No. 20-1019

IN THE

Supreme Court of the United States

JADE THOMPSON,

Petitioner,

v.

MARIETTA EDUCATION ASSOCIATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

Sam Kazman
Counsel of Record
Devin Watkins
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(202) 412-3953
sam.kazman@cei.org

February 25, 2021 *Attorneys for Amicus Curiae*

QUESTIONS PRESENTED

1. 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.
2. Whether *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), should be overruled.

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INTEREST OF *AMICUS CURIAE*[1]

The Competitive Enterprise Institute ("CEI") is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

SUMMARY OF ARGUMENT

In *Janus v. AFSCME*, this Court recognized the importance of this issue in its holding that the certification of an exclusive representative to speak for public employees "substantially restricts the [First Amendment] rights of individual employees." 138 S. Ct. 2448, 2460 (2018). Currently, 6.8 million state and local public employees are covered by union contracts. Julia Wolfe and John Schmitt, *A profile of union workers in state and local government*, Economic Policy Institute (June 7, 2018), https://goo.gl/RQz1qD/. Of those, about 600,000 are non-members. Their First Amendment rights are trampled by state laws that provide for exclusive representation. As it stands, public employees are now free from subsidizing the speech of an exclusive representative, but are forced to associate with unions and let those unions speak for

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, its members, or its counsel made such a monetary contribution. All parties were given timely notice and have consented to the filing of this brief.

them, no matter how strongly employees disagree with that speech.

Jade Thompson is a Spanish teacher at Marietta High School, which is run by the Marietta Board of Education. While Ms. Thompson isn't a member of the Marietta Education Association union, the board treats the union as Ms. Thompson's "representative" and "agent" against her wishes.

Under Ohio law, the union is the "exclusive representative" for "all the public employees in a bargaining unit" if a majority support the union. Ohio Rev. Code § 4117.05(A). This means that even if employees like Thompson do not wish to have the union represent them, as evidenced by their choice not to join the union, they are compelled to do so under state law.

The issues on which the union's speech is treated as the Petitioner's, against her will, are issues that *Janus* recognized as "matters of substantial public concern." 138 S. Ct. at 2460. As this Court has decided repeatedly, freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U. S. 705, 714 (1977). In *Janus* the court stated, "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." 138 S. Ct. at 2463. The state law compelling the Petitioner to accept the union's speech as her own on issues of substantial public concern infringes on her First Amendment rights.

Equally troublesome, the state compels the Petitioner to accept the advocacy of an exclusive

representative for whom she never had a chance to vote. For the most part, public employees simply inherit union representation that was voted on by past workers, and are forced to accept it without any choice in the matter.

For these reasons, the Ohio statute that establishes exclusive representation is in conflict with First Amendment jurisprudence and warrants review by the Court.

ARGUMENT

Ohio state law compels the petitioner, Jade Thompson, to accept the Marietta Education Association (MEA) as her personal representative. Ohio Rev. Code § 4117.05(A). The MEA represents all Marietta High School employees, both those who join the union and those who do not. *Id.* The law allows MEA to speak on behalf of all such employees in determining work terms and conditions for employees. At the very least this allows a majority of employees in a bargaining unit to select an exclusive representative who speaks for both them and for those employees who want nothing to do with the union.

As the Supreme Court recognized in *Janus v AFSCME*, that requirement is "a significant impingement on associational freedoms that would not be tolerated in other contexts." 138 S. Ct. at 2478.

But, making matters worse, the vast majority of public employees who are compelled to accept representation from a union were never even afforded the opportunity to vote on whether they want any union at all, let alone the specific union that would represent them. In the case before the Court, the MEA was certified as the exclusive representative for the

Marietta High School faculty. Thompson, and almost all of her colleagues, were not school employees when there was a certification election. As such, many employees represented by the MEA have never had a vote in selecting the union that represents them today.

Another consequence of this state-law requirement is that the MEA represents and speaks on behalf of Thompson through collective bargaining sessions, meet and confer sessions, and other venues. This is permitted even though she opposes many of the positions that the union takes during collective bargaining negotiations and advocacy on political issues. And the MEA, like other public-sector unions, frequently advocates for or against a broad variety of contentious political matters.

The Supreme Court has consistently held that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U. S. at 714. Under Ohio law, public employees must accept the speech of the MEA as their own and lack the ability to distance themselves from the political advocacy of their exclusive representative.

I. MOST PUBLIC EMPLOYEES ARE FORCED TO BE REPRESENTED BY ORGANIZATIONS THEY DID NOT VOTE FOR

Under a majority of state legal regimes governing public employees, when a public-sector union is certified as the exclusive representative of a bargaining unit, it is granted the sole right to negotiate on behalf of members and non-members over terms of employment such as pay, promotion, layoffs, and retirement.

Upon certification, all public employees are forced to accept union representation, work under a union negotiated contract, and accept that the union speaks on their behalf. Ohio law requires Thompson to accept these conditions despite the fact that she opposes many of the union's positions in its bargaining negotiations and in its political stances.

As it stands, Thompson and other employees who are similarly dissatisfied with their union representation are prohibited from seeking representation other than from the MEA, and from individually negotiating their own work terms and conditions with the Ohio schools.

Compounding the problem of compelling unwilling employees to accept union representation is that very few public employees represented by a union voted for this representation or the specific union that represents them. Once a group of employees is organized, its union remains certified in perpetuity unless it is decertified. Ohio Rev. Code § 4117(A)(1). Decertifying an exclusive representative is an arduous process. Ohio law erects several hurdles to removing an exclusive representative. First, for a year after certification no decertification can occur. *Id.* § 4117.07(C)(6). Second, no decertification election can occur "during the term of any lawful collective bargaining agreement between a public employer and an exclusive representative." *Id.* Third, while a union may have a certification election when it merely alleges 30% support, it takes 50% support with proof by signed signatures of the employees to have a decertification election. Fourth, the time for filing decertification election petitions is extremely limited: "Petitions for elections may be filed with the board no

sooner than one hundred twenty days or later than ninety days before the expiration date of any collective bargaining agreement." *Id.*

Instead of voluntarily selecting a specific union representative, employees are compelled to accept, as a condition of employment, representation by a union chosen by past employees.

In the public-sector, inherited union representation is the norm, not the exception. A majority of states passed laws in the 1960s and 1970s to give government employees the right to collectively bargain. For the most part, unions organized public employers shortly after these laws were passed and there has been relatively limited organizing activity in that area since. As a result, most unionized public workforces were organized over 30 years ago. Few of today's public employees even worked for the government when elections were held to certify the labor unions that act as their exclusive representatives today.

For example, while New York City public school teachers voted to certify the United Federation of Teachers (UFT) in 1961, the UFT continues to represent these teachers to this day. Neill S. Rosenfeld, 50 Years, UNITED FEDERATION OF TEACHERS (2010) http://www.uft.org/files/attachments/uft-50-years-book.pdf. Analysis of U.S. Department of Education data show that "virtually every teacher who voted in that election has since retired." James Sherk, Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives, HERITAGE FOUNDATION (Aug. 27, 2012), http://goo.gl/nxDqaC.

Several school districts in Kansas are similarly situated. The Kansas state legislature passed legislation granting public-sector unions collective bargaining privileges in 1970. By 1971, a number of Kansas' largest school districts had unionized. Calculations using data from the Schools and Staffing Survey conducted by the National Center for Education Statistics show that none of the teachers who voted to elect the Kansas National Education Association still are employed at these school districts. *Id.*

In the top 10 largest school districts in Florida and Michigan, only one percent of current teachers were employed in the year in which the union representative was elected. *Id.*

II. EXCLUSIVE REPRESENTATION ALLOWS GOVERNMENT TO COMPEL SUPPORT FOR POLITICAL AND IDEOLOGICAL ADVOCACY

As a result of Ohio law, public employees at unionized workplaces are forced to accept the speech of an exclusive representative as their own. It is irrelevant whether the employee is a non-member or strongly opposes the speech of the union; the union's advocacy is attributed to and on behalf of these unwilling employees.

As recognized by the Supreme Court, "In the public sector, core issues such as wages, pensions, and benefits are important political issues …." *Harris v. Quinn* 134 S. Ct. 2618, 2632 (2014). But the speech of an exclusive representative that is assigned to non-members goes beyond the important political issues that arise during collective bargaining negotiations.

Technically, the contract with the Marietta Board of Education officially recognizes the "Marietta Education Association, OEA/NEA," as the exclusive bargaining agent. Pet. App. 135. While MEA focuses on a variety of important public policy issues concerning the faculty (which Thompson should not be forced to support), it doesn't directly focus on political issues at the state and national levels. Instead, MEA is part of the larger Ohio Education Association and the National Education Association, which directly take a variety of political positions as the exclusive representatives of Ms. Thompson.

Public-sector unions such as the Ohio Education Association, in their capacities as exclusive representatives, speak out on a variety of political matters. For instance, the Ohio Education Association has publicly endorsed a $13 minimum wage by 2025. OEA, *OEA votes to support $13 minimum wage ballot issue* (last accessed Feb. 23, 2021), https://www.ohea.org/press-releases/2020/oea-supports-minimum-wage/. Another example of the MEA's political activities is its endorsement of candidates for Ohio Governor, Senate, and House seats. See, e.g., OEA, Ohio Education Association Endorses Cordray for Governor, https://www.ohea.org/press-releases/2018/ohio-education-association-endorses-cordray-for-governor/.

The Ohio Education Association and the National Education Association are not alone in the political advocacy while representing people who do not consent to their speech. For example, the published proceedings of the American Federation of State, County, and Municipal Employees (AFSCME) 2018 convention record the advocacy that non-members

were compelled to support via their forced association with the union:

- **Advocacy against Donald Trump.** The convention adopted a resolution condemning "Donald Trump and his vision of America." More specifically, the convention resolved that AFSCME will encourage and support the "defeat" of Donald Trump and his policies. AFSCME, Saluting and Supporting the Role and the Leadership of Women and Youth in Building the Movement Against Donald Trump and His Vision for America, (July 16-18, 2018), http://goo.gl/P6JfVJ.
- **Advocacy for Single Payer Health Care.** The convention endorsed state and federal legislation to provide a universal single payer health care system. AFSCME, Adopt Single Payer, (July 16-18, 2018), https://goo.gl/9wrsNp.
- **Advocacy on Tax Policy.** Tax funds are the lifeblood of public-sector unions. Since taxes fund the government, public-sector unions pay close attention to tax policy and generally support policies that raise taxes. For example, the convention passed a resolution against the "Tax Cuts and Jobs Act," which President Trump signed into law in December 2017. More specifically, AFSCME vowed to "demand the U.S. Congress to repeal these harmful tax cuts, and enact progressive tax laws that close loopholes for the wealthy and corporations to ensure they pay their fair share." AFSCME, Repeal Harmful Tax Cuts for the Wealthy and

Big Corporations (July 16-18, 2018), https://goo.gl/9cx9sN.

- **Advocacy for Exclusive Representation.** This resolution explains that "Exclusive representation means the duly chosen union is the *sole voice* for all workers." AFSCME, Preserving Exclusive Representation (July 16-18, 2018), https://goo.gl/7hsnMj (emphasis added). The union condemned any legislative effort to "eliminat[e] exclusive representation." *Id*.
- **Advocacy for Immigration Policy.** The convention called upon the "Trump administration to drop its DACA [Deferred Action on Childhood Arrivals] appeal in the courts" and resolved that Congress should pass a "clean DREAM Act" that creates a "pathway to citizenship for a generation of young people." AFSCME, AFSCME Rejects Immigration Policy Based on Fear (July 16-18, 2018), http://goo.gl/KM4ubj.

These kinds of compelled political advocacy through forced representation are beyond what the First Amendment allows. As this Court noted in *Janus*, there can be no justification for a state requiring a person to "express[] 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." 138 S. Ct. at 2464. And yet this is exactly what is happening to non-members like Thompson.

CONCLUSION

For the foregoing reasons, this Court should grant this petition to consider 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.

Respectfully submitted,

Sam Kazman
Counsel of Record
Devin Watkins
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(202) 412-3953
sam.kazman@cei.org

Attorneys for Amici Curiae

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