No. 19-847

In The Supreme Court of the United States

JONATHAN REISMAN,

Petitioner,

V.

ASSOCIATED FACULTIES OF THE UNIVERSITY OF MAINE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF PUBLIC POLICY RESEARCH ORGANIZATIONS AND ADVOCACY GROUPS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ERIK S. JAFFE
(Counsel of Record)
GENE C. SCHAERR
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com
Counsel for Amici Curiae

QUESTION PRESENTED

Three times in recent years, this Court has recognized that schemes compelling public-sector employees to associate with labor unions impose a "significant impingement" on those employees' First Amendment rights. *Knox* v. *Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 310–11 (2012); *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014); *Janus* v. *American Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2483 (2018). The most recent of those decisions, *Janus*, likewise recognized that a state's appointment of a labor union to speak for its employees as their exclusive representative was "itself a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478. The lower courts, however, have refused to subject exclusive representation schemes to any degree of constitutional scrutiny, on the mistaken view that this Court approved such arrangements in *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984). The question presented is therefore:

Whether it violates the First Amendment to designate a labor union to represent and speak for public-sector employees who object to its advocacy on their behalf.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE* AND RULE 29.6 STATEMENT[1]

Amici curiae are public policy research organizations and advocacy groups that seek to promote limited and effective government and individual freedom. *Amici* have extensive experience with issues involving public unions and education reform and believe that unions should be supported through employees' free choice rather than government coercion. *Amici* have appeared in courts across the country—including this Court—in important cases involving public unions. See, *e.g.*, *Friedrichs* v. *California Teachers Assoc.*, No. 14-915.

Amici have a strong interest in this case, which implicates matters of substantial public concern, including public-sector wages and the governance of public institutions.

None of the *amici* is publicly traded or has any parent corporations, and no publicly traded corporation owns 10% or more of any of the *amici*. The following organizations join as amici on this brief:

The **Maine Heritage Policy Center** (MHPC) is a 501(c)(3) non-profit, tax-exempt educational organization dedicated to the promotion of public policy solutions that will free people from dependency, create

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were notified of *amici*'s intent to file this brief more than 10 days prior to the filing deadline and have consented to the filing of this brief.

lasting prosperity, and redefine the role of government in the lives of Maine citizens. MHPC conducts detailed and timely research, develops public policy solutions, educates the public, and engages with legislators to foster a greater sense of liberty in Maine.

Alaska Policy Forum is a nonpartisan, nonprofit, tax-exempt organization dedicated to empowering and educating Alaskans and policymakers by promoting policies that grow freedom for all. Labor arrangements such as exclusive representation and mandatory membership in any organization, such as a bar association, are prohibitions on First Amendment rights and impinge upon the freedom of Americans.

Americans for Tax Reform (ATR) is an advocacy organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. ATR is a non-profit, tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code (IRC).

The **California Policy Center (CPC)** is a nonpartisan education and research organization dedicated to advancing the principles of economic and individual freedom. CPC's primary areas of focus are education, labor, government transparency and public finance. Our research has led us to conclude that the exclusive-representation regime undermines education because it discourages talented, prospective educators from effectively participating in discussions with the University regarding important public is-

sues relating to hiring and governance and block educational reform. That obstacle reduces the quality of education provided to California's children. Based in Tustin, California, CPC is a nonprofit, tax-exempt organization under Section 501(c)(3) of the IRS code.

The **Center for Worker Freedom** (CWF) is a nonprofit, educational organization dedicated to educating the public about the causes and consequences of unionization. CWF supports freedom of association and believes all workers should have the right to decide for themselves whether they belong to a labor organization. CWF is a tax-exempt educational organization under Section 501(c)(3) of the IRC.

The **Empire Center for Public Policy, Inc.**, is an independent, non-partisan, not-for-profit think tank based in Albany, New York. The Center's mission is to make New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government.

The **James Madison Institute** is a Florida-based research and educational organization that advocates for policies consistent with the framework set forth in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility. The Institute is a non-profit, tax exempt organization under Section 501(c)(3) of the IRC based in Tallahassee, Florida.

The **John Locke Foundation** is a North-Carolina-based 501(c)(3) organization, taking John Locke's vision as its guide and the North Carolina Constitution as its foundation to plant the flag for

freedom—including workplace freedom—and nurture its growth in North Carolina. Over three decades it has educated policymakers and informed the public debate with reason and research. The Foundation's spirited defense of economic liberty and personal freedom has established it as North Carolina's premier free-market public policy think tank.

The **Mackinac Center for Public Policy** is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws.

The **Mississippi Justice Institute** (MJI) is a nonprofit, public interest law firm and the legal arm of the Mississippi Center for Public Policy (MCPP), an independent, nonprofit, public policy organization dedicated to advancing the principles of limited government, free markets, strong families, individual liberty, and personal responsibility. MJI represents Mississippians whose state or federal constitutional rights have been threatened by government actions. MJI's activities include direct litigation on behalf of individuals, intervening in cases important to public policy, participating in regulatory and rulemaking proceedings, and filing amicus briefs to offer unique perspectives on significant legal matters in Mississippi and federal courts.

The **Nevada Policy Research Institute** is a nonpartisan education and research organization

dedicated to advancing the principles of economic and individual freedom. The Institute's primary areas of focus are education, labor, government transparency and fiscal policy. The challenged exclusive-representation scheme discourages talented, prospective educators who prefer to convey their own views regarding University employment and governance from entering and effectively participating in the profession, thus reducing the quality of education provided to Nevada children. NPRI is a non-profit, tax exempt organization under Section 501(c)(3) of the IRC based in Las Vegas, Nevada.

The **Pelican Institute for Public Policy** is a non-profit and nonpartisan research and educational organization, and the leading voice for free markets in Louisiana. The Institute's mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Institute has an interest in protecting Louisiana citizens' First Amendment rights.

The **Washington Policy Center** is an independent, nonprofit 501(c)(3) research and educational organization dedicated to improving the lives of the people of Washington state through accurate, high-quality research and the advancement of policy ideas that promote the public interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Jonathan Reisman is a professor of economics and public policy at the University of Maine at Machias, a public university that is part of the

University of Maine system. Pet. 5. Under Maine law he is required to accept Respondent Associated Faculties of the University of Maine (the "Union") as his sole and exclusive bargaining agent, entitled to speak and contract on his behalf, despite his disagreement with the Union's positions and advocacy on numerous issues. Pet. 5-7.

As a practical matter, the Union is the sole mouthpiece speaking on behalf of all University employees regarding nearly all aspects of faculty employment including "wages, benefits, grievances, the school year, workload, personnel files, office hours, severance, retirement, leaves of absence, professional development," and even has the right to appear in all grievance proceedings and the exclusive right to appeal grievances and invoke arbitration, even for nonmembers. Pet. 5-6. In the context of public employment, it is undisputed that these topics are "matters of substantial public concern." *Janus* v. *American Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2460 (2018).

By appointing the Union as Petitioner's exclusive representative in this manner, state law compels his speech. Petitioner has no right to negotiate directly with his employer regarding the terms and conditions of his employment and must suffer the union to speak on his behalf in numerous settings that influence significant aspects of university policy.

If Petitioner agreed with the Union, there might be less of a problem here; however, Petitioner wants nothing to do with the Union and expressly resigned his membership in the union based on his disagreement with their positions and advocacy. Pet. 6. But

despite such unequivocal efforts to dissociate himself from the Union and its views, the State nonetheless compels him to accept the union as his sole and exclusive agent regarding a wide range of issues of public importance. As a practical and legal matter, state law forces Petitioner to adopt the words the Union puts in his mouth as if they were his own.

The question presented here is whether Respondents' compelled-representation regime violates Petitioner's free speech and associational rights under the First Amendment.

Amici agree with Petitioner that this is a "question of profound importance that has never received careful attention by this Court." Pet. 8. *Amici* further agree that the court below and others commit grievous error by failing to apply "any degree of constitutional scrutiny" to compelled association with unions designated as exclusive bargaining agents for public employees. Pet. 1. Because lower courts erroneously continue to apply *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), to deny any level of First Amendment scrutiny to such compelled speech and association, even in the wake of this Court's decision in *Janus*, 138 S. Ct. 2448, only this Court can cure the problem by applying the principles of *Janus* to such schemes in general and rejecting the erroneously permissive reading of *Knight* applied below. The Petition thus presents "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

Amici write separately to underscore a point the Court made in *Janus*—that a state requirement that

a labor union "serve as exclusive bargaining agent for its employees" is "a significant impingement on [First Amendment] freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478.

ARGUMENT

I. State-Compelled Exclusive Representation Impinges on the First Amendment Rights of Objecting Public Employees.

As explained in the Petition, Maine's compelled-representation regime forces Petitioner to associate with the Union and to accept the Union's advocacy as his own even though he objects to the Union and opposes its speech on his behalf. This Court recently has acknowledged that this type of regime "substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460.

The lower courts that have addressed the issue thus far have refused to acknowledge this impingement of free speech and associational rights. *Amici* thus outline the incompatibility of compelled-representation regimes with fundamental First Amendment principles.

A. Compelled-representation laws impinge on the free speech rights of objecting public employees.

As this Court has "held time and again," the freedom of speech "'includes both the right to speak freely

and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977)); see also *Riley* v. *National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("'[F]reedom of speech' * * * necessarily compris[es] the decision of both what to say and what *not* to say.").

"[M]easures compelling speech are at least as threatening" as those that restrict speech and may in fact be even more constitutionally suspect because they coerce free and independent individuals "into betraying their convictions." *Janus*, 138 S. Ct. at 2464. Indeed, this Court has suggested that "a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943)). This is why state-compelled speech is subject to strict scrutiny. *Riley*, 487 U.S. at 800-01.

Under these basic principles, it cannot seriously be questioned that compelled representation—by which the State of Maine puts words into Petitioner's mouth with which he disagrees—impinges upon his free speech rights. *Janus*, 138 S. Ct. at 2460, 2469. Indeed, under a consistent and coherent application of the First Amendment, such a regime is almost certainly unconstitutional. See *id*. at 2463 ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command [against coerced speech], and in most contexts, any such effort would be universally condemned."). The Founders certainly would have thought so. *Id.* at 2471 ("[P]rominent members of the founding genera-

tion condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as 'sinful and tyrannical.'") (quoting *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

Given that speech about public-sector wages and the governance of public institutions clearly implicates matters of substantial public concern, there is no reason why a compelled-representation regime should be treated any differently than a state law "requir[ing] all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this." *Janus*, 138 S. Ct. at 2464.

B. Compelled-representation laws impinge on the associational rights of objecting public employees.

Just as it protects free speech, the First Amendment also protects associational rights. "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). And as with the freedom of speech, "a corollary of the right to associate is the right not to associate." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000); see also *Roberts*, 468 U.S. at 623 ("Freedom of association * * * plainly presupposes a

freedom not to associate."); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law* v. *Martinez*, 561 U.S. 661, 680 (2010) (same). Just as with speech, "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (citing *Roberts*, 468 U.S. at 623).

In discussing the importance of the right to associate (or dissociate) with persons and groups of one's own choosing, this Court has emphasized that "[t]his right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-48 (2000). Thus, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox* v. *Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

Compelled association is, at a minimum, subject to "exacting scrutiny." *Janus*, 138 S. Ct. at 2483 ("Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard."). Even under this marginally more forgiving standard, state laws compelling associations are "permissible only when they serve a 'compelling state interes[t] * * * that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S. at 310 (quoting *Roberts*, 468 U.S. at 623).

As with free speech rights, a compelled-representation regime impinges on associational rights. *Janus*, 138 S. Ct. at 2478 ("[R]equir[ing] that a union serve as exclusive bargaining agent for its employees [is] a significant impingement on associa-

tional freedoms."). By forcing Petitioner to associate with a group to which he objects and with which he does not wish to associate, it is virtually certain that Maine law not only impinges on Petitioner's free association rights—thus requiring at least some level of heightened constitutional scrutiny—but in the end actually violates the First Amendment. See *id.* (coerced association "would not be tolerated in other contexts"). This is especially so given that compelled representation harms *both* Petitioner's speech and association rights: "[F]orced associations that burden protected speech are impermissible." *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion).

II. Public-sector labor law should not be exempt from these fundamental First Amendment principles.

Once any form of heightened constitutional scrutiny is applied to compelled representation, it is difficult, if not impossible, to imagine an adequate justification for such burdens on First Amendment freedoms. The rationales previously offered to justify differential treatment of labor-relations law—*e.g.*, labor peace and free rider problems—are no longer persuasive (if they ever were).

This Court in *Janus* overruled *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), in light of factual and legal developments that left it an outlier among the Court's First Amendment cases. The same reasoning leads to the conclusion here that compelling public workers to accept union representation

with which they disagree runs afoul of ordinary First Amendment principles.

In looking at the supposed state interests justifying infringements of the First Amendment in the labor-relations context, the *Abood* Court assumed that conflict and disruption would occur if employees in a unit were represented by more than one union, and the Court predicted that "interunion rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." 431 U.S. at 220-21. And this Court has merely assumed without explanation that "labor peace" as described in *Abood* is a compelling state interest. See *Janus*, 138 S. Ct. at 2465. But given that *Abood* has been overruled, this assumption should no longer be taken for granted.

For example, there is no reason to believe today that compelled exclusive representation remains necessary to achieve "labor peace." *Abood* cited no evidence that "pandemonium * * * would result if agency fees were not allowed," and this Court concluded in *Janus* that "it is now clear that *Abood*'s fears were unfounded." 138 S. Ct. at 2465. So too here. There is no basis to retain the baseless assumption that forcing public employees to accept union representation is necessary for "labor peace," particularly in the context of public employees at a university. It is hard to imagine, for example, members of the Humanities Department walking a picket line with truncheons and chains, ready to assault members of competing unions or "scabs" that might dare defy a union call to action. And even if one or more state university systems had an especially feisty economics department

enamored with old tropes of union violence—Vermont, perhaps—surely the First Amendment requires particularized proof of such dangers to justify each particular state law restricting speech and association in the name of such fears.

In any event, the purported interest in "labor peace" previously relied on in *Abood* cannot be reconciled with First Amendment doctrine. The promotion of labor peace in the context of regulating commerce, see *Abood*, 431 U.S. at 220-21, is subject to rational-basis review. It does not answer the question whether such interest would satisfy the higher burden of strict or exacting scrutiny for impingements on First Amendment rights. The First Amendment does not permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley*, 487 U.S. at 791, 795.

Similarly, compelled-representation regimes cannot be justified as a way to prevent free-riding—*i.e.*, preventing nonmembers from enjoying the benefits of union representation without shouldering the costs. As a logical matter, nonmembers have declined the benefits of union representation and may not be compelled to subsidize union activities with which they may disagree, so free riding is hardly at issue. Indeed, for employees like petitioner, who disagree with the union's speech and advocacy, compelled representation is the exact opposite of free riding: It compels employees to accept speech and negotiations adverse to their own view of their interests, and potentially to expend considerable additional resources to counter adverse speech by the Union that is attributed to the

dissenting employees. There is nothing "free" about a regime that imposes such costs on dissenters.

In any event, this Court has made clear that "avoiding free riders is not a compelling interest." *Janus*, 138 S. Ct. at 2466 (citing *Knox*, 567 U.S. at 311 ("[F]ree-rider arguments * * * are generally insufficient to overcome First Amendment objections.")). Thus, preventing free-riders cannot justify compelled-representation regimes.

In sum, the past rationales for sustaining compelled-representation regimes cannot justify the harms those regimes impose on First Amendment rights. There thus is no basis for exempting labor law from the normal operation of First Amendment principles.

* * * * *

Maine's compelled-representation regime unquestionably and substantially impinges on Petitioner's free speech and associational rights. Although it is almost certain that this regime violates the First Amendment, how the Court would ultimately decide that question is beside the point at this stage. The point is that the Court should take up the question and decide it; otherwise, "the constitutionality of compelled representation will never receive meaningful review." Pet. 13. Such a "serious[] impinge[ment] on First Amendment rights * * * cannot be casually allowed." *Janus*, 138 S. Ct. at 2464.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
GENE C. SCHAERR
JOSHUA J. PRINCE*
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Amici Curiae

* Not admitted in DC

Dated: February 5, 2020