No. 18-1492

In The
Supreme Court of the United States

KATHERINE MILLER,

Petitioner,

v.

JAY INSLEE, in His Official Capacity as Governor of the State of Washington, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF GOLDWATER INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

The Court recently held that a state "requir[ing] that a union serve as exclusive bargaining agent for its employees" is "a significant impingement on associational freedoms" protected by the First Amendment—an infringement "that would not be tolerated in other contexts." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). The state of Washington compels individuals who operate state-subsidized home-based childcare businesses, and who are not government employees, to accept an exclusive representative that speaks for them in petitioning, lobbying, and contracting with the state over public policies that affect their professions. Does this violate the First Amendment?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, Institute litigators represented an attorney challenging a mandatory association in *Fleck v. Wetch*, 139 S. Ct. 590 (2018), in which the Court vacated the Eighth Circuit's decision rejecting a First Amendment challenge to mandatory bar membership and fees and remanded the case for reconsideration in light of *Janus*, 138 S. Ct. 2448. The Institute has also litigated and won important victories for other aspects of free speech, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City*

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[1] The parties have given blanket consent to the filing of amicus briefs. Pursuant to Supreme Court Rule 37.6, counsel for Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than Amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

of Mesa, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different campaign contribution limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as an amicus curiae in this Court and other courts in free-speech cases. *See, e.g.*, *Janus*, 138 S. Ct. 2448; *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015).

SUMMARY OF ARGUMENT

In designing the Constitution, this country's founders sought to limit the influence of factions—that is, of interest groups that would use the government to serve their own interests rather than the public interest. The founders expected that, in a large and diverse republic such as ours, the large number of factions competing with each other in a system governed by checks and balances would prevent each other from obtaining too much power.

Today, public-sector unions exhibit all the characteristics of a faction. But they are not as constrained by our republican system of government as factions typically are. And they have had outsize success in influencing policy because of the many unique legal privileges they enjoy, particularly the power of exclusive representation. That means statutes like the one Petitioner challenges—which forces private citizens like

the Petitioner to accept an exclusive representative to speak to the government on their behalf—create and empower additional dangerous factions and undermine our republican system of government. Public-sector unionism unites governing officials in a manner that creates a distinct in-government class opposed to the citizenry, and which contradicts and at times overwhelms the separation of powers mechanism.

This Court should grant certiorari, both to protect citizens' First Amendment right *not* to associate with an exclusive representative and to prevent these factions from wielding such undue and undemocratic power.

ARGUMENT

I. The founders sought to limit the harm caused by factions.

The Constitution's authors were well versed in the history of republics and aware of the distinctive threats they faced. Among these was the risk posed by what they called *factions*—that is, organizations among those who exercise government power, which could use that power to pursue their own self-interest instead of the public interest. Madison defined a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

The Federalist No. 10 at 57 (J. Cooke ed., 1961) (James Madison).

The founders were wary of factions because they pursue their own interests, without regard for the public interest, in ways that threaten the freedom of others. As Madison noted, a legislator pursuing the interest of a faction of which he is a member essentially acts as a "judge in his own cause," which naturally leads to unjust results unless checked. *Id.* at 59. Madison gave an example: the power over taxation gives legislators acting on behalf of factions the "opportunity and temptation . . . to trample on the rules of justice. Every shilling with which they over-burden the [taxpayer] is a shilling saved to their own pockets." *Id.* at 60. This creates pressure on the legislator to support legislation that shifts the tax burden away from his own constituents and onto the shoulders of others—which might be clever politics but violates principles of justice, encourages retaliatory factionalism by other groups, and ultimately undermines citizens' respect for republican institutions.

Madison was not alone in these concerns. John Adams warned that when government indulges the "[s]elf interest, private avidity, ambition, and avarice" of a faction, the entire society gradually becomes subservient to that faction's desires and influence. *A Defence of the Constitutions of Government of the United States of America, Vol. III* (1788), *reprinted in John Adams: Writings from the New Nation 1784-1826* at 123 (Gordon Wood ed., 2016) (spelling and punctuation modernized). Once that happens, "[n]o favors will be

attainable but by those who will court the ruling demagogues in the house, by voting for their friends and instruments; and pensions and pecuniary rewards and gratifications, as well as honors and offices of every kind [will be] voted to friends and partisans." *Id.* at 124 (spelling modernized).

Worse, once such a faction gained control over the state, it would perpetuate itself by using the state to strengthen its hand; the faction's members would "in effect nominate their successors, and govern still." *Id.* at 118. In this way, an association among government officials who used their authority to perpetuate their power and advantage could subvert the checks-and-balances system entirely.

Jefferson, too, warned of the risks of private associations using political authority to pursue their private ends: he observed that "[t]he public money" could be a "source[] of wealth and dominion to those who hold [it]," and because taxpayer money is both "the instrument, as well as the object of acquisition," government officials could transform the state into a self-perpetuating means of extracting wealth from the public for the self-interest of those wielding government power. *Notes on the State of Virginia* (1787), *reprinted in Thomas Jefferson: Writings* 246 (Merrill Peterson ed., 1984). "With money we will get men, said Caesar, and with men we will get money." *Id.* Writing before the Constitution went into effect, Jefferson warned that there could come "a time, and that not a distant one," when a faction "will have seized the heads

of government" and exercise its power to "purchase the voices of the people, and make them pay the price." *Id.*

As Jefferson's reference to Caesar suggests, the foremost historical example of ruinous factionalism that the founders knew was that of ancient Rome. And foremost among the examples of Roman factionalism was the Praetorian Guard. According to Edward Gibbon, whom the founders carefully studied, this organization began as a bodyguard for Roman rulers and then rose in power and influence until it became "the first symptom and cause of the decline of the Roman empire." 1 Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* 81 (New York: Heritage Press, 1946) (1776). During the reign of Tiberius, the Guard's "pride was nourished by the sense of their irresistible weight," which forced the government to "purchase their precarious faith by a liberal donative." *Id.* at 82. Eventually, the Guard claimed to be the true representative of the people and in all essentials ran the state.

Those events were never far from the founders' concern. In the controversy over Alexander Hamilton's proposed National Bank, for example, Madison wrote to Jefferson that a government-subsidized bank would transform "stockjobbers" into "the praetorian band of the Government, at once its tool and its tyrant; bribed by its largesses, and overawing it by clamours and combinations." Letter from James Madison to Thomas Jefferson (Aug. 8, 1791), in 6 *Writings of James Madison* 59 (Gaillard Hunt ed., 1906) (spelling modernized).

Similar concerns led George Washington, on the advice of Jefferson and Madison, to demand that the Society of Cincinnati, a fraternal organization of Revolutionary War veterans, alter its rules regarding membership. Those rules made membership hereditary, and Jefferson warned that the Society would "probably procure an ingraftment into the government," and its members would become "patrons of privilege and prerogative, and not of the natural rights of the people"—in other words, an incipient Praetorian Guard in the new republic. Letter from Thomas Jefferson to George Washington (Apr. 16, 1784), in *Jefferson: Writings*, *supra*, at 791. Although the Society agreed to alter its charter in ways that satisfied Washington, these concerns ultimately proved justified, as the Society did become an institution through which government patronage and privilege were extracted from public resources for private benefit. *See* Gordon S. Wood, *The Radicalism of the American Revolution* 263 (1992).

Because they were so acutely aware of the threat factions posed, the founders sought in designing our system of government to limit factions' ability to exercise power and oppress others.

The framers saw two potential methods for "curing the mischiefs of faction": "removing its causes" and "controlling its effects." *The Federalist* No. 10, *supra*, at 58. The first method was unacceptable: to remove the causes of faction, one could either limit freedom of speech and freedom of association, or take similar steps to ensure that everyone has the same opinions

and interests. *Id.* This was not a viable option because the "remedy" of restricting freedom would be "worse than the disease" of faction; after all, the whole point of restraining factions is to protect liberty. *Id.* And giving everyone the same opinions and interests is neither desirable nor possible. *Id.* at 58–59.

Madison believed the second method—controlling factions' harmful effects—was feasible through the Constitution's republican system of government. *Id.* at 60-65. A minority faction would, he expected, be controlled by "the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* at 60. And a large republic, such as the one the Constitution would create, would "take in a greater variety of parties and interests," which would make it "less probable that a majority of the whole will have a common motive to invade the rights of other citizens." *Id.* at 64. In other words, a "greater variety of parties" would protect "against the event of any one party being able to outnumber and oppress the rest." *Id.*

The First Amendment naturally helps, on balance, to limit the power of factions in this way. On the one hand, freedom of speech and association allow factions to exist in the first place; as Madison put it, such "[l]iberty is to faction, what air is to fire, an aliment without which it instantly expires." *Id.* at 58. But on the other hand, with a proliferation of factions that are all equally free to pursue their political goals "without hindrance or aid from the state," *Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012), factions will tend to

limit each other's influence and ensure that none can dominate the government or oppress the people.

In brief, the founders hoped the cure for the problem of faction would be found in balance. "Divide et impera"—divide and conquer—"is under certain qualifications, the only policy, by which a republic can be administered on just principles," wrote Madison. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 *Writings of James Madison* 31 (Gaillard Hunt ed., 1904). Because "anarchy may . . . truly be said to reign" in any society where "the stronger faction can readily unite and oppress the weaker," the Constitution needed some device to restrain the power of interest groups. *The Federalist* No. 51, *supra*, at 352 (James Madison). Traditionally, that device had been to empower some "will in the community independent of the . . . society itself," such as an unelected king, that could limit interest group influence without falling prey to it. *Id.* at 351. But this had proven ineffective and counterproductive. A better alternative was to encourage a diversity of rivalrous interests and to establish a government structure of checks and balances whereby power was separated and put into a kind of competition against itself. "Ambition must be made to counteract ambition." *Id.* at 349. By "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments," the founders hoped, the checks-and-balances system would divide those who govern into different groups, thereby hinder their tendency to unite around schemes that might threaten the rights

and interests of the citizenry, *without* creating any dangerously undemocratic power within the government. *Id.*

Madison famously illustrated this idea with the example of the many different religious groups in the American colonies. Living in a society in which established religion was the norm, he was aware that sects both within and outside the established church often exploited their authority—or struggled to gain such authority—with consequences that were adverse to the people's freedom and the community's safety. "In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects." *Id.* at 351–52.

That, at least, is the constitutional plan. Today, however, public-sector unions are not only an especially prominent faction, but they are a uniquely dangerous one because of the legal privileges they enjoy, privileges that undermine the separation-of-powers system.

II. Legal privileges such as exclusive representation make public-sector unions an especially dangerous faction.

In pursuing their goals, public-sector unions have, like any faction, acted in their own interest and contrary to the interests of other groups. As this Court has

recognized, their pursuit of self-interest has been successful: the "ascendance of public-sector unions has been marked by a parallel increase in public spending" in which "the mounting costs of public-employee wages, benefits, and pensions" that unions obtained through collective bargaining "undoubtedly played a substantial role." *Janus*, 138 S. Ct. at 2483.

Indeed, the wages and benefits public-sector unions manage to obtain for government employees often exceed the compensation received by their private-sector counterparts. *See* Jeff Jacoby, *What Public-Sector Unions Have Wrought*, Commentary (October 2010).[2] All that spending must, of course, be paid for by taxpayers. And spending on things unions want limits the government's ability to spend on things other groups prefer. Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L. J. 1156, 1162–63 (1974). In fact, "[u]nsustainable collective-bargaining agreements have . . . been blamed for multiple municipal bankruptcies," *Janus*, 138 S. Ct. at 2483, and in some jurisdictions government spending on pension benefits obtained by unions threatens to crowd out spending on core government services, *see, e.g.*, Adam Schuster, Ill. Policy Inst., *Tax Hikes vs. Reform: Why Illinois Must Amend Its Constitution to Fix the Pension Crisis* 6–9 (2018).[3]

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[2] http://www.jeffjacoby.com/8035/what-public-sector-unions-have-wrought.

[3] https://files.illinoispolicy.org/wp-content/uploads/2018/08/Tax-hikes-vs.-reform1.pdf.

Public-sector unions have had such great success—even though they represent a minority of citizens and frequently occupy political positions contrary to the interests of the majority—in part because of the legal privileges they enjoy, including the power of exclusive representation.

Unlike other factions, public-sector unions have special access to the political process through collective bargaining; they are not compelled, as private entities are, to achieve their goals exclusively or even primarily by normal democratic means, such as lobbying legislators and persuading the public. Instead, their exclusive-representative power gives them a privileged status whereby they can force the government to the bargaining table, and compel officials to negotiate with them until they reach an agreement or an impasse, which leads to further procedures and (where authorized) creates the potential for a strike.[4] *See Janus*, 138

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[4] The statute Petitioner challenges forces childcare providers like her to accept an exclusive representative but forbids them from striking. Wash. Rev. Code § 41.56.028(2)(e) (Pet.App.44a). Where public-sector unions can strike, they are in a position to hold the public hostage until their demands are met, making the contrast between unions' and workers' private interests and the public interest especially stark. *See, e.g.*, Letter from Franklin Roosevelt to Luther Steward (Aug. 16, 1937), *available at* https://www.presidency.ucsb.edu/documents/letter-the-resolution-federation-federal-employees-against-strikes-federal-service (explaining that collective bargaining is inappropriate in the public sector because government employees must "serve the whole people" rather than their own private interests and strikes would "look[] toward the paralysis of Government by those who have sworn to support it"); Brent Appel, *Emergency Mayoral Power: An Exercise in Charter Interpretation*, 65 Cal. L. Rev. 686, 688–91

S. Ct. at 2467 (because government must bargain with an exclusive representative, "[d]esignation as exclusive representative . . . 'results in a tremendous increase in the power' of the union" (citation omitted)); Summers, *Political Perspective, supra*, at 1164.

Still more remarkably, the public employees who appear on the other side of that bargaining table are often *themselves* members of the same public-sector union, rendering any truly adversarial or arms-length negotiation illusory. R. Theodore Clark, Jr., *Politics & Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 684 (1975). This is not a mere accusation—public-sector unions often openly brag about the fact that "[t]hrough political action . . . [w]e have the ability to help hire and fire our bosses . . . [who] negotiate our pay raises, our pensions and our health benefits." *Cf.* AFSCME, *Bargaining for Political Power* (2000).[5]

Public-sector unions commonly negotiate with, or have their agreements ratified by, officials whose campaigns the same unions supported or funded. Not only may union-backed officials accede to union demands for greater spending, but they can also authorize unionization of additional government employees—or even, as in this case, people who *are not* government employees—thereby delivering the union more

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(1977) (describing chaos and violence resulting from a 1975 San Francisco police strike).

[5] http://web.archive.org/web/20110119210735/http://www.afscme.org:80/publications/9722.cfm.

members and even more money to fuel its agenda. *See* Jacob Huebert, Harris v. Quinn*: A Win for Freedom of Association*, 2014 Cato S. Ct. Rev. 195, 208–09 (2014)[6] (describing Illinois' cycle of unions contributing to the campaigns of officials who, in turn, unionize more groups, including non-employee childcare business owners like Petitioner). Thus, a public-sector union becomes a political perpetual-motion machine, funded by taxpayer money to demand more taxpayer money for the union and its members.

Also adding to their uniquely privileged status, public-sector unions' exclusive representation powers prevent individual employees from "negotiat[ing] directly with their employer" or "be[ing] represented by any agent other than the designated union," *Janus*, 138 S. Ct. at 2460, which means that any "[d]issonance or indifference in the employee group is submerged, giving the employees' [supposed] voice increased clarity and force," Summers, *Political Perspective, supra*, at 1164. And the negotiations typically occur behind closed doors, which means that outside voices are excluded. "Other groups interested in the size or allocation of the budget are not present during negotiations and often are not even aware of the proposals being discussed." *Id.* As a result, these groups are not able to present their views or create political pressure to affect the outcome. *Id.*

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[6] https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2014/9/huebert.pdf.

What's more, the parties in public-sector collective bargaining do not have a strong incentive to limit the costs of their bargain, as parties to a private-sector labor-management negotiation do. Private-sector unions are checked in their power by competition among consumers; if a union's demands force a business to sell at too high a price, consumers will shop elsewhere, and both labor and management will suffer. This means private-sector labor and management face an incentive structure that works like a checks-and-balances system and cannot violate the rights of others or harm society. But in government, where taxpayers *must* bear the cost in *any* event, consumer choice plays no role, and a combination among employees leaves the consumer—i.e., the citizen—at the mercy of the combination's leadership. Unions and management can pass on the costs of their bargain to taxpayers, who have no choice but to bear those costs. *Cf. Harris v. Quinn*, 573 U.S. 616, 635 (2014) ("[A] public employer 'lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases.'" (citation omitted)).

True, the legislature must ultimately authorize any spending agreed to in collective bargaining, but that does not negate unions' special advantages. "Once an agreement, even a merely tentative one, is reached at the bargaining table, the opposing interests are placed at a substantial political disadvantage. The issue becomes whether the agreement should be repudiated"—and whether it is worth suffering the consequences of that repudiation—"rather than what

agreement should be made in the first place." Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 674 (1975). The cost of rejecting even the worst of bargains is thus made prohibitive, with the result that nobody effectively represents the citizenry in the entire deal.

Another way unions undemocratically perpetuate their power is through collective bargaining agreement provisions requiring "release time"—that is, funding for government employees who are assigned exclusively to *union* business. *See* Jon Riches, *Union Time on Taxpayer's Dime*, Nat'l Rev. (Mar. 6, 2018)[7]; *Cheatham v. DiCiccio*, 379 P.3d 211, 221 ¶ 45 (Ariz. 2016) (Timmer, J., dissenting). These employees receive their salaries from public money but work solely for the union, which means they can pursue the union's political agenda at taxpayer expense.

In these details, one sees in full all the problems of faction that the founders tried to avoid with the Constitution: in all that a public-sector union does, there is the pursuit of self-interest adverse to the public interest; with union-negotiated spending and pension benefits dominating state and local government budgets, the whole public becomes subservient to a powerful minority; in the special legal advantages public-sector unions enjoy, there is a unification of the interests of government employees that contradicts the "*divide et impera*" concept animating the separation of powers;

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[7] https://www.nationalreview.com/2018/03/new-jersey-teachers-release-time-waste-taxpayer-money-court-challenge/.

and in unions' political activity, there is a faction using its political power to maintain and increase its political power.

Because of their unique legal privileges, public-sector unions have not been constrained in their pursuit of power as the framers expected factions to be. In many jurisdictions where the law has empowered them, they have not been reined in by the majority or counteracted by the various other factions competing for power. That is by design: evading our system's natural constraints on factions—i.e., obtaining more taxpayer money for government unions and employees than they could obtain through the democratic process alone—is the *purpose* of public-sector collective bargaining. *See* Edwin Vieira, Jr., *To Break and Control the Violence of Faction: The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* 22 (1980) (describing how public-sector unions are factions designed to circumvent the democratic process).

During the rise of public-sector unionism, a leading academic advocate argued that public-sector collective bargaining was "particularly appropriate for decisions where the employees' interests in increased wages and reduced work load run counter to the combined interests of taxpayers and users of public services"; it would "balance the massed political resistance of taxpayers and users of public services" by giving public-sector employees—or at least their unions—"a larger voice than the ordinary citizen" in government decision-making. Summers, *Political*

Perspective, supra, at 1192-94. That prediction has proven correct.

III. Allowing the government to appoint exclusive representatives to speak on behalf of groups of private citizens will make the problem of faction worse.

When the government forces a group of private citizens such as Petitioner to accept an exclusive representative to speak to the government on their behalf, it not only commits an unprecedented violation of First Amendment rights (*see* Petition at 17–26); it also artificially creates and empowers new factions, giving rise to the problems discussed above associated with factions in general and legally privileged public-sector unions in particular. That undermines an important purpose of our Constitution and republican government itself.

Conversely, eliminating public-sector unions' power of exclusive representation—at least with respect to non-employees like Petitioner—would reduce those unions to an ordinary faction—limited by the political process in their ability to attain outsize power, as the framers envisioned. *See The Federalist* No. 10, *supra*, at 60–61; *see also* Summers, *Political Perspective, supra*, at 1165–67 (without collective bargaining, public employees would have difficulty prevailing over, or forming coalitions with, other interest groups).

A grant of certiorari is therefore essential, not only to protect individuals' First Amendment right *not* to

associate with an exclusive representative, but also to ensure that the problem of faction will be duly curbed, as the founders intended, rather than made worse.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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