No. 18-719

In The

Supreme Court of the United States

KATHLEEN URADNIK,

Petitioner,

v.

INTER FACULTY ORGANIZATION, ST. CLOUD STATE UNIVERSITY, AND BOARD OF TRUSTEES OF THE MINNESOTA STATE COLLEGES AND UNIVERSITIES,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF OF THE CATO INSTITUTE AND YANKEE INSTITUTE AS *AMICIS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment allows a state to appoint a labor union as the "exclusive representative" of public workers who have declined to join the union and object to its speaking on their behalf.

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

The Yankee Institute is a nonprofit educational and advocacy organization based in Hartford, Connecticut. Yankee is a free-market think tank, providing legal and policy advocacy and education on Connecticut-centered issues. It focuses intently on, *inter alia*, protecting and extending the civil rights of government workers, including the First Amendment right to interact and negotiate with management on an individual basis if workers elect not to associate with an "exclusive representative" union.

This case concerns Cato because it implicates a government burden on individuals' exercise of their constitutional freedoms of association and expression. Yankee joins this brief's effort to aid the Court in determining the First Amendment implications of the constraints on association and other liberties arising from state laws such as the Minnesota law here.

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[1] Rule 37 statement: Blanket consent was filed by both parties. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under Minnesota law, public employees are forced to associate and speak through a state-appointed labor union, even if they choose not to join and strongly object to the positions it takes in collective bargaining and other related activities. The statute at issue here explicitly states that "[p]ublic employees*, through their certified exclusive representative*, have the right and obligation to meet and negotiate in good faith with their employer." Minn. Stat. § 179A.06 subd. 5 (emphasis added). The state-designated union is recognized as the bargaining unit's only "representative" and is granted the right to speak "on behalf of *all* employees." Minn. Stat. §§ 179A.12, subd. 10, 179A.03, subd. 8 (emphasis added). As a condition of her employment at St. Cloud State University, Kathleen Uradnik is therefore forced to accept the Inter Faculty Organization ("IFO") as her "exclusive bargaining representative." Pet. App. 71. The IFO has the "exclusive" right to speak "on behalf" of her on employment issues and other "matters of substantial public concern." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2460 (2018). Such arrangements plainly violate Petitioner's and other dissenting nonmembers' associational rights.

As the Court recognized in *Janus*, designating a union as the exclusive representative of nonmembers inflicts a "significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 2478. Designation as the exclusive representative essentially creates an unwelcome agency

relationship between the union and dissenting nonmembers. *See ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991). Exclusive representation grants a union a monopoly on work-related expressive association, meaning employees cannot choose to forgo union representation nor elect to be represented by an alternative union. The union can even advance its own political agenda at the expense of dissenting minority members and nonmembers. *See Knox v. SEIU*, 567 U.S. 298, 310 (2012) (noting that "a public sector union takes many positions during collective bargaining that have powerful political and civic consequences"). The union may also negotiate contracts for all employees, even those who fundamentally oppose the union's advocacy. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (concluding that union representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees").

Along with the right to associate, the Court has long recognized that "[f]reedom of association . . . plainly presupposes a freedom *not* to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added). And "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463. But in the labor context, courts are reluctant to subject public unions to any degree of scrutiny due to states' purported interest in "labor peace." Exclusive representation regimes, however, are not supported by any state interest—let alone a compelling one—that might justify the significant impingements on associational rights it imposes. Put simply,

there is no labor exception to the First Amendment, and labor laws that violate constitutional principles must be held to heightened judicial scrutiny.

Amici agree with Petitioner that the question presented is one of "profound importance" that "has never received careful attention from this Court." Pet. at 9. Forcing dissenting nonmembers to associate with and speak through a state-appointed union that they did not vote for is a clear violation of fundamental First Amendment principles. Courts "do not presume acquiescence in the loss of fundamental rights." *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999). This case presents an ideal vehicle for setting the record straight by reaffirming associational rights in the labor context. The Court should establish once and for all that public employees do not leave their constitutional rights at the workplace door.

ARGUMENT

I. STATE-COMPELLED EXCLUSIVE REPRESENTATION INFLICTS A SIGNIFICANT HARM ON ASSOCIATIONAL FREEDOMS

A. Exclusive Representation Compels Expressive Association Unions, Over the Objections of Dissenting Nonmembers

Forcing free and independent individuals to associate with a state-designated union and endorse ideas they find objectionable raises serious First Amendment concerns. As the Court has repeatedly held, the First Amendment protects "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)). The government may not "require affirmation of a belief and an attitude of mind," nor may it "force an American citizen publicly to profess any statement of belief." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–634 (1943). Moreover, "[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 op.). An association "is protected by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). And "[t]he ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox,* 567 U.S. at 309.

When a state appoints a union as the exclusive representative of unwilling public employees and permits it to speak on their behalf, it compels those employees to engage in expressive association. The Minnesota statute at issue does just that by forcing Petitioner and other dissenting nonmembers to accept the speech of the state-designated union as their own. State law recognizes the Inter Faculty Organization ("IFO") as "the exclusive bargaining representative" for "all faculty members" at Petitioner's public university. Pet. App. 71. In this role, the IFO is the only "representative" of the bargaining unit, Minn. Stat. §§ 179A.12, subd. 10, 179A.03, subd. 8, and has the exclusive right "to meet and negotiate with the employer on behalf of all employees in the appropriate unit." Minn. Stat. § 179A.03, subd. 8; *see also* Minn. Stat. § 179A.06, subd. 5. Consequently, when the IFO

speaks, it puts its own words in the mouths of Petitioner and other dissenting nonmembers.

Any position the IFO takes during collective bargaining is necessarily imputed to all bargaining unit employees, including those who have refused to join the union and vehemently disagree with its positions. Petitioner herself strongly opposes many positions the IFO has taken on issues involving "wages, hours, and conditions of employment," "the cutting of academic programs," and other matters regarding job seniority. *See* Pet. App. 34–36. However, since "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567 (1990), exclusive representatives are authorized to engage in speech that individual employees oppose. *See Knox*, 567 U.S. at 310.

Importantly, the IFO's speech is not limited merely to economic issues affecting the workplace. *See Janus*, 138 S. Ct. at 2465 (explaining that in the public union context "it is apparent that the speech is not commercial speech."). Even on controversial political matters, Petitioner is forced to accept the IFO's speech as her own. As the Court recognized in *Harris v. Quinn*, "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues." 134 S. Ct. 2618, 2632 (2014). It is undisputed that these topics are "matters of substantial public concern." *Janus*, 138 S. Ct. at 2460. In *Janus*, the Court pointed to numerous positions taken by unions during collective bargaining that involved political issues. *Id.* at 2476–77 (citing examples of unions "speak[ing] out in collective bargaining on controversial subjects such as climate change, the Confederacy,

sexual orientation and gender identity, evolution, and minority religions.").

As other *amici* have discussed at length in their briefs, the IFO has spoken on various political matters. During the 2018 elections, for example, it issued political endorsements for several state offices. *See* Inter Faculty Organization, Political Endorsements—Inter Faculty Organization, https://bit.ly/2Etc2NR. The IFO has also lobbied the Minnesota legislature and executive branch on a variety of policy matters, from education policy to pensions, taxes, human rights, and more. *See* Minnesota Campaign Finance and Public Disclosure Board, Lobbying-organizations, https://bit.ly/2XgLNl8. Given the blurred line between collective bargaining and political advocacy, it is only natural that Petitioner would refuse to associate with a union that may support politicians or policies contrary to her interests.

The nature of public unions makes it practically impossible to separate activities that are political from those that are "germane" to collective bargaining. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 213, 235 (1977). This point underscores why exclusive representation in the public union context imposes such a serious impingement on associational freedoms. Regardless of their individual stances on political issues, the IFO's speech is attributed to both union members and nonmembers alike. There is simply no justification for Minnesota to require Petitioner and other dissenting nonmembers to "express[] support for a particular set of positions on controversial public issues." *Janus*, 138 S. Ct. at 2464.

Exclusive representation regimes like Minnesota's are nothing more than mandatory expressive associations that force public employees to adopt positions that are contrary to their sincerely held beliefs. *See Allis-Chalmers*, 388 U.S. at 180 (quoting *Barnette*, 319 U.S. at 633) (likening exclusive representation to "a law commanding 'involuntary affirmation' of objected-to beliefs"). The Court's jurisprudence on this point is clear: "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Individuals' right to choose who petitions the government on their behalf is a fundamental liberty protected by the First Amendment. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294–95 (1981). If the First Amendment has any meaning at all, it must mean that the government cannot chose who speaks for employees in their relations with the government. The Minnesota statute at issue here clearly violates these core First Amendment principles and should be found unconstitutional.

B. Bestowing Exclusive Representatives with Monopoly Powers Based on a One-Time Election Violates Dissenting Employees' Freedom of Association

If a modern democratic government claimed to have legitimate governing power over all citizens—even dissenting ones—based on a single vote that occurred over 40 years ago, international observers would quickly and correctly describe it as a dictatorship that violates the basic rights of its citizens to have a voice in their governing institutions. Yet the

IFO claims similar power and legitimacy here. And crucially, the IFO is not even a government, but an association that has been illegitimately granted an extraordinary and unique power usually reserved to governments: the power to coerce dissenters.

The IFO was originally elected and certified as the exclusive representative for teachers at Minnesota's seven public universities in 1975. Petitioner did not begin her employment until 1999 and thus never had a chance to vote for the IFO. Even though Petitioner opposes the IFO's advocacy and does not wish to be associated with its speech, she is nonetheless forced to accept the IFO as the only "representative" that speaks "on behalf" of her. Pet. App. 73; Minn. Stat. § 179A.03, subd. 8. And Petitioner's situation is not an isolated one. As other *amici* point out, most public employees under state-compelled representation regimes were never afforded the opportunity to refuse representation or vote for the union of their choice.

To become certified as an "exclusive representative of all employees in a [bargaining] unit" in Minnesota, a union must receive a majority of votes from employees or submit proof that a majority of employees wish to be represented by the union. Minn. Stat. § 179A.12 subd. 2–3, 10. Upon certification, the union remains certified in perpetuity unless it is "decertified" or "another representative is certified in its place." Minn. Stat. § 179A.12 subd. 1. The union's exclusive status restricts employees' rights to "express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment" where that expression of views would "circumvent the

rights of the exclusive representative." Minn. Stat. § 179A.06, subd.1. This effectively gives the designated union a monopoly on workplace associations and employment-related communications with the employer.

As this Court has consistently recognized, the "[f]reedom of association . . . plainly presupposes a freedom *not* to associate." *Roberts,* 468 U.S. 609 at 623. "The right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463. "[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated." *Roberts*, 468 U.S. at 618. Conferring monopoly power to a union designated by a majority of employees based on a one-time election impermissibly denies freedom of association to those who did not have a chance to vote for the representative.

This Court has made clear that "[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment." *Dale*, 530 U.S. at 658. That is precisely what is happening in this case—and in many others around the nation. Instead of voluntarily selecting a union representative of her choice, Petitioner is compelled to accept one that was chosen *by past employees*. The right to choose one's own representative is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 648. Allowing exclusive representation permits "one side of a debatable public question to have a monopoly in expressing its views to the government" and this "is the

antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

C. Exclusive Representation Denies Nonmembers the Right to Negotiate and Contract with Their Employer

"[D]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not . . . negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. The state-designated representative has the exclusive right to contract for and legally bind all employees in the bargaining unit. *See Allis-Chalmers Mfg. Co.*, 388 U.S. at 180. This practice "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Id.*

Under Minnesota law, "[p]ublic employees, *through their certified exclusive representative*, have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment." Minn. Stat. § 179A.06, subd. 5 (emphasis added). "If an exclusive representative has been certified for an appropriate unit, *the employer shall not meet and negotiate or meet and confer with any employee or group of employees* who are in that unit except through the exclusive representative." *See* Minn. Stat. § 179A.07, subd. 4 (emphasis added). Petitioner is thus "restricted from speaking on [her] own behalf by virtue

of the Union's designation as [her] exclusive bargaining agent." Pet. App. 36.

Exclusive representation prevents workers from negotiating directly with their employers to develop contracts that fit their individual situations. For example, employees with different preferences—such as parents who may value shift flexibility or paid leave over other benefits—are unable to negotiate different terms of employment through another representative or on an individual basis. Once an exclusive representative is designated, then all bargaining unit employees must accept the contract the union negotiates. This inevitably leads to one-size-fits-all contracts that ignore the needs of individual employees.

Unions can even enter into binding contracts and make other decisions that harm employees' interests. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 349-40 (1953). After all, unions have institutional interests of their own that may not coincide with individual members' interests. For example, an exclusive representative can waive nonconsenting individuals' rights to bring discrimination claims in court. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271 (2009). And only the exclusive representative has the power to commence and escalate a grievance proceeding. Pet. App. 107–10. Indeed, here the IFO declined to file a grievance on behalf of Petitioner. Pet. App. 36. When a union controls the levers of workplace relations it may subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 58, n. 19 (1974).

Under exclusive representation, nonmembers have no right to order their affairs with their employer and are subject to the whims and interests of the unions, even when those interests are contrary to their own. Such a system contradicts basic First Amendment principles.

II. THE VIOLATION OF ASSOCIATIONAL FREEDOM IMPOSED BY EXCLUSIVE REPRESENTATION WOULD NOT BE TOLERATED IN OTHER CONTEXTS

A. There Is No Labor Law Exception to the First Amendment

The Constitution places a high value on freedom of association. It has even been recognized as an independent constitutional right because it is indispensable to protecting other First Amendment guarantees. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (recognizing a "close nexus between the freedoms of speech and assembly"). Labor unions themselves have historically relied on the concept of freedom of association to protect their right to engage in organizing activities and resist state laws limiting their ability to do so. Indeed, the right of workers to band together to improve their relative bargaining power is a straightforward implication of freedom of association, and exactly the type of voluntary association envisioned by the Founders. Having recognized the right to organize unions as part of the protected freedom of association under the First Amendment, it would logically follow that the right *not* to join a union is a necessary corollary. But this has not been the case.

Modern unions (as well as the courts) have abandoned associational freedom in the labor context in favor of state-compelled representation. While the concept of public unions themselves would certainly shock the Founders, it would be even more astounding to them that public employees could be compelled by law to associate with and speak through state-designated unions. Such coerced association is the very antithesis of the freedom of association that lies at the heart of constitutional liberty. Even "prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Janus*, 138 S. Ct. at 2471. Thomas Jefferson himself denounced "the propagation of opinions which he disbelieves and abhor[s]" as "sinful and tyrannical." *Id.* at 2471 (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

As the Court pointed out in *Janus*, exclusive representation is a "significant impingement on associational freedoms that *would not be tolerated in other contexts*." 138 S. Ct. at 2478 (emphasis added). The Court has long recognized that this type of mandatory association restricts individual liberties. *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (exclusive representation results in a "corresponding reduction in the individual rights of the employees so represented"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them"); *Janus*, 138 S. Ct.

at 2460 ("Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees.").

Freedom of association must mean the freedom to associate only with those whom we affirmatively choose. Without voluntary association on both sides, freedom of association is nothing more than a hollow right. Although courts have given differential treatment to labor laws in the past, exclusive representation regimes can no longer be reconciled with the Court's jurisprudence. There is simply no legitimate reason to exempt exclusive representation regimes from the normal operation of the First Amendment.

B. Labor Laws That Violate Core First Amendment Rights Are Subject to Heightened Judicial Scrutiny

The lower courts have refused to subject exclusive representation schemes to heightened scrutiny, primarily because of this Court's holding in *Minn. State Bd. for Cmty Colleges v. Knight*, 465 U.S. 271 (1984); *see also* Pet. App. 6–7. *Amici* agree with Petitioner, Pet. at 10–13, that *Knight*'s holding does not support the conclusion that exclusive representation is subject only to rational basis review. Such a conclusion cannot reasonably be squared with *Janus*, nor is it in line with established First Amendment precedents. Either way, the issue remains that the Court has not clarified whether the burdens imposed by exclusive representation must satisfy heightened judicial scrutiny. This case is the right vehicle to resolve that question.

This Court has already recognized that exclusive representation inflicts a "significant impingement on

associational freedoms." *Janus*, 138 S. Ct. at 2478. In *Janus*, the Court averred that "exacting scrutiny" has typically been applied in other cases involving significant impingements on First Amendment rights. *Id.* at 2483. It went on to note that cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. *Id.*; *see, e.g., Roberts*, 468 U. S. at 623; *United States v. United Foods*, 533 U. S. 405, 414 (2001). Exclusive representation regimes like Minnesota's implicate fundamental associational and speech rights protected by the First Amendment. They must therefore be subject to—at a minimum—exacting scrutiny.

Under exacting scrutiny, laws that force individuals to join expressive associations are permissible only when they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox,* 567 U.S. at 310; *see also Roberts*, 468 U.S. at 623 (citing earlier cases). The state must "emplo[y] means closely drawn to avoid unnecessary abridgment." *Buckley v. Valeo*, 424 U.S. 1 at 25 (1976). Even when pursuing a legitimate interest, "a State may not choose means that unnecessarily restrict constitutionally protected liberty." "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Forcing public workers to associate with and speak through an exclusive representative fails exacting scrutiny because it is unsupported by any compelling state interest. The First Amendment simply does not permit government to "substitute its judgment as

to how best to speak for that of speakers and listeners." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 791 (1988). It also does not allow the government to "sacrifice speech for efficiency." *Id.* at 795. As the Court recently held in *Janus*, public employees may not, consistent with the First Amendment, be compelled to subsidize union advocacy. 138 S. Ct. at 2460. Like the public-sector agency fees at issue in *Janus*, state-compelled exclusive representation imposes a similar impingement on First Amendment rights. The rationales that have historically been offered to justify the impingement on individuals' associational freedoms—namely labor peace and free rider problems—are insufficient to justify exclusive representation. As this Court rightly pointed out in *Janus*, avoiding the risk of free riders is not a compelling state interest—and neither is "labor peace." Any state interest in "labor peace" can be achieved through means significantly less burdensome on associational freedoms than exclusive representation.

The court below held that Minnesota's exclusive-representation regime satisfied exacting scrutiny because it is "is *likely* the least restrictive means possible for employees who are members to still enjoy the benefits of union representation." Pet. App. 10 (emphasis added). The likelihood that a state's exclusive representation scheme is the least restrictive means is irrelevant. The state must "emplo[y] means closely drawn to avoid unnecessary abridgment." *Buckley*, 424 U.S. at 25. Even when pursuing a legitimate interest, "a State may not choose means that unnecessarily restrict constitutionally protected liberty." It

cannot seriously be argued that exclusive representation is the least restrictive means to achieving a state interest in regulating public labor. The state could, for example, simply limit state entities from bargaining with rival unions. *See Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979) (stating that "the First Amendment does not impose any affirmative obligation on the government to listen").

In the wake of *Janus*, public employees are now free from compelled subsidization of union speech. But they continue to be forced to associate with state-designated unions via exclusive representation. It does not make sense that public employees cannot be obligated to *fund* union advocacy but are still compelled to *associate* with a union to facilitate that advocacy. If anything, compelled association through an exclusive representative could be considered a more severe impingement of First Amendment freedoms than that disapproved of in *Janus*. The Minnesota statute at issue here serves no governmental interest, let alone a compelling one, nor is it tailored to be the least restrictive of associational freedoms.

C. "Labor Peace" Is Not a Sufficient Justification for Exempting Unions from First Amendment Scrutiny

Minnesota's interest in maintaining "labor peace" has been put forward as a rationale for exempting its labor laws from First Amendment scrutiny. The court below concluded that the statute at issue met exacting scrutiny because it promotes the compelling state interest of "labor peace." *See* IFO's Opp'n Mem. at 36–37. But modern developments in labor law make the

vague concept of "labor peace" an insufficient justification for the unconstitutional impingements that exclusive representation imposes on nonmembers' associational rights. Just as the backdrop of economic factors was important to the Court's analysis in *Abood* and *Janus,* so should it be in this case.

For over 40 years, this Court's decision in *Abood* struck a balance between public employees' First Amendment rights and states' interest in ensuring "labor peace." 431 U.S. 209 (1977). But in *Janus*, the Court overruled *Abood* after considering contemporary developments in the labor context that left the case as an outlier compared with the Court's other First Amendment cases. *See Janus*, 138 S. Ct. at 2483–84. This divergence was unsurprising given that the concept of "labor peace" was originally rooted in ideas of "industrial relations" common during the New Deal. *Abood*, 431 U.S. at 220. Labor law is far different than it was nearly a century ago—or even than 40 years ago, when *Abood* was decided. Whatever may have been the case in the early days of the labor movement, it is now undeniable that "labor peace" can readily be achieved through means significantly less restrictive of associational freedoms. *Janus*, 138 S. Ct. at 2457. As *Janus* pointed out: "The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded." *Id.* at 2456.

Indeed, far from creating or preserving "labor peace," exclusive representation has only exacerbated labor disruption by forcing unwilling public employees to associate with and speak through state-designated unions. There is a clear disconnect between

forcing public employees to accept a labor union as their representative and a state's claimed interest in "labor peace." This case presents an ideal vehicle for this Court to clear up that discrepancy.

III. REAFFIRMING SPEECH AND ASSOCIATIONAL RIGHTS IN THE LABOR CONTEXT WOULD HELP VOLUNTARY UNIONISM

After *Janus*, unions would benefit from being released from exclusive representation status. As it currently stands, unions are legally required to provide free representation services to nonmembers who do not pay union dues. Minnesota public employers, for example, are required "to meet and negotiate in good faith with the exclusive representative of its employees" over the "terms and conditions of employment." Minn. Stat. §§ 179A.13, subd. 2(5), 179A.14, subd. 1. Many unions contend that exclusive representation is unfair because nonmembers get the benefits of collective bargaining without having to pay for them. Indeed, the question presented could reasonably be turned around to read: "why should unions be forced to provide services to those who don't pay for them?"

Without state-compelled union representation, public employees would be free to choose their own bargaining representative—or no representative at all. Affording employees this freedom of choice would pressure their representatives to be more responsive. Like a more frequent re-election vote, representational choice would hold unions accountable. In a labor market guided by voluntary union membership, union leaders would be incentivized to represent the genuine interests of the individual employees they

represent. And if they fail or disregard the interests of nonmembers or those in the majority, they would not have any workers to represent.

Allowing competition between unions can actually *improve* union effectiveness. Economic theory suggests that competition promotes efficiency; there is no reason to think that the workplace is any different. By incentivizing unions to compete for members, it would encourage unions to negotiate the best possible terms for their members and maintain good member relations. Minority unions could negotiate terms that protect its members while simultaneously conveying to all employees that unionization results in various benefits, such as better pay, working conditions, and fairer disciplinary processes. Workers who support their union and its priorities could continue to select it as their representative. Research also suggests that if minority unionism was allowed by law, union membership could increase by 30 percent or more. Mark Harcourt, Helen Lam, *How Much Would US Union Membership Increase under a Policy of Non-Exclusive Representation?*, 32 Employee Relations, Issue 1 (2010), at 89–98, https://bit.ly/2GZiYDZ.

Voluntary unionism would allow workers to negotiate contracts tailored to their particular situations. Employees commonly have differing preferences about employment benefits, such as paid leave, wages, hours, job duties, and the like. Without exclusive representation imposed on dissenting employees or union nonmembers, each employee would be free to negotiate contracts through a union of their choice or individually.

Eliminating exclusive representation would also reduce the cost of organizing campaigns and elections. Public employees who wish to form unions and bargain collectively could do so without imposing the cost of collective representation on employees who do not want union representation. This would reduce the resources expended on union representation elections by both employers and unions.

Any claims that unions would discriminate against nonmembers or members of other competing unions are unfounded. Unions are already legally prohibited from negotiating a bargaining agreement that discriminates against nonmembers. *See Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–03 (1944). As Justice Alito aptly pointed out in *Janus*, "it is questionable whether the Constitution would permit a public sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers." 138 S. Ct. at 2468. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that the government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive").

As Friedrich Hayek once claimed, unions "are the one institution where government has signally failed in its first task, that of preventing coercion of men by other men-and by coercion I do not mean primarily the coercion of employers but the coercion of workers by their fellow workers." F.A. Hayek, *Unions, Inflation, and Profits,* in *The Public Stake in Union Power* 46, 47 (Philip D. Bradley ed., 1959). This Court can

set the record straight by reaffirming speech and associational freedoms in the labor context. Doing so would allow public-sector unions to thrive and ensure associational rights are protected. This case presents an ideal vehicle for the Court to clarify once and for all that public employees do not leave their constitutional rights at the workplace door.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, the petition should be granted.

Respectfully submitted,

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