No. 24-71

IN THE

Supreme Court of the United States

AVRAHAM GOLDSTEIN, *et al.*,

Petitioners,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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 1988. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws.

SUMMARY OF ARGUMENT

This Court's decision in *Janus v. AFSCME*, 585 U.S. 878 (2018), reversed *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and held that charging public-sector employees agency fees to support a union's exclusive representative violated the First Amendment. The *Abood* Court's holding that exclusive representation did not violate the First Amendment remains, but that holding's foundation has been weakened by the reasoning the *Janus* Court applied in its agency-fee holding.

Public-sector unions existed long before they were granted exclusive-representative status in 1959. There are currently millions of public employees under exclusive representative contracts. As *Abood* was the only decision that attempted to analyze whether exclusive representa-

1. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. The parties were given ten days' notice of the filing of this brief.

tion is constitutional and the *Janus* Court noted that the decision was "poorly reasoned," *Janus*, 585 U.S. at 886, and that the First Amendment "deserved better," *id.* at 919, this Court should grant certiorari.

If this Court were to analyze the constitutionality of exclusive representation, it should hold it unconstitutional, as there is no governmental interest sufficient to overcome dissenting public employees' First Amendment right not to associate with a union. The traditional interest of labor peace is both circular and unconvincing.

The alternative state interest of promoting governmental efficiency also fails. Government provided public services without exclusive representation for over 170 years. Further, the private sector continues to function with only 6% of those employees being under an exclusive-bargaining agreement, undermining the argument that exclusive representation is necessary to the seamless operation of government. If exclusive bargaining was efficient and economical, market forces would lead to higher unionization in the private sector, but private sector union membership has been falling for decades. But, as this Court has noted, public-sector bargaining is generally not driven by market forces and instead is almost entirely a political act. The exclusive representatives' politics are what the dissenting union members want to be disassociated from.

ARGUMENT

I. This Court's *Janus* decision severely undercut the holding in *Abood* that exclusive representation does not violate the First Amendment and as there are millions of public employees in mandatory exclusive representation unions, this Court should clarify whether that remains constitutional.

A. Public-sector unions existed before exclusive representation.

In *Janus*, this Court noted: "Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid–20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights." *Id*. at 905. This Court further noted that while "public-sector unionism" started in 1959, it has significantly grown since this Court's decision in *Abood*:

> The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector

> employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

Janus, 585 U.S. at 924. As of 2023, around 7 million workers in the public-sector workforce are in a mandatory union: this amounts to 32.5% of the public-sector workforce.[2]

But, prior to 1959, public-sector unions existed and would often successfully influence public employee compensation and benefits. *See generally*, Joseph E. Slater, Public Workers: Government employees unions, the law, and the state 1900-1962 (2004). Many public-sector unions were created in the early 20th century:

> In 1906, the American Federation of Labor (AFL) created its first national union of government workers, the National Federation of Post Office Clerks. In 1902, the Chicago Teachers Federation had affiliated with the Chicago AFL. In 1916, the AFL formed the American Federation of Teachers (AFT). In the year before the Boston strike, the AFT grew from 2,000 to 11,000 members. In 1917, the AFL established the National Federation of Federal Employees. That same year, the National Association of Letter Carriers, founded in 1889, affiliated with the AFL, as did the Railway Mail Carriers. The AFL chartered its first firefighters local in 1903 and created the International

2. https://www.bls.gov/news.release/union2.htm (last visited Aug. 15, 2024).

> Association of Fire Fighters (IAFF) in 1918. The IAFF soon grew from about 5,000 to more than 20,000 members.

Joseph E. Slater, *Interest Arbitration as Alternative Dispute Resolution*, 28 Ohio St. J. On Disp. Resol. 387, 389 (2013). Public sector union "density of organization held roughly steady at 10 to 13 percent [of the public sector workforce] from the late 1930s to the early 1960s." Public Workers at 3.

What changed in 1959 and transformed public-sector unionism into mandatory public-sector unionism was the introduction of exclusive representation. As this Court explained: "Designating 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 be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 585 U.S. at 886. Further, "[n]ot only is the union given the exclusive right to speak for all employees in collective bargaining, but the employer is required by state law to listen to and bargain in good faith with only that union." *Id.* at 898. In sum, "[d]esignation as exclusive representative thus 'results in a tremendous increase in the power' of the union." *Id.* (citation to internal quotation omitted).

B. *Janus* undercuts *Abood*'s exclusive representation holding.

In *Abood*, this Court held that both exclusive bargaining and agency fees[3] were permissible.

The plaintiffs in *Janus* sought to have the *Abood* agency fee ruling overturned. Exclusive representation was not challenged.

In *Janus*, this Court set forth the reasons that it was overturning *Abood* as to agency fees:

> Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions.

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3. Agency fees were defined as:

> Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U.S., at 235, 97 S.Ct. 1782; see id., at 235–236, 97 S.Ct. 1782. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Janus, 585 U.S. at 887.

> Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

Id. at 886.

Thus, with *Abood*'s First Amendment ruling regarding agency fees having been overturned in *Janus*, an obvious question was whether *Abood*'s First Amendment ruling regarding exclusive representation remained good law. At various points, the *Janus* court hinted that it would remain good law,[4] but a thorough examination of the

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4. In discussing an originalism argument made in support of agency fees by the union respondent in *Janus*, this Court noted: "the concept of a private third-party entity the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law." *Id.* at 904 n. 7.

This Court also stated: "It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 916.

But the *Janus* plaintiffs' decision not to challenge exclusive representation's constitutionality does not mean the issue was correctly decided in *Abood*. No exacting scrutiny or strict scrutiny analysis as to exclusive representation occurred in *Janus*. Further, this Court also indicated exclusive representation "substantially restricts the rights of individual employees." *Id.* at 887; see also *id.* at 901 (repeating point).

reasoning behind *Janus*' agency fee holding shows that *Abood*'s exclusive representation holding suffers many of the same flaws of its agency fee holding and that this Court should therefore revisit the exclusive representation question.

In rejecting *Abood* as to agency fees, this Court stated that *stare decisis* is not a significant impediment to rectifying mistakes related to the First Amendment:

> The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."

Janus, 585 U.S. at 917 (citations to quotations omitted).

In determining whether *stare decisis* applied, this Court noted that *Abood* did a poor job in analyzing the First Amendment interests related to agency fees:

> *Abood* went wrong at the start when it concluded that two prior decisions, *Railway Employees v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]."

> 431 U.S., at 226, 97 S.Ct. 1782. Properly understood, those decisions did no such thing. Both cases involved Congress's "bare authorization" of private-sector union shops under the Railway Labor Act. . . .
>
> Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U.S., at 233–235, 76 S.Ct. 714. After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.*, at 238, 76 S.Ct. 714; see [*Harris v. Quinn*, 573 U.S. 616, 635-636, 134 S.Ct. 2618, 2632 (2014)]. For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U.S., at 749–750, 768–769, 81 S.Ct. 1784. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. [*Harris*, 573 U.S., at 635, 134 S.Ct., at 2632]. As we said in *Harris*, "[s]urely a First Amendment issue of this importance deserved better treatment." *Ibid.*

Janus, 585 U.S. at 918-919.

Because *Abood* improperly relied on *Hanson* and *Street*, it did not analyze the government interest under the proper level of scrutiny:

> *Abood's* unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. . . . *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street*, which it interpreted as having deferred to "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S., at 222, 97 S.Ct. 1782 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

Janus, 585 U.S. at 919.

As noted above, there are around 7 million public-sector employees subject to exclusive bargaining contracts. This Court has indicated that exclusive representation in

the public sector has dramatically increased after *Abood*, and the concept of a private third-party entity with the power to bind employees on the terms of their employment (mandatory bargaining) is a foundation of "modern labor law." *Id.* at 904 n. 7 and 924. This Court has also indicated that the First Amendment analysis used in *Abood* was poorly reasoned. *Id.* at 887. Finally, this Court indicated that a First Amendment issue of such magnitude "deserved better." *Id.* at 919.

This Court should grant certiorari so that it can provide clarity about the constitutionality of exclusive representation.

II. Exclusive representation does not survive exacting scrutiny or strict scrutiny.

Properly analyzed, and contrary to *Abood*, exclusive representation for public-sector union employees violates the First Amendment.

The "right to eschew association for expressive purposes" is protected by the First Amendment. *Janus*, 585 U.S. at 892. Further, this Court noted: "[f]reedom of association . . . plainly presupposes a freedom not to associate" and forced associations "that burden protected speech are impermissible." *Id.* (citations to quotations omitted). This Court explained: "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." *Id.*

This Court recognized that many public-sector unions speak on a wide range of public policy matters:

> Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.*, at 452, 131 S.Ct. 1207.

Janus, 585 at 913-914. Here, for instance, Petitioners take issue with their exclusive representative's stance on Israel. Their exclusive representative passed a resolution indicating support for Palestinians and seeking to have Israel boycotted. Pet.App. at 93a-95a. Many of the Petitioners are Jewish and believe that the exclusive representative's actions "singles them out for disparate treatment, opprobrium, and hostility, based solely upon their religious, ethnic, and moral beliefs and identity, including their support for Israel, the nation state of the Jewish people." *Id.* at 75a. Not surprisingly, they do not want to only stop providing financial support to the union (the agency fee question resolved in *Janus*)—they want to completely end all association with the public-sector union in any way shape or form (the exclusive representation question).

In contrast to public employees who have a right not to associate, public sector unions do not have a constitutional right to be granted exclusive representation status. In *Smith v. Arkansas State Highway Emp. Loc. 1315*,

441 U.S. 463 (1979), this Court held that there is no First Amendment right for a public sector union to demand that a governmental employee recognize the union and bargain with it:

> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. [*NAACP v. Button*, 371 U.S. 415 (1963); *Eastern Railroad Presidents Conf. 1828 v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).] The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, *NAACP v. Button*, *supra*, or by imposing sanctions for the expression of particular views it opposes, e. g., [*Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Garrison v. Louisiana*, 379 U.S. 64, 85 (1964)].
>
> But the First Amendment is not a substitute for the national labor relations laws. As the Court of Appeals for the Seventh Circuit recognized in *Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 [(7th Cir. 1972)], the fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution. The First Amendment

> right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." *Id.*, at 461. The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. See [*Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–575, (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960)]. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Id. at 464.[5]

In *Janus*, two potential levels of scrutiny were discussed—exacting scrutiny and strict scrutiny. As agency fees failed under either level of scrutiny, no decision on the proper one was made. *Janus,* 585 U.S. at 894.

The state interest proffered in *Abood* to justify agency fees was "labor peace":

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5. *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984) is largely just an extension of *Smith*. *Knight* cites *Abood* for the proposition that exclusive representation has been upheld. *Knight*, 465 U.S. at 278. But *Knight* did not fix the analytical shortcoming from *Abood* later identified in *Janus*. What *Knight* does is indicate that neither public employees (in that case nonunion members) nor public-sector unions have a constitutional right to make the government listen. *Knight*, 465 U.S. at 285 ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, association, and petition require government policymakers to listen or respond to individual's communications on public issues.").

> In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U.S., at 224, 97 S.Ct. 1782. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221, 97 S.Ct. 1782. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220, 97 S.Ct. 1782. And a settlement with one union would be "subject to attack from [a] rival labor organizatio [n]." *Id.*, at 221, 97 S.Ct. 1782.

Janus, 585 U.S. at 894-895. This Court stated it would "assume that 'labor peace,' in this sense of the term was a compelling state interest." *Id.* at 895.

This interest does not meet even exacting scrutiny. First, it is circular. Exclusive representation is a state interest purportedly because labor peace avoids the "conflict and disruption that [the *Abood* Court] envisioned would occur if the employees in a unit were represented by more than one union." Thus, the argument goes, we need to have exclusive representation to avoid not having exclusive representation. A circular argument does not justify making collective bargaining mandatory nor exclusive. Justice Kagan's contends the real interest for the government "is operating efficiently—by bargaining, if it

so chooses with a single employee representative." *Harris v. Quinn*, 573 U.S. 616, 658 (2014) (Kagan, J., dissenting).

But any governmental efficiency argument fails. Government services were provided for over 170 years before exclusive representation was first extended to any public employees in 1959. Even after exclusive representation began to apply to some public sector workers, some states still do not allow it. See, e.g. N.C. Gen. Stat. § 95-98; Va. Code Ann. § 40.1-57.2. Further, some states treat different sets of public employees differently by providing some with mandatory bargaining and prohibiting others from doing so. See, e.g., Texas Loc. Gov't Code § 174.002 (police and fire bargaining); Texas Gov't Code § 617.002 (general ban on public employee bargaining). If the efficiency benefits of exclusive representation were so strong and obvious, more uniformity would be expected.

Private-sector unionism numbers help further this point. As of 2023, 6% of the private sector workforce is covered by exclusive representation bargaining and 94% is not.[6] This runs counter to the idea that exclusive representation makes economic sense:

> [I]f exclusive bargaining promotes efficiency, we should see employers rushing to adopt it. Most employers are for-profit enterprises; they have to operate efficiently if they want to survive. So even if they do not like exclusivity,

6. Amicus curiae recognizes that some of the 94% of the private-sector workforce not under exclusive bargaining might not meet the jurisdictional requirements of the National Labor Relations Act or the Railway Act to unionize.

> they should be forced to adopt it. If they don't their competitors will, and they'll be undercut by more efficient rivals. The iron law of the market will force their hands.

Alex T. MacDonald, *Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment*, 22 Geo. J.L. & Pub. Pol'y 229, 295 (2024) (footnotes omitted). Clearly, due to the private sector's low unionization rate, it does not view exclusive representation as necessary on the grounds of economic efficiency.

Further, this Court has recognized that public-sector unions are not driven as much by market forces:

> The appellants' second argument is that in any event collective bargaining in the public sector is inherently "political" and thus requires a different result under the First and Fourteenth Amendments. This contention rests upon the important and often-noted differences in the nature of collective bargaining in the public and private sectors. A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market. Municipal services are typically not priced, and where they are they tend to be regarded as in some sense "essential" and therefore are often price-inelastic. Although a public employer, like a private one, will wish to keep costs down, he lacks an important discipline against agreeing to increases in labor costs that in a market system would

> require price increases. A public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment.

Abood, 431 U.S. at 226-227.

The inability to make an economic efficiency argument leaves governments without any purported state interest to overcome public-sector employees' rights to eschew association. As this Court recognized in *Janus*, "'decisionmaking by a public employer is above all a political process' driven more by policy concerns than economic ones." *Janus*, 585 U.S. at 920. Thus, the decision to enact exclusive representation is a political choice and not an economic choice by the government.

This Court has indicated that *Abood* was a poorly reasoned decision and that once *Abood* was decided, there was a large uptick in public-sector exclusive bargaining. Again, there are around 7 million public employees in mandatory bargaining contracts. As public-sector bargaining is an overtly political process, it is not surprising that sincerely held political conflicts between the exclusive public sector unions and the dissenting employees continue to arise. The constitutional question regarding exclusive bargaining is not settled. Whether it can be banned across the board or perhaps be banned in somewhat limited situations, as in the Petitioners' here, needs guidance. It would be incumbent upon government actors to attempt to provide compelling reasons to allow public employees' First Amendment right not to associate to be overcome. To date, the government actors have not done so.

RELIEF REQUESTED

For the reasons stated above, this Court should grant the writ of certiorari.

Respectfully submitted,

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