No. 24-71

In the Supreme Court of the United States

AVRAHAM GOLDSTEIN, ET AL.,
Petitioners,

v.

PROFESSIONAL STAFF/CUNY, ET AL.,
Respondents.

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

Brief of Amici Curiae Advancing American Freedom; Coalition for Jewish Values; Orthodox Jewish Chamber of Commerce; JCCWatch.org; Sarah N. Stern, Founder and President, The Endowment for Middle East Truth (EMET); AFA Action; AMAC Action; America First Policy Institute; American Constitutional Rights Union; American Encore; Americans for Limited Government;

(List of Amici parties continued on inside cover)

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August 22, 2024

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QUESTION PRESENTED

1. Whether it violates the First Amendment for a state to prohibit individuals from dissociating from a union's representation to protest that union's expressive activities?

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that Americans have the fundamental right to associate and disassociate freely. AAF files this brief on behalf of its 5,462 members in the Second Circuit including 4,377 members in the state of New York.

Amici Coalition for Jewish Values; Orthodox Jewish Chamber of Commerce; JCCWatch.org; Sarah N. Stern, Founder and President, The Endowment for Middle East Truth (EMET); AFA Action; AMAC Action; America First Policy Institute; American Constitutional Rights Union; American Encore; Americans for Limited Government; Shawnna Bolick, Arizona State Senator, District 2; Capability Consulting; Catholics Count; Family Institute of Connecticut Action; JoAnn Fleming, Executive Director, Grassroots America - We the People PAC; Frontline Policy Council; Representative Steven E. Galloway, District 24, Montana House of

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[1] All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

Representatives; Charlie Gerow; Allen J. Hebert, Chairman, American-Chinese Fellowship of Houston; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House; Chairman, Missouri Center-Right Coalition; Land Center for Cultural Engagement; Lael "Sunny" Meagher, CEO/President, International Christian Ambassador Association; Men and Women for a Representative Democracy in America, Inc.; National Center for Public Policy Research; National Religious Broadcasters; Pacific Justice Institute; Pamela S. Roberts, Immediate Past President- Kentucky Federation of Republican Women; Setting Things Right; Stand for Georgia Values Action; Students for Life of America; Tea Party Patriots Action, Inc.; Tradition, Family, Property, Inc.; Women for Democracy in America, Inc.; Yankee Institute; and Young Conservatives of Texas believe that the freedom to speak for oneself and to associate or disassociate freely are essential elements of American freedom.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Yet New York in this case presents Petitioners with an unconscionable choice: be forced by law to allow someone with abhorrent views to represent them in negotiation and deal-making with

their employers or lose their livelihood. Such compelled representation as is at issue in this case is "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). It should not be tolerated here.

A person's work is one of the most important aspects of his or her life, consuming significant time and energy, and, hopefully, providing a sense of purpose and self-respect. The state has no business forcing people to choose between their beliefs and their work as New York is seeking to force Petitioners, City University of New York (CUNY) professors, to do. All but one of the professors in this case are Jewish. It is thus unsurprising that they object strongly to the anti-Israel, antisemitic speech of the Professional Staff Congress (PSC), the union which has the legal imprimatur to act as CUNY professors' exclusive representative in employment negotiations.

The Jewish state of Israel is America's "most cherished ally"[3] and is the only country in the Middle East where the equal rights of people of all religions or no religion are recognized. Yet the PSC adopted a resolution in June 2021 regarding the supposed "continued subjection of Palestinians to the state-supported displacement, occupation, and use of lethal force by Israel." Pet. App. 93a. The resolution calls on PSC chapters to consider support of the boycott, divestment, and sanction (BDS) movement aimed at

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[3] Ariel Kahana, *Pence to Israel Hayom: I Will be Israelis' Voice*, Israel Hayom (Jan. 7, 2024 11:55 PM).

removing financial investment in Israel. Pet. App. 94a.

This intentional effort to starve the only Jewish state in the world of the financial resources it needs to defend itself from the enemies that encircle it and desire its destruction is understandably abhorrent to the professors challenging New York's exclusive representation law. It should be equally abhorrent to every American.

The freedom to speak for oneself and to associate or disassociate in order to empower one's speech are among those fundamental rights government in general, and American governments in particular, exist to protect. America's rich history of free association demonstrates that freedom's centrality to the nation's social and political health. New York's exclusive bargaining law, on the other hand, illegitimately forces association with an organization that engages in non-germane and deeply objectionable speech. Because New York's law cannot survive exacting scrutiny, it is unconstitutional and must be struck down.

ARGUMENT

I. The Freedom of Association is Just as Central to the Scheme of American Liberty as the Freedom of Speech and of the Press.

A. Association is an American tradition.

Association is an American tradition and is among those fundamental freedoms protected by the Constitution. In America, "[t]he art of association" is "the mother science; everyone studies it and applies

it."[4] As Alexis de Tocqueville noted, early Americans made a habit of forming associations. Unlike in aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, "all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn to help each other freely."[5]

The American tradition of association is older than the nation itself. Early colonists left Europe for the New World hoping to establish societies where they could worship freely. Over a century and a half later, the American people similarly disassociated from the English Crown. The freedom to associate and disassociate was, for the founding generation, at the heart of the American project.

B. The right to free association has long been recognized in American law.

The Declaration of Independence describes the higher law upon which government is based and illuminates the "inalienable rights" that are "embedded in our constitutional structure." *McDonald v. Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment). According to the Declaration, "Governments are instituted among Men" to secure the fundamental rights of the people. The Declaration of Independence para. 2 (U.S. 1776).

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[4] 3 Alexis de Tocqueville, Democracy in America, 914 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, Inc. 2010) (1840).

[5] *Id*. at 898.

Among those fundamental rights are those enumerated in the First Amendment: the free exercise of religion, the freedom of speech and press, the right to assemble peacefully, and the right to petition one's government. U.S. Const. amend. I. The incorporation doctrine of the Fourteenth Amendment applies the Constitution's protections to the States. As the Court said in *NAACP v. Alabama*, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. 449, 460 (1958) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958)). Further, this Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Association is not a "second-class right," any more than those protected by the Second Amendment are. *See McDonald v. Chicago*, 561 U.S. 742, 780 (2010).

The Court has explained that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP*, 357 U.S. at 460-61. The freedom of association "furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in

shielding dissident expression from suppression by the majority.'" *Id.* (quoting *Roberts v. United States Jaycees*, 486 U.S. 609, 622 (1984)).

Because effective expression so often depends on effective association, association, like speech, is of "transcendent value." *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."). The Court's explication of the right of freedom of association "stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (alteration in original) (quoting *NAACP*, 357 U.S. at 460). As Luke Sheahan writes, "Associations in a democracy are not a means to self-government; they are self-government. They are not one option for the ordering of human life; they are the order of human life."[6] The right to freely speak, and freely associate, strike at the heart of human freedom.

Yet if the professors in this case want to continue in their employment, they are legally obligated to continue associating with, and being represented by, an organization that holds views that are fundamentally at odds with their own.

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[6] Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* 17 (2020).

II. Speech Supporting BDS is Totally Unrelated to the Purpose for Which New York Grants Unions Like the PSC Exclusive Representation.

The Supreme Court has recognized the constitutional peril of compelled speech and association. For example, it has:

> [H]eld that while the Constitution [does] not prohibit a union from spending "funds for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," the Constitution [does] require that such expenditures be "financed from charges, dues, or assessments paid by employees who did not object to advancing those ideas and who were not coerced into doing so against their will by the threat of loss of government employment."

Keller v. State Bar of California, 496 U.S. 1, 9 (1990) (quoting *Abood v. Detroit Bd. of Ed.*, 432 U.S. 209, 235-36 (1977)). Further, the government cannot condition private sector employment on an employee's relinquishing of his First Amendment rights. *Id* at 10.

Thus, the First Amendment requires that, at a minimum, employees not be forced by law to financially support activity that is not germane to a mandatory association's purpose. *Id*. at 14 ("The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall

outside of those areas of activity."). While "defin[ing] [non-germane] activities," *id.*, may often be difficult, it is not so here.

The purpose of the union in this case, as expressed by the statute that gives the PSC exclusive bargaining authority, is "negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment." N.Y. Civ. Serv. Law § 204(1). The resolution that is at the heart of this case is an effort to advocate for a particular position in an international geopolitical conflict. It has nothing whatsoever to do with professors' working conditions or compensation. Anti-Israel professors, of course, can use their associational rights to join together freely and advocate for their beliefs if they so choose. The question here is whether the union can simultaneously engage in such inflammatory non-germane speech while also operating, by legal mandate, as the sole representative of all professors in the CUNY system.

Courts have typically considered germaneness to determine whether mandatory union or bar association dues can be used to fund particular union or bar association speech or advocacy. Here, the issue of germaneness is relevant to the question of the professors' right to full disassociation because it demonstrates that, even assuming some compelled association is justified, the government cannot compel

association with groups that advocate positions contrary to one's core values.

Because the mandatory association at issue here muzzles professors, prohibiting them from advocating for their own employment interests, giving their voices instead to an organization that opposes those professors' core values, the exclusive representation law violates their First Amendment speech and association rights. To protect those rights and the rights of those locked into legally enforced exclusive representation around the nation, the Court should grant certiorari.

III. New York's Forced Association Law Cannot Survive Either Strict Scrutiny or Exacting Scrutiny.

New York's exclusive representation requirement cannot survive either exacting or strict scrutiny and thus should be reviewed by this Court and struck down. The appropriate test for compelled association is strict scrutiny because the right burdened here is core to American freedom. As argued above, association is not a "second-class right." Nonetheless, the mandatory representation requirement at issue here cannot even survive exacting scrutiny, the test courts have generally applied in compelled association cases. *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021) ("In its freedom-of-association cases, the Court has generally applied 'exacting . . . scrutiny,' under which 'mandatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'") (quoting *Knox v. Serv.*

Emps. Intl. Union, Loc. 1000, 567 U.S. 298, 310 (2012)).

As the Fifth Circuit has recognized, "[c]ompelled membership in a bar association that engages in non-germane activities . . . fails exacting scrutiny." *McDonald v. Longley*, 4 F.4th at 246 (quoting *Knox*, 567 U.S. at 310). State bar membership and compelled representation are analogous for purposes of this case. *See Keller*, 496 U.S. at 12 ("There is, by contrast, a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other.").

Even if the compelled exclusive representation at issue in this case does serve a compelling state interest as applied to Petitioners, it is not narrowly tailored to achieve those purposes. New York's exclusive representation law could prohibit unions that enjoy statutory protection as exclusive representatives from engaging in any advocacy not directly related to the relationship between the employees and the employer with which it negotiates. Employees who wish to engage in social or political advocacy can always create voluntary advocacy organizations, and New York's interest in empowering employees to negotiate "collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment," N.Y. Civ. Serv. Law § 204(1), would still be wholly served by a union so restricted. While exclusive representation undoubtedly raises facial constitutional issues, the Court need not address those issues to find that New York's law as applied in this case is unconstitutional. Thus, the Court should

grant certiorari and protect the associational and speech rights of Petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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