattern of misclassification of costs at Sempra Utilities, where the company has charged ratepayers for lobbying, political activities, and expenses related to outside legal firms. These costs have been improperly booked as above-the-line expenses when forecasting future costs."); Decision Different of Commissioner Rectschafeen, Rulemaking No. 13-11-005, at 29 (Cal. Pub. Utils. Comm'n Apr. 18, 2022) ("As an experienced utility, SoCalGas should have known that its billing of lobbying against reach codes implicated several basic legal principles that are central to its duties to the Commission and to customers . . . Thus, aside from billing ratepayers for lobbying contrary to the intent of the Commission, SoCalGas appears on the face of the record to have misled staff about the direction of its lobbying…").

100. *See infra* Part III.B.

101. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

102. Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 892 (2018).

103. *In re* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 112-13 (1990), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990).

however, discarded the germaneness test in favor of adopting an absolute prohibition on any compelled subsidy of a private organization's speech on issues of public concern.

A. The Germaneness Standard: Authorizing Certain Compelled Political-Speech

Beginning in the 1950s, the Supreme Court theorized that compelling payment for speech raises First Amendment concerns. In the Court's account, compelling payment is like compelling people themselves to speak.[104] Adopting this premise in *Abood v. Detroit Board of Education*,[105] the Court held that if a state conditioned employment on union membership, the union could not use its dues payments to fund political speech on issues "not germane to [the union's] duties as a collective bargaining representative."[106] Continuing, the Court explained that while mandatory fees to cover collective bargaining were acceptable because of the state's interest in labor peace and efficient collective bargaining, all other "ideological activities unrelated to collective bargaining," such as "the expression of political views" or spending "on behalf of political candidates," were not germane. These costs could therefore not be funded through mandatory fees because they risked conflicting with individual beliefs.[107]

The *Abood* Court recognized that there would be "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."[108] While challenging, the Court maintained that identification of activities germane to collective bargaining was necessary to not "restrict[] the Union's ability to require every employee to contribute to the cost of collective-bargaining activities."[109]

Following the *Abood* decision, courts and FERC extended the germaneness reasoning to the utility context. In a series of decisions, federal and state courts applied the germaneness test in order to determine whether the First Amendment protected objecting ratepayers from subsidizing and associating with utility political activities.[110]

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104. *See* Railway Emps. Dep't. v. Hanson, 351 U.S. 225 (1956).

105. 431 U.S. 209 (1977).

106. *Id*. at 235-36.

107. *Id*. at 235.

108. *Id*. at 236.

109. *Abood*, 431 U.S. at 237.

110. The issue of whether the First Amendment prohibits utilities from charging ratepayers for their political speech and activities is distinct from whether these expenses can be appropriately classified under state and federal statutes authorizing utilities to recover expenses in the public interest. While a majority of states have disallowed utilities from recovering charitable contributions from ratepayers on grounds that they are not utility expenses, these are narrow decisions that fail to prohibit all, if not most, of utility political speech and activity. *See, e.g.*, *Trunkline Gas Co*., 90 FERC ¶ 61,017, 61,065 n.68 (2000) (collecting cases); El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n, 103 N.M. 300, 706 P.2d 511 (1985) (upholding prohibition on utilities charging advertising and lobbying expenses to ratepayers because reasonable expenses included in rates mustl directly benefit ratepayers).

A New York state court was the first to consider an argument, raised by an objecting ratepayer, that *Abood* should be extended to a utility's rate recovery of charitable organization expenses.[111] As a threshold issue, the court recognized that there must be "state action" for the application of the compelled speech and compelled association doctrine.[112] In *Matter of Cahill v. Pub. Serv. Comm'n*,[113] the court adopted the law of a prior decision which held that during the rate-setting process, the regulatory commission "is not merely acquiescing in an otherwise acceptable business practice, but is engaged in an active supervisory role on a continuing basis."[114] Because the prior decision established "the law of the case," the *Cahill* court considered the threshold issue of state action satisfied.[115] In an analogous First Amendment challenge to utility political expenses, the Court of Appeals for the District Court of Columbia Circuit "assume[d] state action *arguendo*," and then "move[d] directly to germaneness."[116]

Next, courts considered whether the plaintiff's claim constituted a First Amendment intrusion on an objecting ratepayer's beliefs. In *Cahill*, the court explained that "ratepayers are entitled to protection against forced financial support for causes and messages personally distasteful to them, because that would render those individuals faithless to their own beliefs."[117] The *Cahill* court analogized to *Abood*, noting that both sets of plaintiffs challenged a scheme forcing payment that ultimately benefited causes repugnant to the plaintiffs. The *Cahill* court, however, noted that the government compulsion in the utility case was more severe than that in *Abood*: unlike objecting nonunion members who could find new employment, "ratepayers are powerless against governmentally regulated monopolies and have no place else to seek indispensable public utilities services."[118]

After establishing that the state compelled protected ratepayer speech when public service commission authorized rate recovery of charitable and political contributions, courts considered whether the practice could nevertheless be justified because the contributions were "germane" to a compelling state interest.

In *Cahill*, the court rejected the utility's argument that the First Amendment intrusion could be justified by something less than a compelling state interest. As established in *Abood*, "germane" expenses were only those that the state had a

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111. *In re* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 108 (1990) (citing *In re* Cahill v. Public Serv. Comm'n, 490 N.Y.S.2d 90 (Sup. Ct. 1985), *aff'd*, 498 N.Y.S.2d 49 (N.Y. App. Div. 1986), *aff'd*, 513 N.Y.S.2d 656 (1986), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990)). *See also* Richard P. Johnson, *Power to the People: The First Amendment and Utility Operating Expenses*, 69 WASH. U. L.Q. 945, 945 (1991).

112. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

113. *Cahill*, 76 N.Y.2d 102 (1990), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990).

114. *In re* Cahill v. Public Serv. Comm'n, 490 N.Y.S.2d 90, 94 (Sup. Ct. 1985) (citing *Metropolitan Edison Co.,* 419 U.S. at 351) (rejecting argument that rate-recovery is government acquiescence in private utility decisions and therefore does not rise to the level of state action).

115. *Cahill*, 76 N.Y.2d at 108.

116. Braintree Elec. Light Dep't v. FERC, 550 F.3d 6, 11, 14 (D.C. Cir. 2008) (passing on the unsettled question of whether the concept of state action varies with the specific right at stake but noting "the possibility that customers of a government-sanctioned monopoly might be regarded as analogous [under *Abood* and kindred cases]").

117. *Cahill*, 76 N.Y.2d at 111.

118. *Id*. at 112.

compelling interest in "retriev[ing] . . . from ratepayers."[119] For purposes of utility expenses, the *Cahill* court determined that state had a compelling interest in only those costs necessary for, or germane to, the "reasonable cost of doing business and to the provision of utility services."[120] The court concluded that effects of the "gossamer [of] civic goodwill" from utility charitable contributions "on the elementary provision of utility services are at best speculative, and at worst clearly not a sufficient basis upon which to compromise First Amendment freedoms…"[121]

The Court of Appeals for the District of Columbia Circuit also applied the germaneness test in a ratepayer First Amendment challenge to utility political expenses. In *Braintree Elec. Light Dep't v. FERC*,[122] the court considered whether FERC erred when it authorized rate recovery for political expenses incurred by ISO New England (ISO-NE), a private non-profit entity that administers the region's energy markets and operates the bulk power transmission system.[123] After FERC approved ISO-NE's 2005 and 2006 tariffs, ISO-NE customers challenged FERC's authorization because the tariffs included costs for various lobbying expenses.[124] The plaintiffs argued that in authorizing ISO-NE's tariff, FERC sanctioned ISO-NE to charge its utility customers for lobbying costs. In doing so, FERC "in effect compelled subsidization of speech in contravention of the First Amendment."[125]

The Court of Appeals held that FERC's approval of ISO-NE's lobbying expenses did not violate the First Amendment because FERC faithfully applied *Abood*'s germaneness test, and that the lobbying expenses were "germane to ISO-NE's mission."[126] The court noted that while ISO-NE's lobbying activities resulted in the entity "adopt[ing] some highly contentious positions," ISO-NE did so only after FERC directed the ISO to develop a public position and engage in political speech on these issues.[127] Because ISO-NE's lobbying and communication expenses were germane to its mission, the Court of Appeals determined that under *Abood*, costs for these activities could be recovered from ratepayers even though they burdened First Amendment rights.

B. Discarding the Germaneness Standard: The Exacting Scrutiny Standard for Compelled Speech and Compelled Association Claims

Prior to *Janus*, the compelled speech doctrine rested comfortably on *Abood*'s germaneness test. In the utility context, this meant that state and federal regulators authorized utilities to recover "germane" expenses relating to "cost of doing business and to the provision of utility services," which could include some utility

119. *Id*. at 112.
120. *Id*. at 112-13.
121. *Cahill*, 76 N.Y.2d at 113.
122. 550 F.3d 6.
123. *See id*. at 8.
124. *See id*. at 9, 10-11.
125. *See id.* at 9.
126. *Braintree Elec. Light Dep't*, 550 F.3d at 14.
127. *Id*. at 14-15.

political activity.[128] *Janus*, however, discarded *Abood* in favor of adopting an absolute prohibition on any compelled subsidy of a private organization's speech on issues of public concern.

In *Janus*, the Court considered the constitutionality of an Illinois law authorizing public-sector unions to collect nonmember agency fees that the union used for the collective bargaining process and other activities, such as "lobbying, social and recreational activities, advertising, membership meetings and conventions, and litigation, as well as other unspecified services."[129] The case originated when an employee at the Illinois Department of Healthcare and Family Services complained that an agency fee forced him to subsidize the public union's speech. Mark Janus strongly objected to "many of the public policy positions that [the union] advocate[d] for, including the positions that it [took] in collective bargaining."[130] As a result, Mark Janus alleged that the agency fee amounted to "coerced political speech" in violation of the First Amendment.[131]

In its analysis of the plaintiff's compelled speech claim, the Court first determined that *Abood*'s germaneness line-drawing exercise was no longer workable for delineating the permissibility of costs. Recall that under *Abood*, nonmembers could be charged for a "portion of union dues attributable to activities that are germane to the union's duties as collective-bargaining representative, but nonmembers [could] not be required to fund the union's political and ideological projects."[132] Under *Abood*'s approach, the union could recover agency fees by isolating expenses associated with its public policy positions.[133] In its decision to overrule *Abood*, the *Janus* Court emphasized the difficulty, in theory and in practice, of disentangling the agency-fee provision to identify costs attributable to a union's public policy activities.

The *Janus* Court acknowledged that the union followed the chargeable-nonchargeable line practice, reporting categories of its expenses and "set[ting] out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses," but the Court nevertheless determined that the chargeability standard was unworkable because of its vagueness.[134] If the union could recover "expenses… that may ultimately inure to the benefit of the members of the local bargaining unit," this broad formulation could "encompass just about anything that the union might choose to do."[135] The majority's reasoning also emphasized how challenging, laborious, and difficult it would be for a nonmember to verify charge-

128. *In re* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 113 (1990), *cert denied*, New York Tel. Co. v. Cahill, 498 U.S. 939 (1990).

129. Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 888 (2018) (internal citations omitted).

130. *Id*. at 888-89.

131. *Id*. at 889-90.

132. *Id*. at 887.

133. *See generally* Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 519 (1991) (setting out three-part test for "determining which activities a union constitutionally may charge to dissenting employees").

134. *See Janus*, 585 U.S. at 923. *See generally id.* at 921-23.

135. *Id*. at 922.

ability determinations "without launching a legal challenge and retaining the services of attorneys and accountants."[136] For these reasons, the Court explained, *Abood* was unworkable.

With *Abood* abandoned, the Court next determined that serious First Amendment concerns are raised when the state compels individual funding of a private organization's speech on matters of public concern. The Court explained that this is because compulsion is analogous to a state-requirement that an individual believe, speak, or associate with this speech. The majority reasoned that union speech is a matter of great public concern because the union speaks on issues "affecting how public money is spent."[137] Specifically, the Court noted that because collective bargaining involves "the level of… state spending for employee benefits" the union's speech affects how public money is spent and is therefore a "matter of great public concern."[138] The Court also noted that union speech in collective bargaining implicates "other important matters" like "education, child welfare, healthcare, and minority rights," all of which, according to the majority, are issues that alter state and local government budgets.[139]

The Court also seemed to extend its "matters of great public concern" test to any speech "on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identify, evolution, and minority religions."[140] These "sensitive political topics," the opinion explained, are "undoubtedly matters of profound value and concern to the public" and "merit special protection."[141] The majority's reasoning is expansive: it seems to suggest that any speech on either a controversial subject or an issue that could affect public spending, is a matter of great public concern.[142]

In the Court's interpretation, compelling people to give money that is used for speech is like compelling people to speak.[143] Under the Court's account, the Illinois law "seriously impinge[d]" on individual First Amendment rights when it compelled Mr. Janus' agency-fee.[144] As a result, the Court applied an "exacting scrutiny" standard to the Illinois law.[145]

136. *Id*. at 923.

137. *Janus*, 585 U.S. at 912.

138. *Id*. at 910-11.

139. *Id*. at 912.

140. *Id*. at 91314.

141. *Janus*, 585 U.S. at 914-15.

142. *See generally id*. at 939-47 (Kagan, J., dissenting).

143. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 23435 (1977); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977). For an argument that compelled subsidies to private organizations, as well as the government, is not akin to speaking. *See* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 180-94 (2018).

144. *Janus*, 585 U.S. at 894.

145. *Id*. The Court declined to decide whether strict scrutiny should apply in compelled speech cases because in this case, "the Illinois scheme [could not] survive under even the more permissive [exacting scrutiny] standard." *Id*. at 895.

In order to survive First Amendment review, "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[146] Under this analysis, the Court could have maintained the *Abood* approach of segregating union dues, or alternatively, acknowledged that union agency-fees do constitute an infringement on speech rights but reasoned that this transgression is marginal. Instead, the Court determined there are not "compelling" interests in requiring employee support for the union's speech. Even if Illinois' interests in avoiding free-riding and the "conflict and disruption that it envisioned would occur if employees in a unit were represented by more than one union" were compelling, the Court reasoned that this interest could be achieved without restricting nonmembers' First Amendment rights.[147]

The *Janus* Court concluded that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees."[148] "Any other attempt . . . to collect such a payment" requires that workers "affirmatively consent[] to pay."[149] This suggests that workers do not need to object to agency fees: dissent is presumed, and affirmative consent must be required to opt-in.

C. Extending Janus: State Bar Associations and a Vaccine Religious Exemption Form

Federal appeals courts have considered challenges that extend the new compelled speech doctrine to non-union contexts.[150]

In *McDonald v. Longley*,[151] the Fifth Circuit considered whether attorney First Amendment rights are violated when the State of Texas mandates membership in a state bar that engages in political and ideological activities with which an attorney objects. In *McDonald*, three Texas lawyers sued the state bar claiming that it was engaged in "political and ideological activities that [were] not germane to its interests in regulating the legal profession and improving the quality of legal

146. *Id*. at 894.

147. *Id*. at 895.

148. *Janus*, 585 U.S. at 929.

149. *Id*. at 930.

150. Appellate courts have considered whether a union's exclusive representation in collective bargaining violates the First Amendment, and each has found that First Amendment speech or associational rights were not violated because plaintiffs were free to not associate with the speech by resigning from the union and no longer paying dues. *See e.g.*, Goldstein v. Professional Staff Cong./CUNY, 96 F.4th 345, 350 (2d. Cir. 2024) (holding that *Janus* does not undermine the constitutionality of exclusive representation by public-sector unions that do not assess mandatory agency fees because plaintiffs were free to resign their membership from the union or to engage in public dissent against the union's views); Peltz-Steele v. Umass Fac. Fed'n, 60 F.4th 1, 4-8 (1st Cir. 2023); Adams v. Teamsters Union Loc. 429, No. 20-1824, 2022 WL 186045, at *2-3 (3rd Cir. 2022); Uradnik v. Inter Fac. Org., 2 F.4th 722, 725-27 (8th Cir. 2021). *But see* Road-Con, Inc. v. City of Phila., 120 F.4th 346, 355 (3rd Cir. 2024) (reversing a lower court decision that dismissed a First Amendment claim that the plaintiff's associational rights were abridged when "contractors and their employees [ ] are forced to recognize a union as the exclusive representation of employees, hire employees from a union's job-referral system, and financially contribute to unions in order to work on [certain] public projects") (citation and internal citations omitted).

151. 4 F.4th 229 (5th Cir. 2021).

services."[152] A three-judge panel upheld the majority of the challenged bar programs, but the court determined that when the Texas State Bar engages in political activities that are not germane to its mandate to regulate the legal profession, the state unconstitutionally compels the speech and association of objecting attorneys. In resurrecting the "germaneness" test, the court explained that while *Janus* overruled *Abood*'s germaneness test more generally, the Supreme Court had extended the germaneness investigation to state bar associations in a distinct case, *Keller v. State Bar of California*.[153] Despite the fact that *Keller* "rested almost exclusively on [*Abood*]" the Fifth Circuit used the germaneness line-drawing test for the compelled speech and association claims because *Keller* has "direct application in this case" and the *Janus* Court did not "abrogate[] [*Keller*] with a bang."[154]

In its analysis, the Fifth Circuit considered whether various Texas State Bar legislative activities were germane to the Bar's purpose "regulating the legal profession or improving the quality of legal services."[155] The court determined that the Bar's lobbying "efforts [ ] directed entirely at changing the law governing cases, disputes, or transactions in which attorneys might be involved" are not germane to the purposes of the association.[156] While the Texas State Bar "attempt[ed] to salvage the [lobbying] program by maintaining that only its voluntary sections engage in lobbying and that therefore plaintiffs are not compelled to associate with those initiatives," the Fifth Circuit rejected this argument.[157] In doing so, the court explained that "those positions have the imprimatur of the entire Bar" because "[n]o voluntary section may assert a position regarding legislative, judicial, or executive action unless it has first obtained permission from the Bar's Board of Directors."[158]

Turning away from the *Keller*-controlled compelled speech claim, the court next considered whether the compelled association of all attorneys with the Bar's non-germane lobbying efforts could withstand judicial scrutiny. The Fifth Circuit first cited *Janus* for the proposition that the right to "eschew association for expressive purposes" is part and parcel of the "cardinal constitutional command" that the government may not compel "individuals to mouth support for views they find objectionable."[159] The court held that that if a state bar engages in nongermane activities, then compelled membership is necessarily unconstitutional.[160] The Fifth Circuit panel emphasized other constitutional options for the Texas State Bar: the organization could ease engaging in non-germane activities or the state

152. *Id*. at 237.

153. 496 U.S. 1 (1990).

154. *McDonald*, 4 F.4th at 243 n.14.

155. *Id*. at 247-48.

156. *Id*. at 248 (emphasis omitted).

157. *Id*. at 248.

158. *McDonald*, 4 F.4th at 248-49.

159. *Id*. at 245 (internal citations omitted).

160. *Id*. at 246. (reaching this conclusion, the court assumed that membership in a state bar, irrespective of whether the public associates the bar's members with the bar's activities, has expressive meaning) *Cf.* Crowe v. Oregon State Bar, 112 F.4th 1218, 1236, 1239 n.10 (9th Cir. 2024).

could directly regulate the legal profession and instead create a voluntary bar association.[161] Continuing to "mandate[] membership in the Bar as currently structured or engaging in its current activities," however, would be unconstitutional.[162]

The Ninth Circuit also applied *Janus* to a freedom of association challenge raised by an attorney to the Oregon State Bar Association's political speech. In *Crowe v. Oregon State Bar*,[163] a three-judge panel considered "whether the First Amendment tolerates mandatory membership itself—independent of compelled financial support—in a state bar that engages in nongermane political activities."[164]

In assessing the freedom of association claim, the Ninth Circuit first determined that the attorney demonstrated an infringement on his associational rights because he objected to statements made by the Oregon State Bar (OSB) in its monthly publication that "all its members" condemned white nationalism and criticized then-President Trump.[165] The court acknowledged that despite the absence of compelled financial support, Oregon forced the attorney to associate with the political speech in two ways. First, the State Bar implied that it was speaking on behalf of all the attorneys it regulates and as a result, "a reasonable observer would attribute meaning to [attorney] membership in OSB because of the [ ] statements."[166] Crowe therefore "established that the [bar] association impaired his own expression because he objects to the message sent by his membership."[167]

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161. *McDonald*, 4 F.4th at 246.

162. *Id.* at 252. *See also* Boudreaux v. Louisiana State Bar Ass'n., 86 F.4th 620 (5th Cir. 2023). In *Boudreaux*, the Fifth Circuit again considered a compelled association claim against a state bar association. The court concluded that a bar association's social media postings related to health and wellbeing of lawyers, technology and safety, community-engagement, Pride month, and student loan debt violated a Louisiana attorney's associational freedom protected by the First Amendment. *Id*. The court explained that the germaneness standard from *Keller* "requires inherent connection to the practice of law and not mere connection to a personal matter that might impact a person who is practicing the law." *Id*. at 633. According to the court, the Louisiana Bar Association's social media postings were not reasonably related to the regulation or improvement of legal service. Because the association engaged in non-germane speech, "its mandatory membership policy violate[d] [the plaintiff's] rights to free speech and free association." *Id*. at 640. The court then entered a preliminary injunction preventing the association from requiring the plaintiff to join the bar or pay dues pending completion of the lower court's remedies phase.

163. *Crowe*, 112 F.4th 1218.

164. *Id*. at 1229 (internal citations omitted).

165. *Id*. at 1236-37 ("Crowe has shown that a reasonable observer would attribute meaning to his membership in the OSB because of the *Bulletin* statements. OSB endorsed the Specialty Bars' statement criticizing then-President Trump and suggested that all members agreed with it. Specifically, the formatting and content of the two statements made it appear as though OSB essentially adopted the Specialty Bars' statement. OSB made the editorial decision to publish the two statements side-by-side, surrounded by a single dark green border that was the same color as OSB's logo. And OSB's statement echoed the themes in the Specialty Bars' statement, using strikingly similar language. . . If OSB had made clear that its own statement reflected the views of OSB's leadership—and not its members—then there would be no infringement. But OSB suggested the opposite.").

166. *See id*. at 1236-38. The court analogized the state bar association's statements to those at issue in *Caroll v. Blinken*. Students were required to pay an annual "activity fee" to their university and a portion of this fee funded a policy advocacy organization. According to the policy organization's bylaws, any student who paid the activity fee was a member of the organization. When the organization engaged in advocacy, it claimed to represent all students at the participating campuses. 957 F.2d at 993-99 (2d Cir. 1992)..

167. *Crowe*, 112 F.4th at 1238.

After explaining that the State Bar infringed on Crowe's freedom of association, the Court applied exacting scrutiny to the plaintiff's mandated association with the State Bar. "Under exacting scrutiny, the infringement must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[168] The panel determined that because the Oregon State Bar's statements about white nationalism and President Trump were not germane, and the association did not offer a justification for associating its members with the statements, "that infringement does not survive exacting scrutiny."[169]

The Sixth, Seventh, and Tenth Circuits have also considered the constitutionality of state bar associations arising from requirements that attorneys join and pay mandatory dues.[170] Unlike the Fifth or Ninth Circuit cases, the plaintiffs in the cases before the three circuits did not allege that the bar association participated in any non-germane activity: the plaintiffs challenged *Keller*'s holding directly. Applying *Keller*, the Sixth, Seventh, and Tenth Circuits held that the First Amendment permits state bar associations to require membership and dues for germane activities. The courts reasoned that because *Keller* applied directly to the claims raised by the plaintiff and had not been directly overruled by the Supreme Court in *Janus* or a separate case, the compelled association and compelled speech remained justified by the state interest in legal profession regulation.[171]

In *B.W.C. v. Williams*,[172] the Eighth Circuit extended *Janus*'s reasoning to a different context: a vaccine exemption form. The Missouri government issued a form for public school students seeking to claim a religious exemption from mandatory immunizations. On the form, the Missouri Department of Health and Senior Services (DHSS) included a statement recommending that all children be immunized. Public school students and their parents challenged this statement, arguing that the requirement to sign the form violated their free speech rights because they were being forced to associate with the speech on the form recommending vaccination. The court held that the requirement to sign the form did not violate the First Amendment because the form did not require the plaintiffs to affiliate with DHSS's immunization statement. The form's text clearly set out the government's message to parents, "separated from the religious opt-out."[173] As a result, there was "little risk" recipients would believe that parents and students were compelled to "mouth support for views they find objectionable."[174] Because the DHSS form did not compel speech, restrict speech, or incidentally burden speech, the court did not address the level of scrutiny required in a compelled association case.

Federal appeals courts are being confronted with plaintiff challenges that raise the new compelled speech doctrine in non-union contexts. While compelled

168. *Id*. (internal citations omitted).

169. *Id*. at 1240-41.

170. *See* Taylor v. Buchanan, 4 F.4th 406 (6th Cir. 2021); Schell v. Chief Just. & Chief Justs. of the Okla. Sup. Ct., 11 F.4th 1178 (10th Cir. 2021); File v. Martin, 33 F.4th 385 (7th Cir. 2022).

171. *But see Taylor*, 4 F.4th at 410 (Thapar, J., concurring) ("The association claim could go forward even if the bar association allowed lawyers to opt out of funding ideological activity").

172. 990 F.3d 614 (8th Cir. 2021).

173. *Id*. at 619.

174. *Id*. (internal citation omitted).

speech challenges to state-bar associations continue to be controlled by the *Keller* analysis that incorporates the germaneness standard, there is no reason to suggest that *Janus*'s exacting scrutiny does not apply to other cases where the government mandates association with a private organization and compels objecting members to subsidize its speech.

V. UTILITIES UNCONSTITUTIONALLY COMPEL RATEPAYER SPEECH AND ASSOCIATION

Monopoly utilities charge ratepayers for political activities that they engage in with the goal of both modifying how public money is distributed on issues of public concern. Through rate-regulation, the state authorizes utilities to charge ratepayers for this speech and political activity. If *Janus* is applied, it is likely unconstitutional for monopoly utilities to charge ratepayers for any political speech or activity. Because many of the utility expenses levied onto ratepayers bear no clear relationship to the provision of reliable and safe utility service, they would fail to meet the "exacting standard" demanded by the Court after *Janus*.

Captive ratepayers injured by inflated power bills that reflect utility costs for speech and political activities to which ratepayers object, could test this theory and bring legal challenges against utility companies, as well as individual utility regulators in their official capacities, seeking prospective declaratory and injunctive relief.[175]

Pursuant to the state's grant of a monopoly franchise to a privately-owned utility company, ratepayers could allege that they are forced to pay compulsory fees to the utility as a condition of receiving electric service. Reflecting the *Janus* majority's theory of compelled payment as compelled speech and compelled association, ratepayers could raise two constitutional claims. First, ratepayers could argue that when the state compels them to take service from a utility company engaging in political speech and political expressive activity, the state infringes on individual freedom of association. Second, ratepayers could argue that the First Amendment prohibits the utility company from compelling ratepayer subsidization of its political activities. Advancing an analogous compelled subsidization claim, plaintiff ratepayers could also argue that a utility company can no longer charge ratepayers for its trade association dues. In raising these constitutional claims against rates approved by regulators that include political speech and political activity costs, captive ratepayers could establish the correct filed rate.[176]

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175. While sovereign immunity shields the state itself from suit, under *Ex Parte Young*, a lawsuit can proceed if the plaintiff is seeking prospective equitable relief against a state official acting in their official capacity who is engaging in a continuing violation of federal law. *See generally* 209 U.S. 123, 159-60 (1908). Rates approved by FERC also reflect utility political activities and speech, and state regulators are required to authorize utilities to recover FERC-regulated charges. *See* Mississippi Power & Light v. Mississippi *ex rel.* Moore 487 U.S. 354, 369-70 (1988). A plaintiff, seeking prospective equitable relief, could also bring a challenge against federal utility regulators authorizing rates that include utility political activities.

176. When regulators approve rates and terms of services, rates are considered *per se* reasonable and may not be collaterally attacked in courts. *See generally* Old Dominion Elec. Coop. v. FERC, 892 F.3d 1223, 1232 (D.C. Cir. 2018); American Tel. & Tel. Co. v. Central Off. Tel., Inc., 524 U.S. 214, 221-22 (1998) (summarizing the filed rate doctrine that applies to regulated companies' tariffs). *See also infra* Part VI.

A. Threshold Issues: State Mandated Association and Speech

In determining whether "mandated support is contrary to the First Amendment principles" a threshold inquiry must consider whether there is a state-imposed mandate requiring individuals to associate with a private organization's speech or activity.[177] The legally bestowed monopolistic nature of investor-owned utilities is unique because it mandates individual association with a private corporation's actions and speech. States enforce utilities' franchise rights through its police power, which prohibits competition and nullifies consumer choice.[178] If you need electricity, then you are required to associate with a state-designated monopolist utility as a ratepayer, and you are required to pay the rate scheme approved by the state PUC.

Consider ratepayers in the state of Georgia. If you live in Atlanta and think that Georgia Power's lobbying activities in the state legislature are inexcusable, you cannot purchase electricity from a different utility company.[179] Your only option for obtaining electricity from a company that is not Georgia Power is to relocate outside of the utility's footprint to a different part of the state.[180] Because of the state-sanctioned and state-enforced monopoly, ratepayers are compelled to associate with an investor-owned utility company or forgo any utility services, which are "a function of the state."[181] There is no other recourse for ratepayers to obtain utility services.

The state-mandated association is even greater in the monopoly utility context than in the bar association or public-sector union context. Attorneys have selected into their profession, and public-sector employees have opted to work for a state employer. Utility ratepayers have made no such choice. If ratepayers would like to have access to utility services, then they have no other course of action for obtaining utility services other than to take service from the designated monopoly utility and to pay state-set rates.

177. U.S. v. United Foods, Inc., 533 U.S. 405, 410, 413 (2001).

178. *See, e.g.*, Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 675 S.E.2d 294 (Ga. Ct. App. 2009).

179. GA. CODE ANN. § 46-3-2 (2024) ("[I]t is necessary and appropriate that the state establish and implement a plan whereby every geographic area within the state shall be either assigned to an electric supplier or declared unassigned as to aby electric supplier; that, to accomplish such a plan, it is necessary that all electric suppliers within the state be subject to this part; that the commission be delegated power, authority, and jurisdiction with respect to such plan.").

180. *See 2025 Facts & Figures*, GA. POWER (last visited June 10, 2025), https://www.georgiapower.com/about/company/facts-and-figures.html.

181. Smyth v. Ames, 169 U.S. 466, 544 (1898).

Investor-owned utilities speak with "powerful political and civic consequences"[182] in a manner that "impute[s] some meaning to membership" as a ratepayer.[183] When utilities engage in political activities, "part of its expressive message is that its members [its ratepayers] stand behind its expression."[184] The ratepayers are "part of the message."[185]

Like state bar associations, utilities purport to engage in expressive political activity on behalf of their ratepayers. For example, in 2019, when a FirstEnergy Vice President testified before the Ohio House of Representative's Energy and Natural Resources Committee on House Bill 6, Ohio's nuclear and coal bailout legislation, Dave Griffing tied its captive customers to FirstEnergy's support of the legislation. In his testimony, Griffing urged HB 6's passage because the legislation "provides more savings to customers."[186] Similarly, Dominion Energy when discussing 2023 legislation establishing Dominion's two-year profit margin, it did so by framing the legislation as beneficial for the utility's customers.[187] Compelling membership therefore compels support of a utility's message. "If a [ratepayer] disagrees" with the message, "then compelling his or her [association] infringes on the freedom of association."[188]

Assuming state action and mandated association with an expressive entity, we must next consider the character of the utilities' expressive conduct. Are states compelling ratepayer association and subsidization of utilities' political speech and political conduct? Or is the expressive conduct at issue commercial[189] and

182. Knox v. Service Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 310 (2012).

183. *See* Crowe v. Oregon State Bar, 112 F.4th 1218, 1234-35 (9th Cir. 2024) (canvassing cases and explaining that "a plaintiff cannot demonstrate that his freedom of association is infringed merely by pointing to the fact that he is required to interact with an organization in some sense. Instead, he must show that the required association impairs his expression. Other cases make clear that a plaintiff can make that showing if a reasonable observer would impute some meaning to membership in the organization and the plaintiff objects to that meaning.").

184. McDonald v. Longley, 4 F.4th 229, 246 (5th Cir. 2021). *Compare id.*, *with* B.B.C. v. Williams, 990 F.3d 614, 619-20 (8th Cir. 2021) (explaining that features of the vaccine op-out form make clear that there is no risk of association with the government's message).

185. *McDonald*, 4 F.4th at 246.

186. *See* Dave Griffing, Remarks at the Energy and Natural Resources Committee, Ohio House of Representatives, at 1, 5 (May 8, 2019), https://www.documentcloud.org/documents/23599747-testimony_davegriffing_firstenergysolutions_582019/.

187. *See* Charlie Paullin, *General Assembly Deal Sets Dominion Profits for Two Years While Overhauling Regulatory System*, VA. MERCURY (Feb. 25, 2023, 6:27 PM), https://virginiamercury.com/2023/02/25/general-assembly-deal-sets-dominion-profits-for-two-years-while-overhauling-regulatory-system/ ("'This legislation is a win for customers and regulatory oversight,' said Dominion spokesperson Aaron Ruby in a statement. 'It will lower electricity bills for our customers, reduce the impact of rising fuel costs and strengthen [Virginia Service Corporation Commission] oversight.'").

188. *See McDonald*, 4 F.4th at 246.

189. *See, e.g.*, *Joint Reply Comments of PJM Interconnection et al*., FERC Docket No. RM 22-5-000 (Apr. 28, 2022) [hereinafter *Joint Reply*] (alleging that trade association expenditures are not intended to fund specific speech, but instead involve funding an initiative that enables utilities to work with government officials towards outcomes that promote reliable electric service at just and reasonable rates).

"uncontroversial"[190] speech? The characterization of utility speech and activity could be consequential for determining the standard of judicial review as certain commercial speech could be subject to intermediate scrutiny.[191] Both compelled commercial and political speech, however, are reviewed under an exacting scrutiny standard.[192]

Following *Janus*, any expressive activity that utilities engage in with the goal of both modifying the distribution or collection of public money on issues of public concern, is political. The *Janus* Court also explained that speech about "controversial" subjects, such as climate change, raises sensitive political topics and as a result, "occupies the highest rung of the hierarchy of First Amendment values and merits special protection."[193]

Any lobbying effort—whether undertaken by utility, trade association, or 501(c)(4) entity using utility funds—falls comfortably within the *Janus* Court's political speech framework. Utilities, their trade associations, and their associated 501(c)(4) entities, lobby on a breadth of local, state, and federal regulations and legislation, all of which propose to direct public money in response to issues of public concern, such as climate change and infrastructure investment.[194] Some issues, like utility service improvements and energy efficiency programs, may initially strike us as less controversial than other policy issues, such as ambitious targets for renewable energy or the role of the administrative state in promulgating environmental and energy regulations. Even these topics, however, implicate issues of public spending, and they too can be the subject of impassioned debate.

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190. National Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 768 (2018) (citing Zauderer v. Office of Disciplinary Couns., 471 U.S. 626 (1985) (proposing that "our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their commercial speech.")).

191. Commercial speech has been thought to enjoy a lesser degree of constitutional protection and courts generally do not apply "strict" scrutiny that is thought to otherwise apply outside the commercial sphere. *See* Knox v. v. Service Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 309-10, 321-22 (2012); Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). *But see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522-23 (Thomas, J., concurring) (arguing that there should be no distinction between commercial and political speech because there is not a philosophical or historical basis for doing so); *see also* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 504-06 (Thomas, J., dissenting). Regardless of the distinction establishing commercial speech, prior precedent establishes that "exacting scrutiny" applies even under the test used for compulsory subsidization of commercial speech.

192. Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 894 ("[P]rior precedent in this area . . . had applied what we characterized as 'exacting scrutiny,' a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial sphere. Under 'exacting scrutiny,' we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'") (internal citations omitted).

193. *Id*. at 914-15 (internal citations omitted). *See also* Brian Kennedy & Alec Tyson, *How Americans View Climate Change and Policies to Address the Issue*, PEW RSCH. (Dec. 9, 2024), https://www.pewresearch.org/science/2024/12/09/how-americans-view-climate-change-and-policies-to-address-the-issue ("A large majority of Democrats (86%) say climate change is affecting their local community at least some. By contrast, fewer than half of Republicans say this (41%). A majority of Republicans (58%) say climate change is having not too much or no impact at all on their community . . . Seven-in-ten Democrats say human activity contributes a great deal to climate change; another 22% say it contributes some. Republicans are far less likely to see a human impact . . . 44% [of Republicans] say natural patterns in the Earth's environment contribute a great deal to climate change.").

194. *See generally supra* Part III.A.

For example, utility service improvement issues may not seem particularly ideological or contentious given an expressed desire by the utility, the state, and utility customers, for all ratepayers to enjoy better service outcomes. Yet service improvement issues are contentious because the conversation necessarily implicates issues like undergrounding, utilities' redlining patterns, and community rights to self-generate. Utilities in certain states have historically failed, and arguably are continuing to fail, to invest in power delivery systems in low and medium-income communities of color.[195] These communities are forced to rely on aging infrastructure and as a result, are often the most prone to frequent outages and prolonged blackouts.[196] In turn, states can bear the direct cost of health care needs when communities are without power during extreme weather events and some states use public money to subsidize community solar to protect against utility blackouts and reduce costs.[197] The legacy and continued practice of utility redlining, as well as the state policy programs that use taxpayer money to respond to utility service failures, are hotly debated.

Trade associations and utility-associated 501(c)(4) organizations engage in other activities that extend beyond policy, legislative, and regulatory advocacy, as well as the financial support of political candidates.[198] For example, trade associations use member-dues to "identify[] and promote[] best practices [for resiliency

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195. *See generally* CHANDRA FARLEY ET AL., ADVANCING EQUITY IN UTILITY REGULATION, GRID MODERNIZATION LAB'Y CONSORTIUM 20-27 (Nov. 2021), https://escholarship.org/content/qt1mr715sx/qt1mr715sx.pdf; Robert Walton, *The Energy System is 'Inherently Racist,' Advocates Say. How are Utilities Responding to Calls for Greater Equity?*, UTIL. DIVE (Oct. 26, 2022), https://www.utilitydive.com/news/energy-system-inherently-racist-utilities-responding-equity-ej-justice40/634203.

196. *See, e.g.*, Comments of the Detroit Area Advocacy Organizations, No. U-20147, at 14-25, 35-43 (Mich. Pub. Serv. Comm'n Mar. 15, 2024), https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y00000CWa5oAAD (arguing that DTE's planned distribution grid investments "prioritize[e] non-[environmental justice (EJ)] communities in distribution grid conversion projects and select[] most EJ communities with the least reliable service for 4.8 kV hardening…"); Urban Core Collective's Comments on Consumers Energy Company's Electric Distribution Investment Plan, No. U-20147, at 32-35 (Mich. Pub. Serv. Comm'n Feb. 16, 2024), https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y00000C2nBZAAZ ("Even with the [utility's] proposed EJ reliability flag and prioritization system, Archetype 4—which has significant overlap with EJ communities—is estimated to only receive 28 percent of the planned investments, even though it serves 40% of customers); *see generally* UTILITY REDLINING: INEQUITABLE ELECTRIC DISTRIBUTION IN THE DTE SERVICE AREA, WE THE PEOPLE MICH. (Aug. 2022), https://wethepeoplemi.org/wp-content/uploads/2022/08/DTE-Utility-Redlining-V3_20220822-FINAL.pdf.

197. *See, e.g.*, SOMAH, PROGRAM HANDBOOK 9-12 (2d. ed. 2020), https://aea.us.org/wp-content/uploads/2020/08/SOMAH_Handbook.pdf (explaining how Assembly Bill 693 created the program, funded at $100 million annually from a share of greenhouse gas auction proceeds). *See* Mario Alejandro Ariza, *Redlining Shaped the Power Grid. Communities of Color are Still Paying the Price*, FLOODLIGHT (May 15, 2025), https://floodlightnews.org/redlining-shaped-the-power-grid-communities-of-color-are-still-paying-the-price.

198. *See, e.g.*, *Joint Reply*, *supra* note 189 (alleging that trade association expenditures are not intended to fund specific speech, but instead involve funding an initiative that enables utilities to work with government officials towards outcomes that promote reliable electric service at just and reasonable rates); *Initial Comments of Edison*, *supra* note 46 (explaining "EEI provides member companies with a significant range of services that benefit electricity customers, beyond any lobbying activity that we report consistent with federal requirements," including grid resiliency and power restoration coordination, as well as meetings and conferences for "providing information, data exchange, and an opportunity for policy discussions aimed at ensuring the continued provision of affordable, reliable, and resilient clean electricity in a rapidly changing world.").

and power restoration] through benchmark efforts and forums."[199] While these discrete activities are not framed as ideological or political in nature, utility trade association activity is aimed at guaranteeing and protecting the for-profit utility revenue model, which itself is a contentious political issue that impacts public spending. In any case, utilities, trade associations, and 501(c)(4) entities engage in political activity. Following *Janus*, any attempt to differentiate between "permissible" and "impermissible" utility, trade association, and utility-associated 501(c)(4) political activity generates line-drawing issues identified by the Court as unworkable.

For purposes of classifying utilities' speech or activity, the more challenging issue is raised when utilities and their trade associations engage in goodwill or issue advertising. The Supreme Court maintains a distinction between speech proposing a commercial transaction and other varieties of speech.[200] The "core" of commercial speech is "speech which does no more than propose a commercial transaction."[201] Whether speech that combines commercial and noncommercial elements is classified as commercial turns on whether the communication is an advertisement, whether it makes references to a specific product, and whether the speaker has an economic motivation.[202] While no one factor is sufficient to designate speech as commercial, the Court has strongly implied that all are not necessary.[203]

It is conceptually difficult, however, to distinguish between commercial and political speech.[204] Consider a hypothetical utility issue advertisement. If a monopoly utility engages in a traditional paid advertising campaign to garner public support for a proposed utility-owned transmission line by highlighting the utility and the benefits of the line to its ratepayers, is this commercial or political speech? On one hand, the utility's speech could be characterized as commercial.[205] The

199. *See Issues & Policy: Reliability, Resilience & Emergency Response*, EEI (last visited Jul. 15, 2025), https://www.eei.org/en/issues-and-policy/reliability-emergency-response ("EEI supports member companies by identifying and promoting best practices through benchmark efforts and forums and finds collective solutions to business continuity programs, processes, and projects across the industry and companies . . . Electric companies affected by significant outages often to the industry's mutual assistance network—a voluntary partnership of electric companies from across the country—to help speed restoration.").

200. *See generally* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980). *But see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522-23 (Thomas, J., concurring) (arguing that there should be no distinction between commercial and political speech because there is not a philosophical or historical basis for doing so); *see also* United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) (noting that speech "need not be characterized as political before it receives First Amendment protection").

201. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (internal citation omitted).

202. *See generally id*. at 66-67.

203. *See generally id*. at 67 n.14.

204. *See generally* Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RSRV. L. REV. 1143, 1148 (2004) (explaining "the Court has explicitly held that the fact that the speech concerns public issues is not sufficient to take it out of the realm of commercial speech . . .").

205. *See* Central Hudson Gas & Elec. Corp., 447 U.S. at 566-68 ("Most business—even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Instead, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business . . . In the absence of factors that would distort the decision to advertise, we may assume that the

speech would certainly function as a brand advertisement; the media would promote the utility's brand by tying the company's actions to a stated desire to build infrastructure because ratepayers would benefit. In the narrowest sense, the speech also refers to a specific product: utility services that are made possible by utility-owned infrastructure, like the transmission line. There is also little doubt that the utility would speak because of the economic incentives that encourage utility capital expenses; engendering goodwill amongst ratepayers reduces the risk of ratepayer opposition during the regulatory proceedings required to approve the infrastructure and recoup the utility costs and profits.

On the other hand, because of the utility's legally-protected monopoly, it seems like the company's speech—both in form and function—could be distinct from that of traditional corporate actors who engage in product promotion within a competitive marketplace.[206] In the first instance, it is possible that the utility's speech would not function as an advertisement. If the utility is acting not as a commercial actor, but instead as a political entity anticipating a regulatory challenge that could nullify a lucrative profit opportunity, then perhaps the speech should not be characterized as an advertisement.[207] Additionally, when a utility speaks, it does not do so in order to sell utility services or reach new consumers. A utility's services are prescribed by regulators, and its customers are already defined and captive, unable to make choices that reflect individual commercial decisions.

The commercial speech doctrine provides us with little clarity for disentangling utilities' political and commercial speech. Nonetheless, "the right against compelled speech is not, and cannot be restricted to ideological messages,"[208] and as a result, "exacting scrutiny" applies to both compelled commercial and compelled political claims.

B. Compelled Association Claim

When association with a private entity is compelled by the state, "exacting scrutiny" must be applied if the group is engaging in any expressive activity on issues of public concern. In order to justify the state-forced association of ratepayers with utilities' speech, the state must show that the association "serve[s] a compelling state interest that cannot be achieved through means significantly less

willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.").

206. In *Central Hudson*, the majority reasoned that "speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and if they decide to use the service how much of it to purchase." *Id*. at 585 (Rehnquist, J., dissenting). This reasoning is premised on the mistaken assumption that all consumers can select their utility service provider.

207. *See* Chemerinsky & Fisk, *supra* note 204, at 1155 ("[A]n important distinction between commercial and noncommercial speech is whether the speaker is a person or entity 'engaged in commerce.'") (citing Kasky v. Nike, Inc., 45 P.3d 234, 258 (Cal. 2002)).

208. National Assoc. of Mfrs. v. NLRB, 717 F.3d 947, 957 (D.C. Cir. 2013).

restrictive of associational freedoms."[209] After *Janus*, it is no longer sufficient for the intrusion on First Amendment rights to be "germane" to some state interest.[210]

States may have a compelling interest in providing citizens with the opportunity to purchase reliable and safe utility service at just and reasonable rates,[211] but utilities' political speech does not further the state's interest. Even though utilities often engage in lobbying and other political activity using the language of ratepayer interests, they do so in a misleading manner because the interests of ratepayers often diverge from the interests of utilities and their shareholders. Moreover, ratepayer interests are already represented by state attorneys general or offices of consumer advocates. There is no discernable correlation between the state's interest in fair and effective utility regulation and utilities and their trade associations engaging in political lobbying, advertising, and contributing to 501(c)(4) organizations.

The state's interest in providing citizens with an opportunity to purchase reliable and safe utility service could be advanced through effective ratemaking or integrated resource planning proceedings, to which utilities are a required party. If that is the case, then the state could allow utilities to participate in this narrow set of regulatory proceedings: the utility could charge ratepayers for reasonable expenses associated with participating in the proceeding. Utilities would be unable to comment or engage in the proceedings on behalf of ratepayers. This would assist in disentangling the utilities' expressive message from that of ratepayers.

If we accept the premise that state-compelled association with a private entity engaging in speech on matters of great public concern inflicts a serious First Amendment associational injury, then the available alternative indicates that this injury is unnecessary. After *Janus*, states cannot continue mandating its citizens to take utility service from a monopoly utility company that is engaging in political activities.

C. Compelled Subsidization Claims: Utilities and Trade Associations

When ratepayers object to a utility's political activity but are nonetheless compelled to subsidize the political activity, ratepayer First Amendment rights are violated because compelling people to give money to a private entity that will be

209. Knox v. Service Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 310 (2012) (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)); see *also* Janus v. American Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 916 (2018).

210. In *Keller*, the Supreme Court observed that *Abood*'s germaneness requirement is appropriate in the exacting scrutiny framework for state bar association claims. Keller v. State Bar of Cal., 496 U.S. 1, 13 (1990). But unlike with state bar associations, the Court has never extended the *Abood* germaneness standard to utility expenses in a distinct case that remains binding on lower courts. For this reason, *Keller*'s germaneness requirement remains for state bar associations "despite its increasingly wobbly, moth-eaten foundations," but there is no such distinct germaneness standard for utilities that survives *Janus*. McDonald v. Longley, 4 F.4th 229, 253 (5th Cir. 2021).

211. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 19 (1986) (plurality opinion) ("The State's interest in fair and effective utility regulation may be compelling").

used for political speech is akin to compelling people to speak themselves.[212] After *Janus*, federal and state practices of authorizing rates after utilities self-identify and self-segregate expenses associated with its own political activity, as well as that of its trade associations, no longer satisfies the First Amendment. Specifically, the *Janus* Court overturned the *Abood* approach of "list[ing] categories of expenses and set[ting] out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses."[213] This concern applies in the utility context. Ratepayers face an impossible task when trying to monitor and tie utility and trade association expenses to specific activities.

Compelled ratepayer subsidies for utility political activities do not survive exacting scrutiny. First, there is not a connection between the state's interest in providing fair and effective utility service for its citizens, and many of utilities' political activities that ratepayers are forced to subsidize. Utility and trade association lobbying activities generally do not inherently result in more effective utility service for ratepayers. Instead, utilities' lobbying is designed to maximize profits and protect the monopoly franchise model. For example, when FirstEnergy charged ratepayers for lobbying expenses and political corruption activities during its effort pass Ohio House Bill 6, its actions were not tied to rendering utility service. Instead, FirstEnergy acted to make utility service more costly for ratepayers by shifting the financial consequences of poor management decisions away from utility shareholders and onto its ratepayers. Similarly, when EEI lobbies against net metering policies, or gas utilities lobby against electrification building policies, utilities and their trade associations act in a manner to protect monopoly franchises. Because utilities can derive value from policy barriers that limit competition, they act in spite of documented evidence that competition can benefit ratepayers and that electrification improves health outcomes for state residents.

While it could be possible for state and utility interests to align on discrete "matters of great public concern," ratepayer-funded lobbying is not required to

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212. The *Janus* Court accepted the premise, articulated in *Abood*, that individual rights protected by the First Amendment are disrupted when the state requires objecting individuals to support or subsidize a private organization's ideological cause. It is difficult, of course, to reconcile this premise with the reasoning that undergirds the government's authorization to collect fees and taxes from individuals protesting. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2004) ("We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns."). *See also* Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 36-38 (2019); Baude & Volokh, *supra* note 143, at 10. I make no attempt to reconcile the conflicting reasoning, but I will briefly note why I believe that utilities' speech should not be classified as government speech. First, a utility is not a "government entity" because state regulatory commissions lack substantial control over the companies. While utilities' revenue collection from ratepayers is subject to government oversight in order to protect the public from excessive rates, utilities' speech activity (governmental affairs, advertising decisions, etc.) is not. The government also lacks any control of utilities' speech and the utilities' corporate form. *Cf. Johanns*, 544 U.S. at 561 (finding government speech and noting that appointments to a Beef Promotion and Research Board were approved by the Secretary of Agriculture, as was "every word used in every promotional campaign. All proposed promotional messages were reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department"). Additionally, utilities are private for-profit corporations that take no funding "from appropriations made by the legislature." *Keller*, 496 U.S. at 11. Finally, utilities are not democratically accountable. *Cf.* Board of Regents of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

213. *See Janus*, 585 U.S. at 923.

realize these priorities. Instead, voluntary groups of consumer advocates can continue their current practices of engaging in political advocacy to improve service outcomes, and utility shareholders can shoulder their own political activity expenses. In 2023, Colorado, Connecticut, and Maine enacted statutes prohibiting utilities from using customer funds to support political activities,[214] and the three states have effectively managed regulatory proceedings and legislative sessions in the years since. Moreover, even if utilities maintain that certain political activity could benefit ratepayers, the *Janus* Court was clear that chargeability determinations, such as above-the-line and below-the-line USofA utility accounting rules, are no longer adequate to protect individual speech interests because the procedures are too burdensome. After *Janus*, chargeability determinations in the utility context violate the First Amendment and ratepayer dissent from these processes are presumed.

The state's interest in providing fair and effective utility service for its citizens similarly lacks a connection to the compelled ratepayer subsidization of utilities' advertising. Promotional advertising, which is designed to engender goodwill in a targeted audience, does not improve utility service to ratepayers. While some informational advertising, such as information identifying planned outages

214. *See* COL. REV. STAT. ANN. § 40-3-114 (2023); CONN. GEN. STAT. § 16-243p (2023); An Act to Require Transparency in Public Utility Advertising Expenditures, 2023 ME. LAWS 329 (codified as amended at ME. STAT. tit. 35-A, § 302 (2023)). California enacted the California Ratepayer Protection Act of 2025, which prohibits investor-owned utilities from using ratepayer money to support utility political influence activity, trade association dues, and certain promotional advertising. The Act defines "political influence activity" broadly to encompass direct or indirect influence of the political process. The Act further explains that regulators "shall assess a civil penalty, based on the severity of the violation, against a utility that violates" the prohibition on utilities charging ratepayers for prohibited activities. *See generally* 2025 CAL. LEGIS. SERV. CH. 634 (West). In 2025, Maryland enacted legislation that prevents utilities from recovering "through rates any costs associated with: membership, dues, sponsorships, or contributions to an industry trade association, group, or related entity exempt from taxation under § 501(c)(6) of the Internal Revenue Code." *See generally* MD. CODE ANN., PUB. UTIL. § 4-504(b)(1) (West 2025). This statutory language does not appear to apply to any political activity undertaken by the utility itself. *See* 2025 Md. Laws. 625. In 2019, New Hampshire enacted legislation prohibiting a utility from recovering lobbying or political activity costs undertaken directly or indirectly on behalf of a utility. *See* N.H. REV. STAT. ANN. 378:30-e (2019). The statutory language is narrow as it encompasses only those "lobbying" activities that would require registering as a lobbyist under state law. *Id*. The language does not appear to cover efforts to prevent legislation or regulatory proceedings from being initiated, or lobbying efforts that occur prior to the introduction of new legislation or regulatory proceedings. *Id*. "Political activity" only includes those activities conducted "in support of a candidate committee, a political committee, or an inaugural committee, or in support of or opposition to a candidate for public office." *Id*. The law also does not consider advertising, trade association or charitable contributions, and the direction of ratepayer funds to 501(c)(4) organizations that engage in "issue" advocacy. *See* N.H. REV. STAT. ANN. 378:30-e (2019). In 2023, the Louisiana Public Service Commission instituted a regulatory proceeding to investigate utilities' use of ratepayer funding on any "(1) activities meant to influence the outcome of any local, state, or federal legislation, ordinance, resolution, rule, measure, or other regulatory decision, (2) advertising, marketing, and/or public relations expenses that do not directly relate to a purpose or program that is required or authorized under statute or commission rule or order, and/or (3) organization or membership dues or other contributions to any organization, association, institution, corporation, or other entity that engages in lobbying or other similar activities meant to influence the outcome of any local, state, or federal legislation, ordinance, resolution, rule, measure or other regulatory decision." *See* Notice of Proceeding, Docket No. R-36832 (La. Pub. Utils. Comm'n Jun. 22, 2023), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=3rw%2fqty7%2boI%3d. The Commission has not updated or clarified its rules, requirements for utility disclosure, or promulgated enforcement mechanisms.

or explaining bill-payment assistance programs, could support's the state interest in fair and effective utility service, promotional advertising does not. Advertising campaigns, which could include branding company swag for events, sponsoring sports stadiums, showcasing a monopoly utility's reliability in a printed advertisement, or discussing a utility's plan to underground transmission and distribution lines, do nothing to benefit the utility's captive ratepayers. Instead, the beneficial public relations generated by a utility's promotional advertising advances the financial interests of the private utility corporation and its shareholders by helping the utility avoid regulatory oversight or public scrutiny.

Utilities' contributions to PACs or 501(c)(4) organizations also do not improve the state's interest in fair and effective utility service. Political action committees raise and spend money to elect or defeat political candidates, and 501(c)(4) organizations engage in lobbying activity, issue advocacy, and political activity more broadly, on behalf of corporate donors. Utility preferred electoral and policy outcomes are not tied to states being able to provide citizens with the opportunity to purchase reliable and safe utility service.

To the extent that the state has a compelling interest in providing its citizens with the opportunity to purchase reliable and safe utility service at just and reasonable rates, the state can achieve that objective through means far less restrictive of speech rights. Notably, state legislators and PUCs can prohibit utilities from including any political activities—direct or indirect lobbying costs, the entirety of trade association dues, utility advertising costs, contributions to PACs and 501(c)(4) organizations—in rates. Several states already expressly forbid utilities from recovering certain political activity costs.[215] While utilities in remaining states would likely experience "unpleasant transition costs in the short term," unconstitutional "exactions cannot be allowed to continue indefinitely."[216] Any alleged financial harm incurred by the utility would be "the inability to extract mandatory dues from the plaintiffs in violation of the First Amendment, which is really 'no harm at all.'"[217]

For these reasons, government-authorized rates compelling objecting ratepayer subsidization of utility political activity fail "exacting scrutiny." Utilities use their own funds to engage in constitutionally protected political speech, but they can no longer extract funds from disapproving or unwitting ratepayers to fund their political speech, as well as the political activities of their trade associations.

VI. COHERING RATEPAYER ECONOMIC AND POLITICAL POWER

There are reasons that explain why governments adopted legal frameworks granting monopolies to private for-profit companies for the provision of utility

215. *See* COL. REV. STAT. ANN. § 40-3-114 (2023); CONN. GEN. STAT. § 16-243p (2023); An Act to Require Transparency in Public Utility Advertising Expenditures, 2023 ME. LAWS 329 (codified as amended at ME. STAT. tit. 35-A, § 302 (2023)); *See also* 2025 CAL. LEGIS. SERV. CH. 634 (West); MD. CODE ANN., PUB. UTIL. § 4-504(b)(1) (West 2025); 2025 Md. Laws. 625; N.H. REV. STAT. ANN. 378:30-e (2019); N.H. REV. STAT. ANN. 378:30-e (2019); Notice of Proceeding, Docket No. R-36832 (La. Pub. Utils. Comm'n Jun. 22, 2023), https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=3rw%2fqty7%2boI%3d.

216. *See Janus*, 585 U.S. at 929.

217. McDonald v. Longley, 4 F.4th 229, 255 (5th Cir. 2021).

services.[218] This legal and financial ordering, however, is not constitutionalized to provide monopoly utilities with a singular role in using ratepayer funds to control the future of the utility service model. In raising constitutional claims against rates approved by regulators that include political speech and political activity costs, ratepayers can assert their collective interests against utilities' economic and political interests.

Existing legal doctrines and regulatory practices limit ratepayer challenges to utilities' rates and practices. The Federal Power Act and relevant state laws require regulated entities to file tariffs showing all "rates and charges," as well as the "classifications, practices and regulations affecting such rates and charges" for any jurisdictional service.[219] When regulatory commissions approve a filed tariff, they "speak[] as the Legislature, and [their] pronouncement has the force of a statute."[220] Once rates are approved, the rate on file is considered "per se reasonable and cannot be the subject of legal action against the private entity that filed it."[221]

After rates are approved by a regulatory agency, ratepayers are generally unable to challenge filed rates in court.[222] In order to preserve the regulatory agency's primary rate setting jurisdiction, ratepayers can only challenge a utility's rates during the rate-case process.[223] Even when rates approved by regulatory agencies reflect improper methods or manipulated market prices, ratepayers generally cannot challenge the rate determination through fraud, antitrust, and consumer protection claims in court.[224]

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218. *See generally* Munn v. Illinois, 94 U.S. 113 (1876); Robert Bradley Jr., *The Insull Speech of 1898: Call for Public Utility Regulation of Electricity (The Origins of EEI's Support for Cap-and-Trade in Today's Energy/Climate Bill)*, MASTERRESOURCE (Apr. 29, 2010), https://www.masterresource.org/edison-electric-institute/the-insull-speech-of-1898/; Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 259, 260-77 (2006).

219. 16 U.S.C. § 824d(c).

220. Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 385 (1932). *See also* Oklahoma Operating Co. v. Lowe, 252 U.S. 331, 339-40 (1920).

221. Alpert v. Nationstar Mortg. LLC, 983 F.3d 1129, 1129 (9th Cir. 2020) (quoting Tenore v. AT&T Wireless Servs., 962 P.2d 104, 108 (Wash. 1998)); *see generally* Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n, 539 U.S. 39, 47-51 (2003); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18-19 (2d Cir. 1994).

222. *See* Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929 (9th Cir. 2002) ("At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.").

223. *See* Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 584-85 (1981)*; see also* Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986). One of the justifications offered for the doctrine is that in authorizing challenges to established rates, courts would functionally sanction certain ratepayers, likely the litigious and the well-resourced, to enjoy different rates than those who fail to challenge the reasonableness of rates.

224. *See, e.g.*, Breiding v. Eversource Energy, 939 F.3d 47, 56-57 (1st Cir. 2019) (holding that the filed rate doctrine barred consumers' claims that energy companies violated the Sherman Act and state consumer-protection and antitrust laws); Simon v. KeySpan Corp., 694 F.3d 196, 205-06 (2d. Cir. 2012) (noting that the filed rate doctrine applies "even when a claim is based on fraud or impropriety in the method by which the rate is determined," and that "when the filed rate doctrine applies, it is rigid and unforgiving"); H.J., Inc. v. Npurthwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992); Taffet v. Southern Co., 967 F.2d 1483, 1494-95 (11th Cir. 1992).

Consequently, this filed rate doctrine confines ratepayer voices to state regulatory proceedings, which courts presume to be sufficient for balancing the interests of ratepayers vis-à-vis those of utilities. Of course, the modern commission rate-case proceeding reflects a process that is neither neutral nor equitable.[225] Utilities enjoy an initial procedural advantage insofar as they generate the information upon which a rate case is premised.[226] This procedural advantage compounds into a political advantage: utilities decide how they will use ratepayer funds to engage in advantageous political activity. In turn, the utilities' political advantage protects the existing utility service model.[227] Finally, utilities enjoy the legal safe harbor provided by the filed rate doctrine, which insulates commission rate decisions from further challenge. The result is a legal structure where ratepayers depend entirely on state utility regulators to respond to their voices, and to protect their associational and speech interests.[228]

To the extent that commission-approved rates continue to allow utilities to recover political costs, ratepayers can reassert their individual and collective interests by raising constitutional challenges to this practice in federal courts. If ratepayers are successful in asserting their voices, it is possible that the regulatory process could reflect a more balanced political participation process. Regulators, perhaps cognizant of potential legal challenges, may scrutinize utility political spending through stringent accounting requirements, and rate-case intervenors could benefit from the greater transparency during rate cases.

Ratepayers would still face the general challenge of responding to well-resourced utilities that can use shareholder funds to protect and realize profits. They would do so, however, in a political environment where utilities no longer purport to represent ratepayer interests.

Ratepayer voices are critical to ongoing and future debates in the power industry. Given the scale of impending electric power investments to meet forecasted load growth[229] and the necessary infrastructure response to mitigate the

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225. *See supra* Part III.B.

226. It is possible that ratepayers could petition state PUCs or FERC to initiate a rulemaking to amend their rules governing the recovery of political activity expenses. Whether, and how, regulatory agencies will respond to these requests is a different issue. Regardless, the constitutional injury is ongoing. For example, in March of 2021, the Center for Biological Diversity petitioned FERC to change its accounting and reporting changes to protect customers from subsidizing political activity. In December of 2021, the Commission issued a Notice of Inquiry, seeking comments on this issue. The Commission has not acted since. *See Biological Diversity's Opening Comments*, *supra* note 45.

227. When utilities lobby the regulators who decide their rate cases and cull support amongst the legislators with the authority to pass laws to protect or transform the utility industry, they do so, in part, to protect the existing regulatory process.

228. *See generally* Jedediah Purdy, *Beyond the Bosses' Constitution*, 118 COLUM. L. REV. 2161, 2182-83 (2018) (contextualizing the *Janus* opinion and noting that the "individual-rights core of the opinion is buttressed by the structural worry that the challenged regime distributes the power of political influence in a way that entrenches certain established interests . . .").

229. *See, e.g.*, *AI to Drive 165% Increase in Power Demand by 2030*, GOLDMAN SACHS (Feb. 4, 2025), https://www.goldmansachs.com/insights/articles/ai-to-drive-165-increase-in-data-center-power-demand-by-2030; Cathy Kunkel, *Projected Data Center Growth Spurs PJM Capacity Prices by Factor of 10*, INST. ENERGY ECON. AND FIN. ANALYSIS (Jul. 30, 2025), https://ieefa.org/resources/projected-data-center-growth-spurs-pjm-

consequences of climate change,[230] utilities' voices should not monopolize debates on issues in which ratepayers stand to bear the economic and environmental burden of these decisions.

VII. CONCLUSION

States cannot continue to mandate its citizens to subsidize, and associate with, utility and industry trade group political activity. When utilities engage in political activities using money that they collect from the public through government-set rates, the utilities and the state compel captive utility ratepayers to fund and associate with private political speech in violation of the First Amendment. In compelling association with, and financial support of, utility political activities, the state inflicts serious First Amendment injuries on objecting ratepayers.

Following the Supreme Court's decision in *Janus v. American Federation of State, County and Municipal Employees*,[231] utility ratepayer speech can no longer be burdened when utilities engage in activities with the goal of modifying how public money is distributed or collected. The modern First Amendment prohibits federal and state regulators from authorizing utilities to engage in political activity or to charge ratepayers for political speech.

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capacity-prices-factor-10; ELIZA MARTIN & ARI PESKOE, EXTRACTING PROFITS FROM THE PUBLIC: HOW UTILITY RATEPAYERS ARE PAYING FOR BIG TECH'S POWER (Harv. Env't & Energy L. Program, 2025) (explaining the legal mechanisms that utilities use to socialize the costs of serving data centers to other ratepayers).

230. *See, e.g.*, *Electricity Grid Resilience: Climate Change is Expected to Have Far-Reaching Effects and DOE and FERC Should Take Actions*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 10, 2021), https://www.gao.gov/products/gao-21-423t; U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT 279-81 (A.R. Crimmins, C.W. Avery, D.R. Easterling, K.E. Kunkel, B.C. Stewart, T.K. Maycock eds., 2023) (explaining efforts to enhance energy system resilience).

231. *See generally* 585 U.S. 878 (2018).